

**Editor's note: Petition for review by Director or directed reconsideration by IBLA denied by Order of Director dated Sept. 10, 1985.**

STATE OF ALASKA

IBLA 84-867, 84-872, 84-889

85-39, 85-64, 85-65, 85-126

Decided May 10, 1985

Consolidated appeals from the several decisions of the Bureau of Land Management waiving administration of the subject lease and rights-of-way held by the State on lands conveyed to Native corporations.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Third Party Interests

BLM's waiver of its right to continue to administer leases, contracts, permits, rights-of-way and easements to the extent they encumber land which has since been conveyed to Alaska Native corporations has the effect of transferring the responsibility and authority for such administration to the grantee corporation. Where all of the land occupied by such an outstanding third-party interest has been so conveyed, BLM must waive its administration of such interests as mandated by 43 CFR 2650.4-3, absent a Secretarial finding that retention of that function is in the interest of the United States. BLM policy favoring partial waivers in most instances appears to comport well with the public interest and will not be disturbed by the Board merely because the State of Alaska would prefer to preserve the status quo.

APPEARANCES: E. John Athens, Jr., Esq., Ass't. Attorney General, Fairbanks, Alaska, for the State of Alaska; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

These appeals have been consolidated because they present virtually identical issues, arguments, and pleadings. In each instance the State of Alaska holds a lease or right-of-way issued and administered by the Bureau of Land Management (BLM) on lands which have since been conveyed by BLM to a Native corporation, subject to the State's continued right of use and enjoyment of its interest, pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601, 1613(a), 1621(j) (1982). By its several decisions described below, BLM then waived its administration of the State's lease or right-of-way.

IBLA 84-867 involves airport lease F-45 at Ambler, Alaska. The surface of the public land included within the lease was transferred by interim conveyance on December 16, 1981, to Nana Regional Corporation, subject to the airport lease held by the State. On August 1, 1984, BLM issued its decision waiving its right to continue its administration of the lease pursuant to sec. 14(g) of ANCSA.

IBLA 84-872 concerns the State's highway right-of-way F-033602 on land which was transferred by interim conveyances to Sitnasuak Native Corporation on September 3, 1982, and September 23, 1983. By its decision of August 10, 1984, BLM waived its administration of this right-of-way.

IBLA 84-889 involves the State's material site right-of-way F-030479. On October 23, 1981, BLM transferred all of the land occupied by the right-of-way to Bering Straits Native Corporation by interim conveyance. By its decision of July 24, 1984, BLM waived its administration of this right-of-way.

IBLA 85-39 concerns the State's material site right-of-way F-030599. Apparently at some point after the right-of-way was granted, a part of the land was included in Native Allotment F-15557. On October 23, 1984, the remainder of the land occupied by the material site was transferred by interim conveyance to Ahtna, Inc., pursuant to ANCSA. By its decision dated August 27, 1984, BLM waived its administration of the portion of the right-of-way on land conveyed to Ahtna, Inc., while retaining its administration of that portion which was included in the individual allotment.

IBLA 85-64 involves 18 material site rights-of-way granted by BLM to the State pursuant to 23 U.S.C. § 317 (1982) for construction and maintenance of Federal Aid Highways. <sup>1/</sup> On October 23, 1981, BLM transferred the lands occupied by these rights-of-way to Ahtna, Inc. By its decision of September 6, 1984, BLM waived administration of all of these rights-of-way.

IBLA 85-65 likewise involves a Federal Aid Highway material site right-of-way (F-026112) granted to the State; the subject land being subsequently conveyed to Ahtna, Inc. By its decision of August 22, 1979, BLM waived administration of the grant.

IBLA 85-126 concerns another such material site right-of-way (F-029727) granted to the State. Part of the land was transferred to Ahtna, Inc., on October 23, 1981. BLM then waived administration of that portion of the right-of-way by its decision of September 5, 1984.

