Department of the Interior
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Chapter 2: Valid Existing Rights Under the Alaska Native Claims Settlement Act

Originating Office: Office of the Solicitor

601 DM 2

2.1 **Purpose.** This chapter provides a Departmental policy statement regarding valid existing rights under the Alaska Native Claims Settlement Act (ANCSA). These guidelines were previously issued in Secretary's Order No. 3029 dated November 20, 1978, the provisions of which have been converted to this chapter.

2.2 **Policy**. The Solicitor's memorandum dated October 24, 1978. (See Appendix 1), has been adopted as the position of the Department on the subject of valid existing rights under ANCSA. Based on conclusions reached in Secretary's Order No. 3016 dated December 14, 1977, if, prior to the passage of ANCSA, lands which were tentatively approved for selection by the State of Alaska were (a) tentatively approved or patented by the State to Municipalities or boroughs; or (b) patented or leased by the State with an option to buy under Alaska Statute 38.05.077 (the so-called open-to-entry program); then valid existing rights were created within the meaning of ANCSA. Also, lands covered by such open-to-entry leases from the State should not be included in conveyances to Native Corporations.

2.3 **Clarification.** The Solicitor's memorandum dated November 20, 1979, (see Appendix 2) has been adopted as a clarification to the Department's position. Regarding adjudication of third party valid existing rights, it is appropriate for BLM to determine in the first instance the validity of those interests created by federal laws which are administered by BLM, other than unpatented mining claims under the Mining Law of 1872, 30 U.S.C. 22 et seq., and rights-of-way under RS 2477 (repealed in 1976 by 90 Stat. 2793).

2.4 **Procedures.** The Bureau of Land Management will identify third party interests created by the State, as reflected by the land records of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department will not adjudicate these interests.

2.5 **Prior Determinations.** This policy is not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official. The question of retroactive application of this policy is addressed in 601 DM 2.6.

2.6 **Retroactivity.** The Solicitor's memorandum dated June 2, 1979 (see Appendix 3) has

been adopted as the position of the Department on the retroactivity of policy set forth in 601 DM 2.2. Based on the principles set forth in the Solicitor's memorandum. In Re Appeals of State of Alaska and Seldovia Native Association, Inc., ANCAB Nos. VLS 75-14 and 75-15, decided June 9, 1977, 2 ANCAB 1, 84 I.D. 349, is reversed to the extent it is inconsistent with 601 DM 2.2., but In Re Appeal of Eklutna, ANCAB No. VLS 75-10, decided December 10, 1976, I ANCAB 190. 83 I.D. 61. Is not reversed even though portions of it are inconsistent with 601 DM 2.2. This result derives from the fact that the parties in interest to In Re Appeal of Eklutna have relied on the decision to negotiate a settlement of their dispute and no useful purpose would be achieved by upsetting that negotiated settlement. In addition, the land has been conveyed and is no longer under the Department's jurisdiction. The land at issue in the other appeal has not been conveyed and the parties in interest have not changed their position in substantial reliance on the opinion. 601 DM 2.2 applies to all other land still within the Department's jurisdiction as of the date of this release.

United States
Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

October 24, 1978

Memorandum

To: Secretary of the Interior

From: Solicitor

Subj: Valid Existing Rights under the Alaska Native Claims Settlement Act

On November 28, 1977, I forwarded an opinion to you on the issue of valid existing rights under the Alaska Native Claims Settlement Act. On December 14, 1977, you signed Secretarial Order 3016 adopting my opinion as the position of the Department. Subsequent reaction to that order by various Native organizations, the State of Alaska, and other interested parties, precipitated a

reconsideration of the original opinion. After careful review and reconsideration of the entire administrative record, I have concluded that my original opinion should be amended in certain respects. As such, I recommend that Secretarial Order 3016 be rescinded and that the following opinion, which will replace opinion M-36897, be issued as its replacement.

Certain questions have arisen in connection with the implementation of the Alaska Native Claims Settlement Act (ANCSA)1/,including an issue on which there is apparently a conflict between a decision by the Interior Board of Land Appeals (IBLA)2/ and two decisions issued by the Alaska Native Claims Appeal Board(ANCAB)3/. To the extent that the opinions have created uncertainty as to the Department's policy and legal position with respect to the implementation of ANCSA, the policy and legal position should be clarified.