All of the foregoing decisions to waive administration of the State-held lease or right-of-way were issued from the Fairbanks District Office of BLM. Each of the decisions stated that the waiver was pursuant to the authority of section 14(g) of ANCSA (43 U.S.C. § 1613(g) (1982)); each decision noted that the holder of the granted lease or right-of-way (the State in each case) remains entitled to all rights, privileges and benefits provided by the grant

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<sup>1/</sup> BLM serial numbers for sites involved in IBLA 85-64 are F-026067, F-026068, F-026069, F-026070, F-026071, F-026074, F-029387, F-029729, F-029731, F-030594, F-030622, F-030652, F-030929, F-033436, F-033441, F-033526, F-033590, A-058900.

for so long as the grant remained viable; each decision advised that the Native corporation concerned "is entitled to any and all interests previously held by the United States as grantor in such [lease or] right-of-way within the conveyance boundaries."

The State of Alaska, through its Department of Transportation and Public Facilities, has appealed each of the decisions.

The salient provision of sec. 14(g) of ANCSA provides:

(g) All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration \* \* \*.

The State argues first that BLM's waiver of its administration of the State's lease or right-of-way did not effect a transfer of such administration to the Native corporation which is the new owner of the land. It maintains that while the above-quoted legislation invests BLM with discretion to waive its administration, it does not empower BLM to transfer that function to another entity. Moreover, the State points out, the statute provides that the State shall continue its right of "complete enjoyment" of the grants, which it says will be impaired if administration is transferred to the various Native corporations. This is so, the State says, because BLM has regulations, whereas the corporations have none; BLM administers the hundreds of State leases and rights-of-way uniformly, while the several corporations each may interpret its rights differently; the State has a right to appeal BLM decisions to this Board, whereas the corporations offer no internal review; that when the State acquired its interests there was no provision in law or regulation for the transfer of the administration of those interests to private entities; therefore, a transfer of administration from BLM to the Native corporations would be inconsistent with the statutory mandate that the State shall have "complete enjoyment" of its interests.

The State argues further that an assignment or transfer of administration by BLM to a Native corporation is contrary to the regulations of this

Department, citing 43 CFR 2803.1-1(a)(2), which the State interprets as a prohibition of such transfer where the right-of-way is held by a State or local government.

Additionally, the State contends that since BLM has unconditionally waived its administration, it no longer has jurisdiction to transfer it to a Native corporation. It says:

The State of Alaska has only appealed the Waiver[s] of Administration of the BLM to the extent that [they] may be construed by [the Native corporations] as transfer[s] of administration to [the corporations]. The State of Alaska has not appealed the Waiver[s] of Administration as such. Because the BLM has waived the administration of the right[s]-of-way, which it clearly has discretion to do under Section 14(g) of ANCSA, and no party has appealed the waiver, the BLM has lost its jurisdiction not only to continue administration of the right[s]-of-way but also to transfer administration to [the corporations] should this Board hold that Section 14(g) permits such a transfer. To avoid further litigation it is requested that the Board make clear in its decision that the BLM has no further authority with respect to [serial numbers].

Finally, the State argues that even if this Board should hold that BLM's waiver of its administration effected a transfer of that function to the respective corporations, the Board must reverse the BLM decisions as arbitrary and capricious. The State asserts that there are no regulations or guidelines governing such transfers of administration; that BLM does not afford the State a hearing to ascertain whether the transfer will diminish the State's right of "complete enjoyment" of its interest; that BLM does not ask the Native corporation if it is willing to accept the responsibility for administration of the State's interest; that BLM does not make a record of the factors considered which served as the basis for the exercise of its discretion; that BLM's actions constituted abuses of its discretion.

The State asks that the Board hold that the State is entitled to a hearing in each case to determine if the transfer of administration will diminish in any way the State's "complete enjoyment" of its interest.

BLM, through the Office of the Regional Solicitor, filed its answer effectively rebutting the arguments advanced by the State.

The Board notes first that both the statute, *supra*, and the regulations under 43 CFR 2650.4 provide express authority for BLM to waive its administration of outstanding leases, contracts, permits, rights-of-way or easements in lands conveyed to Native corporations, and that the State acknowledges this. While it is true that the words "transfer" or "assign" do not appear, it is the Board's obligation to determine whether the effect of such a waiver is to accomplish a transfer of that function to the Native corporation to which the land has been conveyed. We find in the affirmative.

Both section 14(g) of ANCSA and the pertinent regulation, 43 CFR 2650.4-2, state that upon conveyance of the land to the Native corporation, the corporation "shall succeed and become entitled to any and all

interests of the \* \* \* United States as lessor, contractor, permitter or grantor, in any such leases, contracts, permits or easements covering the estate conveyed \* \* \*." Clearly, upon conveyance of the land, the grantee corporation supplants the United States, which retains no right, title, interest, benefit or privilege as the grantor of any lease, right-of-way, or other outstanding interest held by a third party. The United States retains only the right to administer such third-party interests, which right it may waive. If it elects to waive its right of administration, that function must naturally flow to, and be reposed in the owner of the land. There can be no other logical consequence. The only possible alternative would be that, upon BLM's waiver, all right by anyone to administer such outstanding third-party interests in the land ceased to exist, and the grantee corporation would be left helpless to enforce compliance or to protect its own interests. That, assuredly, was not what Congress intended when it authorized the United States to waive administration.

We find next that such waiver and resultant transfer have not in any case impaired or diminished the State's "complete enjoyment" of its legal rights under the lease or right-of-way held by it. It still enjoys the same right to use the same land in the same manner under the same terms and conditions as before. The fact that the State may prefer one administrator over another, or one administrator to several, does not bear on its rights to "complete enjoyment of its interest in the land." "Enjoyment" in this context does not mandate a right to happiness, contentment, or freedom from apprehension. Rather, it refers to the exercise of a right; the possession and fruition of a right, privilege, or use.

Finally, this Board finds that BLM's waiver of its administration of these interests was neither contrary to regulation nor arbitrary, capricious, or abusive of its discretion. To the contrary, waiver of administration is mandated by 43 CFR 2650.4-3, at least in those cases where the conveyance covers all the land on which the outstanding third-party interest is situated. In pertinent part, that regulation states:

§ 2650.4-3 Administration.

Leases, contracts, permits, rights-of-way, or easements granted prior to the issuance of any conveyance under this authority shall continue to be administered by the State of Alaska or by the United States after the conveyance has been issued, unless the responsible agency waives administration. Where the responsible agency is an agency of the Department of the Interior, administration shall be waived when the conveyance covers all the land embraced within a lease, contract, permit, right-of-way or easement, unless there is a finding by the Secretary that the interest of the United States requires continuation of the administration by the United States. \* \* \*. [Emphasis added.]

Thus, in those cases where the entire lease or right-of-way was on land conveyed to a Native corporation, BLM had no discretion to exercise. Absent a finding by the Secretary that retention of administration was in "the interest of the United States" (not the State), BLM was obliged by the

regulation to waive. Moreover, the State is chargeable with constructive notice of the regulation and, therefore, was not entitled to additional notice that BLM intended to implement it. In light of the mandatory tenor of the regulation, only BLM's refusal to waive would constitute arbitrary and capricious conduct.

The regulations at 43 CFR Subpart 2803 deal with the administration of rights-of-way and temporary use permits, and section 2803.5(b) of that subpart provides for the discretionary assignment of the right-of-way in the event that the lands involved are transferred out of Federal ownership. (The regulation does not deal with waiver or transfer of administration of the right-of-way.) The State points out, correctly, that State and local governments are not affected by those regulations, as they are excepted under 43 CFR 2803.1-1 (2). BLM argues that exception applies only to the section concerning reimbursement of costs in which it is found. However, section 2803.1-1(a)(2) plainly states, "The regulations contained in this subpart do not apply to: (i) State or local governments \* \* \*." Section 2803.5(b) is one of the regulations "contained in this subpart." Nevertheless, we do not find that this aids the State's case, for two reasons. First, as noted above, section 2803.5(b) does not address the waiver or transfer of the administration of the right-of-way, but only the right-of-way itself. Second, Subpart 2803 contains regulations of general applicability to BLM lands and granted rights-of-way everywhere, whereas section 14(g) of ANCSA is specifically referable to such rights-of-way in Alaska, and effectively negates anything to the contrary in Subpart 2803 insofar as lands in Alaska are concerned. Accordingly, we do not consider Subpart 2803 applicable to this case.