ISSUES PRESENTED

1. Are lands which were tentatively approved for State selection available for conveyance to Native corporations when they are located within the area withdrawn for Native selection by Section 11(a)(2) of the ANCSA if prior to the enactment of ANCSA the lands had been:

a. tentatively approved or patented by the State to municipalities or boroughs?

b. leased with an option to buy by the State to individuals under the State's open-to-entry program?

c. patented by the State to individuals under the State's open-to-entry program?

2. If open-to-entry leases are valid existing rights should the land be excluded from the conveyance to Natives or should it be included in the conveyance as a subject to interest?

3. To what extent does ANCSA require the Department to determine whether third party rights acquired under State laws are valid?

4. Should this opinion be applied retroactively?

CONCLUSION

1. I conclude that all three of the third party interests identified above are valid existing rights within the meaning of ANCSA.

2. I conclude that the lands covered by open-to-entry leases should be excluded from Native conveyances.

3. I conclude that the validity of third party interests which were created by the State should be identified if possible to put all interested parties on notice, but need not be adjudicated.

4. I conclude that the issue of retroactive application of Secretarial Order 3016 was not adequately presented as an issue for reconsideration. As such, the Department should provide a thirty-day (30) comment period to all affected parties on the question of whether or not this

opinion should be applied retroactively.

DISCUSSION

1. Valid Existing Rights.

From the time the United States acquired possession of Alaska from Russia, Congress recognized in a general way the claims of Alaska Natives to the land they had used and occupied. Thus in 1884 Congress declared: The Indians...shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. Act of May 17, 1884 (23 Stat. 24).

At the time of the Alaska Statehood Act (72 Stat. 339) Congress recognized that these aboriginal claims would be a potential encumbrance on land conveyances to the State and would have to be addressed by Congress. Section 4 of the Statehood Act provides in pertinent part:

> The State and its people...forever disclaim all rights and title...to any lands...which may be held by any Indians, Eskimos, or Aleuts...(such lands) remain under the absolute jurisdiction of the United States until disposed of under its authority.

The legislation addressing the land claims of Alaskan Natives came in 1971, thirteen years after the Statehood Act. During the thirteen-year interim the State received patent to about 4.8 million acres and tentative approval to about 7.7 million acres. It had filed selections on an additional 15 million on which no federal action had been taken.

The concept of tentative approval comes from Section 6(g) of the Statehood Act which states in pertinent part:

> ...Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior...but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands.

The implementing regulations (43 CFR 2627.3(d)) provide that tentative approval will be issued only after determining that there is no bar to passing legal title...other than the need for survey of the lands or for the issuance of patent or both.

By the time ANCSA was enacted the State had created several types of third party interests on land to which it had received tentative approval. Among these were conveyances to boroughs and municipalities under A.S. '29.18.190, and conveyances by the State under its open-to-entry program A.S. '38.05.77, as well as mineral leases, timber sales contracts, free use permits and others.

The determination of whether these rights survive Native selection under ANCSA could begin with an analysis of the nature of the State's title to tentatively approved lands. It is argued that the State's title is a vested title subject only to being voided if Native occupancy could be

proved. Edwardsen v. Morton, 360 F. Supp. 1359 (D. D.C. 1970) is cited both for and against this proposition. It was also argued during the debates which preceded ANCSA that the State's tentatively approved selections, being vested rights, could not be used by Congress to settle the aboriginal claims without compensation to the State. If the protection which the third party grantees received is to be found in common law property principles outside of ANCSA, these exceedingly complex questions would have to be resolved. Since I conclude that protection of third party interests created by the State is provided in ANCSA, I need not determine whether such persons are also protected by principles outside of ANCSA.

A fundamental principle of ANCSA is that [a]ll conveyances made pursuant to this Act shall be subject to valid existing rights. In addition, the sections withdrawing land for Native selection (Sections 11(a), 16(a)) expressly provide that the withdrawal is subject to valid existing rights. The revocation of prior reserves created for Natives is also subject to valid existing rights. (Section 19(a)).