The Board's only remaining concern must focus on the two instances in which BLM waived its administration of only those portions of the State's material site rights-of-way which occupied land conveyed to the Native corporation, i.e. IBLA 85-39 and IBLA 85-126. These waivers were not obligatory under 43 CFR 2650.4-3, which is controlling only where all of the land occupied by the right-of-way (or other interest) is conveyed out of Federal ownership. Thus, unlike the others, these two cases involve an exercise of discretion by BLM. Although the BLM case files provide no explanation of why these decisions to partially waive were made, BLM has shown in its answer that partial waivers are standard operating procedure to implement Bureau policy. The policy and the procedure to implement it were established by Instruction Memorandum (I.M.) No. AK 83-98, dated December 29, 1982, as revised and updated on March 29, 1983 and June 28, 1983. The policy portion of the I.M. first declared that BLM will not waive administration of a lease issued under the Mineral Leasing Act of 1920 when only a portion of the mineral lease is on conveyed land. The next provision reads as follows:

Policy for Other Leases, Contracts, Permits, Rights-of-way Easements

Generally, it is not in anybody's best interests for the United States to continue administering these other less than fee authorizations on lands no longer in Federal ownership. Therefore, with the following two exceptions, BLM-Alaska policy will be to waive administration of all non-mineral leases, contracts, permits, rights-of-way or easements whether totally or partially within conveyances. [Emphasis added.]

The exceptions are:

1. For any authorization for or supporting the Trans Alaska Pipeline System (TAPS).
2. Where there is a documented finding with supporting rationale of a clear need to continue administration. This should normally occur only in cases where in the judgement of the officer issuing the original authorization, waiver of administration for very small portions of long lineal or large site authorizations would cause more problems than it solves. Review of such a decision shall be sought from the next higher administrative level.

This Board has held that BLM internal memoranda such as I.M. No. AK 83-98 are not regulations and have no legal force. United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982). Even so, such documents may be reviewed as evidence contributory to a determination of the propriety of BLM decisions made in accordance with, or contrary to, such instructions. See Margaret A. Ruggiero, 34 IBLA 171 (1978).

The Board can find no basis to disturb BLM's established policy regarding partial waivers of administration in cases such as these. The policy appears to comport well with the public interest generally and with the interests of the Native corporations. Where the land is no longer owned by the United States and the United States has no residual interest or benefit deriving from the third-party leases, rights-of-way, permits, et cetera, which encumber those lands, it is difficult to justify continuing the Federal administration of those interests at taxpayers' expense, particularly where the new landowner (the corporation) is capable of assuming that function on its own behalf. Except in unusual circumstances, there is little or no reason for the United States to continue to maintain records, perform compliance inspections in the field, engage in correspondence with the interested parties, handle billings, collections, accounts and disbursements, and conduct adjudication. The fact is that these matters are no longer the proper responsibility of the Federal government, and that fact is not altered because the State finds the change inconvenient or otherwise undesirable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Edward W. Stuebing  
Administrative Judge

I concur:

C. Randall Grant, Jr.  
Administrative Judge.

## ADMINISTRATIVE JUDGE ARNESS DISSENTING:

These consolidated appeals are concerned with the consequences of the existence of a Federal airport lease and a number of Federal Aid Highway rights-of-way upon a subsequent grant of the servient estate upon which the lease and rights-of-way are located. 1/ The grants of the lands burdened by the lease and the rights-of-way were made under provision of section 14 of the Alaska Native Claims Settlement Act of 1971 (ANCSA) (Act) 43 U.S.C. § 1613 (1982). Section 14(g) of ANCSA permits the Department, under certain conditions, to waive further administration of leases and rights-of-way following conveyance of the lands upon which the reserved rights are located. Pertinently, the Act provides: "The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration." 43 U.S.C. § 1613(g) (1982).

It is clear, generally, as the majority opinion holds, that current Departmental policy favors waiver of administration in cases where the land upon which a right-of-way or lease is located is conveyed out of Federal ownership and control pursuant to ANCSA. See 43 CFR 2650.4. 2/ There is no authority, however, for holding, as does the majority, that an attempted waiver of administration by the Department automatically results in a transfer of administration of an affected lease or right-of-way to the Native corporation which has been granted the servient estate, in cases where the affected lease or right-of-way is held by the State of Alaska. There are a number of reasons why this holding is in error.

The grant of authority appearing in section 14(g) of ANCSA which permits the Department to waive administration is conditioned that the agency waiving administration be "the agency responsible for administration." Six of these appeals involve highway and material site rights-of-way reserved pursuant to the Federal Aid Highway Act, as amended (1958 Act) 23 U.S.C. § 317 (1982), which provides for cooperation in the administration of such rights-of-way by the Departments of the Interior and Transportation. The 1958 Act provides, in pertinent part:

(a) If the Secretary [of Transportation] determines that any part of the lands or interests in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands,

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1/ Seven cases are consolidated on appeal; six concern Federal Aid Highway rights-of-way; they are IBLA 84-872, 889, and IBLA 85-39, 64, 65, and 126. One case, IBLA 84-867 involves the airport lease. 2/ But see section 508 Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1768 (1982), which provides that, in cases where the entire servient estate is conveyed out of Federal ownership, "the right to enforce" the terms of rights-of-way shall be retained by the Secretary where it is desired to ensure that "the terms and conditions of the right-of-way [are] complied with."

the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which it is desired to appropriate.

(b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State Highway department, or its nominee, for such purposes and subject to the conditions so specified.

(c) If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary [of Transportation] and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

Although it is not clear that the entire administration of such rights-of-way is vested in the Secretary of Transportation, it is clear that the statutory plan envisions, following the creation of the right-of-way, at least a cooperative administration by both the Departments of Transportation and Interior. While it may be cumbersome, the statute requires that, once a Federal Aid Highway right-of-way is created, it becomes a matter under the primary control of the Secretary of Transportation, until that officer is notified that termination of the grant is indicated. Therefore, it is only then, at the time termination of the grant is sought, that the Secretary of the Interior would be empowered to exercise his discretion concerning the continued existence of the grant.

The nature of the Federal Aid Highway rights-of-way was considered in detail in State of Alaska Department of Highways, 20 IBLA 261, 82 I.D. 242 (1975), which observed that, in referring to 23 U.S.C. § 317 (1982), "administration of this provision is a function of the Department of Transportation." 20 IBLA at 266, 82 I.D. at 244. If the provisions of the Federal Aid Highway Act are to be given effect, it is clear that waiver of administration may not take place where any right-of-way created under 1958 Act is affected, unless the Secretary of Transportation has been consulted and proposes or agrees to the termination of these rights which were created for the improvement of the highway system under his administration. See 23 U.S.C. § 317 (1982). There is nothing in the record on appeal in any of the Federal Aid Highway right-of-way cases now before this Board which indicates that such a consultation and transfer of responsibility has taken place.

Even ignoring the lack of coordination with the other Federal agency affected by the decision to waive administration in this case, the nature of the right affected by Departmental action proposed should be considered. It

is clear, as the State argues, that the "administration" of these rights-of-way involves something other than the ownership of either the dominant or the servient estate in the lands affected by this decision. The majority opinion suggests a number of "administrative" acts (recordkeeping, inspections for compliance with conditions of the grant, collection of rents, adjudication), but in the case of these highway rights-of-way the real administrative power is the power to cancel the rights-of-way for any reason stated in the grants or in the 1958 Act. There is no rent paid for these rights-of-way. The decisions appealed from characterize the grants as "perpetual." "Administration" in the case of such a right-of-way is equivalent to the power to terminate the grant.

One Federal court has opined that cancellation of such rights-of-way can only be accomplished by Secretarial action. See Southern Idaho Conference Association of Seventh Day Adventists v. United States, 418 F.2d 411 (9th Cir. 1969). That opinion observes:

Under the express provisions of 23 U.S.C. § 317, "If at any time the need for any such \* \* materials \* \* \* shall no longer exist, \* \* \* such \* \* \* materials shall immediately revert to the control of the Secretary". Under the applicable regulation the title conveyed by the patent remains subject to the material site "until it is specifically canceled" by the Secretary.

418 F.2d 415. And in deciding Bering Straits Native Corp., 83 IBLA 280 (1984) this Board concluded that, where the record indicated conditions attached to a Federal Aid Highway right-of-way grant may not have been fulfilled, that the "right-of-way is, therefore, concluded to be properly subject to continuing review by the authorized BLM officer where substantial questions concerning compliance with the right-of-way grant terms have been raised by the native corporation concerned." Id. at 287.