Although the phrase valid existing rights is not specifically defined in Section 3 Definitions, both the statute and the legislative history offer guidance as to its meaning.

Section 14(g) provides in pertinent part:

> 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...the patent shall contain provisions making it subject to the lease, contract (etc.)....

Section 22(b) directs the Secretary to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent.

Section 22(c) protects persons who have initiated valid mining claims or locations in their possessory rights if they have met the requirements of the mining laws.

By regulation the Department has construed Sections 14(g) and 22(b) and provided the mechanism for implementing them. 43 CFR 2650.3-1(a) provides:

> Pursuant to section 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entry or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements.

This regulation makes a basic distinction between rights leading to acquisition of title and rights of a temporary nature. The former are excluded from the conveyance, the latter are included, but protected for the duration of the interest.

It has been argued that for those rights which lead to the acquisition of title the statute and the regulations also distinguish rights which are created under Federal law and those created by State law, protecting only the former. I do not agree for several reasons.

First, the authority of the State to create third party interests in tentatively approved (T.A.'d) lands comes from section 6(g) of the Statehood Act, quoted in pertinent part above. Although the State has exercised this authority through State legislation which defines the terms on which persons may acquire leases, etc., the Congress, in ANCSA, clearly considered such leases to be issued under Federal law, namely the Statehood Act. Section 11(a)(2), for example, withdraws T.A.'d land from the creation of third party interests by the State under the Alaska Statehood Act. Section 14(g), as already stated, refers to leases issued under section 6(g) of the Alaska Statehood Act.

Therefore, it is appropriate that 43 CFR 2650.3-1(a) does not limit its scope to entries which are maintained under Federal laws and lead to acquisition of title, but says simply laws leading to the acquisition of title. Second, I do not believe the listing of the rights to be protected was intended to be limiting, but rather was ejusdem generis. The regulation already quoted (43 CFR 2650.3-1(a)) precedes its list with such as those created by..., indicating clearly that the list is not exhaustive. Furthermore, there is no logical reason why Congress would have intended to protect rights of municipalities or individuals which lead to the acquisition of title under such Federal laws as the Townsite Act or the Homestead Act, but did not intend to protect the same municipality or individual when the law under which the rights are being perfected is a State law.

It is my conclusion, therefore, that the Department's regulations have construed valid existing rights under ANCSA to include rights perfected or maintained under State as well as federal laws leading to the acquisition of title.

This conclusion is reinforced by the provisions of Section 11(a)(2) which provides that the withdrawal of State selected and T.A.'d lands is from Aall forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act. The underscored language reveals that third party interests created by the State are considered to have been created under the Statehood Act, which is a Federal statute. Also by withdrawing the land from the future creation of third party interests by the State, there is a strong implication that third party interests already created were considered valid existing rights. Finally, the fact that the lands are withdrawn from appropriations under the mining laws makes it clear that valid existing rights as used in Section 11(a)(2) contemplates rights which lead to the acquisition of title as well as those of a temporary nature.

The fact that Congress expressly referred only to leases issued by the State is not persuasive evidence that Congress intended no other State-created interests to be protected. The reasons for Congress' special emphasis on State leases is entirely understandable.

The House Committee report reflects Congress' concern that a lease issued by the State which on its terms was conditional on the issuance of a patent to the State not be terminated by virtue of

the Native selection. H.R. Report No. 92-523, 92d Cong., 1st Sess. (1971), p. 9.

It is well-known that ANCSA was the subject of intense concern to the oil and gas industry which had mineral leases on State selected lands.4/ It is therefore not surprising that Congress paid special attention to State-issued leases. But that is not that is not to say that Congress was unaware of or unconcerned with State issued patents, which was equally conditional on the issuance of a federal patent to the State. Thus the House Committee report, supra, states: Section 11(i) protects all valid rights.... If it had intended to protect only leases or only rights of a temporary nature the use of the word all would seem inappropriate.