The fact that these rights-of-way are created, not by ANCSA, but by the 1958 Act, was considered to be of crucial importance by the Board in Northway Natives, Inc., 5 ANCAB 147, 88 I.D. 14 (1981), <sup>3/</sup> when it directed BLM consideration, as a discretionary matter, of the question whether certain Federal Aid Highway rights-of-way were valid existing rights burdening a Native conveyance. This factor is important, since, as Alaska points out in its brief at 4, the effect of the interpretation sought to be given by BLM to the decision in this case is to make Native corporations receiving grants of land pursuant to ANCSA the delegates of the Secretary for the purpose of extinguishing rights-of-way under the 1958 Act. It is by no means clear that such a result was intended by ANCSA; indeed, it is not entirely clear that the BLM decisions in these cases actually contemplate such a transfer, although the brief filed by the Solicitor in these appeals explains that a transfer of administration to the Native corporation is, in fact, intended in each case. See BLM Answer at 6-10.

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<sup>3/</sup> The Alaska Native Claims Appeals Board (ANCAB) was abolished and all responsibilities delegated to ANCAB were transferred to this Board by Secretarial Order No. 4078, dated Apr. 29, 1982. See 47 FR 26340 (June 18, 1982).

To illustrate the ambiguity of these decisions on appeal the decision in IBLA 85-39, addressed both to the State and to Ahtna, Incorporated, (the Native corporation concerned), which recites in material part as follows is quoted in full text:

Administration Waived in Part

Interim Conveyance No. 443, issued October 23, 1981, to Ahtna, Incorporated is subject to the following right-of-way.

<u>Serial No.</u>	<u>Type</u>	<u>Grantee</u>	<u>Expiration Date</u>	F-030599	Right-of-Way
State of Alaska	Perpetual				

Pursuant to Section 14(g) of the Alaska Native Claims Settlement Act (ANCSA) of December 18, 1971, the United States hereby waives administration in part of the above described right-of-way. This waiver affects only that portion of the right-of-way which is contained in Interim Conveyance No. 443, more specifically described as Sec. 3, T. 18 S., R. 7 W., Fairbanks Meridian. Pursuant to law, the grantee is entitled to all rights, privileges, and benefits granted by the terms of the grant during the term of the grant until it expires, is relinquished, or is modified by mutual consent of Ahtna, Incorporated and the State of Alaska, Department of Transportation and Public Facilities. The Bureau of Land Management will continue to administer that portion located in Native allotment serial number F-15557 located in Sec. 3, T. 18 S., R. 7. W., Fairbanks Meridian.

Ahtna, Incorporated is entitled to any and all interests previously held by the United States as grantor in any such right-of-way within the conveyance boundaries.

There are no rental, or other revenues associated with this right-of-way.

A duplicate case file covering the use authorization for which we are waiving administration is enclosed. The original file cannot be sent because all of the lands encompassed have not been conveyed; therefore, it will be retained in this office.

This decision hews closely to the statutory language. It does not state that administration of the right-of-way is to be transferred to Ahtna; it does, however, assure the State that it will retain "all rights, privileges, and benefits" conferred with the right-of-way grant; it also recites that Ahtna will succeed to "all interests previously held by the United States as grantor." In so doing, the decision merely repeats provisions of section 14 of ANCSA. At first, the fact that BLM has made such a "decision" is perplexing, since it seems to arise spontaneously, and restate the obvious, both the right-of-way grant and the Native conveyance having been issued sometime previously. The origin of this action by the agency is explained by the BLM answer to the State's statement of reasons, which explains that the

decision is issued in response to Instruction Memorandum (IM) AK 83-98 dated December 29, 1982, which directs:

Enclosed are procedures for waiver of administration of leases, contracts, permits, rights-of-way and easements pursuant to Section 14(g) of ANCSA located on lands conveyed to Native corporations.

These procedures must be implemented immediately. Delays result in payment of rentals, which BLM is no longer authorized to accept or handle under the Bureau accounting system, and in severe problems in getting these rentals to the corporations.

(BLM Answer at 6). Of course, in the case of the six highway rights-of-way there are no rentals to collect. The memorandum does not limit its operation to those leases or permits which are revenue producing, and it does speak in terms of "waiver" while referring to section 14(g) of ANCSA. Since, however, the only reason given for the directed action is to ensure rentals (and royalties) formerly collected by BLM from lands conveyed pursuant to ANCSA will now be paid to the Native corporations, it is apparent the waiver was never intended to apply to cases involving Federal Aid Highway rights-of-way. None of the six rights-of-way involved in any of these appeals, at any rate, involve rentals or payments of any kind.