This concern runs throughout the hearings' record. On August 8, 1969, Senator Stevens (R-Alaska) learned for the first time that the Alaska Federation of Natives was claiming land that had been tentatively approved to the State. Highlights from pages 344-351 of the testimony of that day's hearings are excerpted below:

SENATOR STEVENS. Maybe just one last question, and this will be directed to all of your people, General Clark. It is my understanding there is no conflict between the recommendations that are made here today and existing State rights, that is, in terms of State selections, already patented or State selections to which there has been tentative approval given is that correct?

* * *

The Statehood Act set up a unique thing, and we are forever going to be indebted to Congress for this unique approach, and that is, the State of Alaska is going to be able to treat it as though it owns the land, the land to which the Secretary of Interior had given tentative approval on selection

* * *

MR. CLARK. Well, it is right as to the patent insofar as the settlement proposal is concerned. On tentative approval, the federation has not taken a position on that here.

* * *

Well, let me have President Notti, who can speak better for the Federation than I, as counsel for it, address himself to that. But before he does, let me say that this does not mean that there is any irreconcilable conflict necessarily there. You are talking about whether there is a quitclaim or a waiver only to tentatively approved land.

* * *

MR. NOTTI. Senator, we have discussed this in our meetings, and as far as patented lands go to State or individuals, we here make no claim against that.

Lands that have not been patented, have not gone to final patent, and that includes tentative

approval, we are not willing to concede at this time that we do not have selection rights in these areas. We think we do.

* * *

SENATOR STEVENS. I hope everyone realizes the effect of the statement you have just made, which is probably the most significant statement that I think has been made in the whole hearing. I have never before this time had any indication that the Alaska Federation of Natives did not concede the validity of the land freeze.

* * *

I want to eliminate any conflict with the State. We are protecting the rights of private individuals. As I understand the position of everyone who has been here so far, if there are private existing rights they will be recognized. That would include the homesteader who has filed and received his certificate of final proof. It would include the man who had the trade manufacturing site or the various other entries who has gone as far as he can and has received final approval of the Interior Department, subject to only one thing, and that is the issuance of a patent after survey.

Now, the State is in that same position, and I think the position of the AFN is treating the State differently than other private rights, non-Federal, nonnative rights, because they are not recognizing the validity of a tentative approval in that sense, the sense that, in fact, put Alaska where it is today.

If it had not been for tentative approval, the State of Alaska could not have proceeded to lease Prudhoe Bay, could not have proceeded to lease most of the lands that have been leased, and I am sure that anyone familiar with the State government would tell you that without the right to issue leases on tentative approval land, we would not have had the income we have had.

The State would have been bankrupt, and I think it will drastically affect the outcome of the sale in September if this point is not cleared up before that time.

We are expecting $1 billion from that lease sale. Now here is a cloud, a definite cloud, on that sale because those are tentative approval lands, and I think it must be cleared up. If it is not cleared up, it is going to affect all Alaskans drastically, and I urge you to clarify your position and to state that you are not going to contest lands to which tentative approval has been given to the State before the land freeze, because if you do not, I would predict that the income from the land sale in September is going to be somewhere around $40 million instead of $1 billion.

SENATOR GRAVEL. If the Forest Service sells timber from the Tongass Forest, would this not be a similar situation? The State's tentatively approved land is being claimed; just as is the forest lands. AFN has already talked of protecting the rights of individuals, and they are looking upon Government, the State or Federal, in the same light.

Now, I personally--maybe you could explain to me--do not see why the tentative approval area should be sacrosanct if the Tongass National Forest is not sacrosanct.

SENATOR STEVENS. Well, but this is the point: The State was given certain rights under the Statehood Act, the right to select these lands. Where the lands have been patented,

there is no dispute. The only reason the patent was not issued under tentative approval was because the survey had not been done. The State and Federal Government have done everything there is to do except issue the patent.

SENATOR GRAVEL. I understand that. But suppose the State does have patent. The Natives would still be looking to the State for participation if there are certain areas of State land needed to fill out the allowable land grant area around the village. If that is the case they would get land from the State, just as they would from Federal Government, lands, such as the Tongass National Forest or some wildlife refuge. That does not disturb me one iota, and I do not see an economic change of significance that will alter the wealth because they are not going to disturb the oil companies under the lease. That lease will be there.

* * *

The ambiguity might occur as to whether or not the Natives have a claim on the lease interest or the State's interest in it. There is a difference. I believe AFN stated earlier that as far as the homesteader is concerned they recognize his rights, just as the rights of the oil companies would be recognized. But possibly there may be inferences here of which I am not aware.

* * *

MR. CLARK. Let me say, first, Senator Stevens, that I think it would be terribly unfortunate if we exaggerated the risks here. There is nothing that I can see that the Federation has ever done that would challenge a lease that may have been entered into and, therefore, I do not see how their claiming their villages, whether it falls in tentatively approved land or the Tongass National Forest, could affect the bonus value of the lands. The lessee is not really threatened. (Emphasis supplied.)

Throughout this discussion several things are apparent: First, Senator Stevens is concerned with protecting the rights of private individuals. He lists several examples -- homesteaders and other people with rights under federal law, and in the same discussion mentions the Prudhoe Bay oil lessees. Second, these Prudhoe Bay leases are cited as an example and quoted with the homesteader in Senator Gravel's comment; and third, Stevens, Gravel, and Clark all agreed in general terms that private rights should be protected. Nowhere did anyone suggest that lessees should be treated differently from other private individuals.

In the 1971 hearings the question of private rights in T.A.'d land again arose:

SENATOR STEVENS: Almost all the property rights that have been created since 1958 have come through the tentative approval provision in the Statehood Act. There have been very few rights in the State of Alaska created otherwise. If we were to disturb that provision...we would be disturbing the whole system of private rights in the State.

Mr. Weinberg, then speaking for the Natives, replied:

Now, we are not suggesting that every land title in the State of Alaska be upset ...[P]atents should not be upset. Even patents to the State where the State still holds the land. But we do believe that the T.A. land problem can be met and it should be met by Congress...[N]obody's private title is going to be upset.

Testifying on May 7, 1971, before the House, Mr. Hugh Fleischer representing nine individual Native villages who were deeply concerned by the T.A.'d land issue, urged the Congress to include T.A.'d land in the bill, but included the statement:

We don't think that this legislation we are proposing would create any serious problems with respect to third party interests... Hearings on HR 3100, May 3, 4, 5, 6, 7, 1971, p. 327.

The need to protect all third parties was expressed by Governor Egan in a letter to the House Committee dated May 12, 1971, (Appended to the 1971 House Hearings at p. 264) as follows:

Under specific authorization of the Statehood Act the State has granted large numbers of patents and leases and entry rights to third parties in T.A.'d lands.
The first principle to be observed in any determination regarding T.A. lands is that no interest given by the State to any third party shall be disturbed. (Emphasis added.)

All of the foregoing legislative history supports the conclusion that Congress did not single out leases from other State created rights as the only ones to be protected. It shows, I believe, that the reference to State issued leases, preceded by the word including, was intended to mean that leases were only one of the State vested rights that were to be protected under the statute as valid existing rights.

In my opinion, there is no ambiguity in either the statutory language or the legislative history concerning Congress' intent to protect all valid existing rights which were created under federal or State law.

a. Borough and Municipal Lands.

Coupled with the issue of valid existing rights is the question of whether or not State T.A.'d lands which have been selected by boroughs or municipalities are valid existing rights which are protected from Native selection. Certain Native corporations have argued that boroughs and municipalities are instrumentalities of the State whose rights are so derivative as to be identical to those of the State and that the State cannot exempt land from Native selection by conveying to itself.

The legislative history on this point is non-existent. The Alaska Native Claims Appeal Board (ANCAB) addressed the issue in the Appeal of Eklutna, Inc., ANCAB VLS 75-10 and rejected the Instrumentality of the State argument, relying on provisions of State law and State Supreme Court decisions to the effect that for many purposes, including bringing lawsuits and holding land, a municipality5/ has a separate legal entity.