The airport lease, however, does require a \$ 10 annual rental payment. <sup>4/</sup> It is, therefore, among the class of cases which were intended to be affected by the memorandum. In this case, IBLA 84-867, a 20-year airport lease was issued to the State in 1976. This lease was issued pursuant to the Act of May 24, 1928, as amended, 49 U.S.C. §§ 211-213 (1982), which provides for administration of such leases by the Secretary of the Interior, subject, however, to certain conditions:

(a) That an annual rental of such sum as the Secretary of the Interior may fix for the use of the lands shall be paid to the United States.

(b) That the lessee shall maintain the lands in such condition, and provide for the furnishing of such facilities, service, fuel, and other supplies, as are necessary to make the lands available for public use and an airport of a rating which may be prescribed by the Administrator of the Federal Aviation Agency.

(c) That the lessee shall make reasonable regulations to govern the use of the airport, but such regulations shall take effect only upon approval by the Administrator of the Federal Aviation Agency.

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<sup>4/</sup> The BLM case file in IBLA 84-867, the airport lease, indicates that the airport lease application was initiated in 1966, although it was not issued until 10 years later. Issuance followed upon consultation with, and with the consent of, the Native corporation concerned. Cf. 43 CFR 2650.1(a)(2)(i).

(d) That all departments and agencies of the United States operating aircraft (1) shall have free and unrestricted use of the airport, and (2) with the approval of the Secretary of the Interior, shall have the right to erect and install therein such structures and improvements as the heads of such departments and agencies deem advisable, including facilities for maintaining supplies of fuel, oil, and other materials for operating aircraft.

(e) That whenever the President may deem it necessary for military purposes, the Secretary of the [Air Force] may assume full control of the airport.

49 U.S.C. § 212 (1982).

Although not to the degree apparent in the case of the 1958 Federal Aid Highway Act, the provisions of 49 U.S.C. § 212 clearly indicate that, as to the Federal airport leases also, the Secretary of Transportation plays a part in the administration of the lease, and that, in any event, during the life of the lease, the Secretary of the Air Force may, at the direction of the President, assume "full control" of the lease. It is again by no means clear that section 14(g) was meant to authorize the termination of the scheme of administration outlined by 49 U.S.C. § 212, without prior notification to, and consultation with, the other affected Federal agencies. Transfer of "administration" to the Native corporation of this lease without such consideration is therefore inconsistent with the provisions of 49 U.S.C. § 212.

The problems inherent in a surrender of either the highway rights-of-way grants or the airport lease require inquiry into the meaning of the terms "waives" as it is used in section 14(g) of ANCSA. This is so, especially in view of the purposes attributed to this action by IM AK 83-98, which is said to be intended to generate income for the Native corporations affected. Apparently there is no legislative history directly dealing with the single sentence in section 14(g) construed by BLM in these decisions; neither BLM nor the State has furnished citation to any such authority, and independent research fails to reveal that the meaning of the statutory authorization to waive administration was ever explained by the lawmakers during their deliberations on the Act.

The implementing regulation, 43 CFR 2650.4-3, also provides for waiver of administration "when the conveyance covers all the land embraced within a lease, contract, permit, right-of-way or easement \* \* \*." <sup>5/</sup> There is, as the majority decision observes, no specific regulatory authority for transfer of administration of state-held leases or rights-of-way to Native corporations. On the contrary, transfer of state-owned rights is expressly excepted from regulatory provisions governing assignments. See 43 CFR 2803.1-1(a)(2)(i) which excepts state-held rights-of-way from transfer "where the public lands shall be used for governmental purposes and such lands and resources shall continue to serve the general public." This language appears to be descriptive of all six rights-of-way and the lease involved in this consolidated appeal.

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<sup>5/</sup> This regulation does not, therefore, by its terms, apply in IBLA 85-39, since in that case only a part of the right-of-way was affected. Partial waiver is not permitted by the regulation as written, contrary to the majority finding on this issue.

Contrary to the assumption by the majority that waiver of administration by BLM would necessarily involve transfer of administration of state-held rights-of-way to the Native corporation receiving the land burdened with the rights-of-way, it is equally easy to assume that waiver results in a transfer of administration to the State. Put differently, "waiver" simply means the end of administration by BLM. This view of the legal effect of withdrawal by BLM from further participation in these matters is consistent with the meanings generally ascribed to the words "waives" or "waiver."

The dictionary definition of these words is instructive, and in harmony with the usual legal constructions placed upon the words when they are used in legal instruments or writing. The American Heritage Dictionary of the English Language (1976) defines "waive" thus:

waive (wāv) tr.v. waived, waiving, waives. 1. To relinquish or give up (a claim or right) voluntarily. 2. To refrain from insisting upon or enforcing; dispense with: "The original ban on private trading had long since been waived" (William L. Schurz). 3. To put aside or off for the time. -- See Synonyms at relinquish. [Middle English weiven, to outlaw, abandon, relinquish, from Norman French weyver, variant of Old North French gaiver, from gaif, ownerless property. See waif.] [Emphasis in original.]

"Waiver" is defined as: "1. The intentional relinquishment of a right, claim, or privilege. 2. The document that evidences such an act. Id. Black's Law Dictionary (Fourth Ed. 1951) defines "waiver" as follows:

The intentional or voluntary relinquishment of a known right, \* \* \* or such conduct as warrants an inference of the relinquishment of such right, \* \* \* or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something the doing of which or the failure of forbearance to do which is inconsistent with the right, or his intention to rely upon it. \* \* \* The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or of the opportunity to take advantage of some defect, irregularity, or wrong. \* \* \* A doctrine resting upon an equitable principle, which courts of law will recognize. \* \* \*

Waiver is essentially unilateral, resulting as legal consequence from some act or conduct of party against whom it operates, and no act of party in whose favor it is made is necessary to complete it. \* \* \* And may be shown by acts and conduct and sometimes by nonaction. \* \* \*

Waiver is distinguished from "estoppel" in that in "waiver" the essential element is an actual intent to abandon or surrender a right, while in "estoppel" such intent is immaterial; the necessary condition being the deception to his injury of the other party by the conduct of the one estopped. \* \* \* And "estoppel,"

may result though the party estopped did not intend to lose any existing rights.  
[Citations omitted.]

What emerges from all this is the understanding that waiver is not an assignment or transfer, it is best described as a relinquishment or giving-up and may be accomplished by nonaction as well as an expressed surrender. A directed assignment or transfer to a specified party of the right surrendered is not part of the concept of waiver. In the case of these rights-of-way which are at issue here, the right surrendered, if it must inure to some entity, could as easily pass to the State or to the public, which has presumably been using the rights-of-way, as it could to the Native corporations. Thus, while the statute and regulations permit waiver of administration by BLM they do not provide for the transfer of the relinquished administration to the Native corporations.

It must be concluded, therefore, that, so far as concerns both the Federal Aid Highway rights-of-way and the airport lease in all seven of the cases now before this Board, the interest of the United States requires continuing administration by the United States. This is so because there has been no showing that any of the grants have expired or terminated for other reasons, and because the statutory basis for each grant requires that an orderly termination, in coordination with another Department, of the right-of-way or lease, is required but has not been accomplished in any of these cases on appeal.

It must also be concluded that "waiver" is not the proper vehicle for accomplishing the result desired by BLM in these cases, which is declared to be to transfer monies received from permits and leases to the Native corporations whose lands are burdened with the revenue-producing use. Administration involves more than the collection of rents and royalties. Since the transfer of funds derived from rents and royalties to the Native corporations appears to be what is intended, rather than termination of administration for these rights-of-way and the airport lease, waiver of administration is clearly an inappropriate action. BLM should, if it has authority for transferring these funds to the Native corporations, take direct action to accomplish the desired transfer of funds. Since the reason for the desire to transfer the rents or royalties is not explained, and no other authority appears for the transfer of monies obtained from the airport lease in this consolidated appeal, the seven decisions on appeal should all be reversed. <sup>6/</sup> This is not to say that administration of certain reserved interests may not be waived; it is clear that they may. There must, however, be a reason for the waiver, and it must be shown to be in the interest of the United States to do so. See 43 CFR 2650.4-3; see also 43 U.S.C. § 1768.

Franklin D. Arness  
Administrative Judge

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<sup>6/</sup> The Instruction Memoranda furnished to explain the reason for the decision are silent on this point. (See, e.g., Instruction Memoranda AK 83-98, dated Dec. 29, 1982; Change 1 to AK 83-98, dated Mar. 29, 1983; Change 2 to AK 83-98, dated June 28, 1983)