ANCAB found in its decision that a municipality is an entity legally capable of constituting a third party whose interest in lands is separable from that of the State. Forming the basis of this finding were pertinent sections of the Constitution of the State of Alaska, portions of Title 29 of the Alaska Statutes, and several decisions of the Alaska Supreme Court. The pertinent portion from pages 32-34 of that decision is incorporated herein:

Article X, Section 1 of the Constitution of the State of Alaska provides:

The purpose of this article is to provide for maximum local self government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

Article X, Section 2, provides:

Local Government Powers. All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.

Article X, Section 3, provides as follows:

Boroughs. The entire State shall be divided into Boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. ...The legislature shall classify boroughs and prescribe their powers and functions. Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.

Title 29 of the Alaska Statutes, Municipal Government, in A.S. 29.48.010, lists the following municipal powers, exercised by the Borough and its successor, the Municipality:

* * *

4. to enter into agreements...with the State, or with the United States:

* * *

6. to sue and be sued;

* * *

9. to acquire, manage, control, use and dispose of real and personal property...

* * *

A.S. 29.48.260. Municipal Properties, provides:

(a) A municipality may acquire and hold real and personal property or interest in property,...

(b) ...a municipality may sell, lease, donate or exchange with the United States, the state, or a political subdivision real estate or other property, or interest in property,...

* * *

Municipal powers to sue have been exercised against the State; in Kenai Peninsula Borough v. State (Alaska, 532 P. 2d 1019), the Court held that the Borough, in transporting students by school bus, did not act as agent of the State.

In Wellmix Inc. v. City of Anchorage, 471 P. 2d 408, 410 (1970), an eminent domain action, the Court held that the City of Anchorage, the condemnor, was not an agency of the State within Supreme Court rule 7(a), regarding the appeal period allowed in an action to which the State or an agency thereof is a party.

In Chugach Electric Association v. City of Anchorage, Alaska, 476 P. 2d 115 (1970), an electric utility holding a certificate of public convenience and necessity from the Public Service Commission (a State agency), sought relief from the City's refusal to issue a building permit, required under City Ordinance for the construction involved in providing service to a bowling alley. Construing the problem as a conflict between a municipal ordinance and the State statute vesting power in the Public Service Commission, the Court held in favor of the State.

In none of these cases was the municipal party's standing denied on the ground that a municipality functioned as a mere alter ego of the State.

The Board notes that a variety of statutory provisions, cited by the Municipality in its Supplemental Brief filed June 2, 1976, appear to place municipal governments on an equal footing with other private grantees with regard to disposition of State lands. The Board further notes that, insofar as '6(g) of the Statehood Act provides, The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State, a municipal government may not participate directly in the selection process, but must take as the State's grantee. A selection made by the State to protect a city's watershed was held consistent with this principle:

The selection was made by Alaska in its own name and, insofar as the record shows, was not subject to any contract, conveyance, or other transaction with the City of Anchorage. ...The fact that the interests of the state and its political subdivision, the City of Anchorage, coincide, is without legal significance and, on this record, in no sense evidences a violation of the prohibition against alienation contained in section 6(g). (Udall v. Kalerak), 396 F. 2d. 746 749 (1968))

[14] The Board recognizes that the Municipality is organized and may be dissolved under State law. At present, the Municipality is empowered to exercise governmental and proprietary functions under the Constitution and laws of Alaska. These functions include the acquisition, management, and disposal of land, independent of control by the State. The Board must conclude that, until revoked or modified by constitutional or legislative

amendment, with the consent of the electorate, such powers remain in force and render the Municipality an entity separate from the State for purposes of holding third party interests under ANCSA.

In reviewing ANCAB's analysis and reasoning, it is my opinion that this interpretation reflects the Congressional intent of ANCSA.

b. Open-to-Entry Leases.

The issue of whether or not open-to-entry leases are valid existing rights and how they should be processed by the BLM has also been raised.

The State open-to-entry leasing program, A.S. 38.05.077, provides for the issuance to qualified applicants of a five-year lease (renewable for five years) to not more than five acres of State land classified as open-to-entry.

It further provides:

(4) Before a person may purchase the parcel of land upon which he has entered he shall have a survey made of the entry....

* * *

(6) When the entry has been made upon land that has been selected by the State and upon which the State has not received tentative approval or patent, the entry shall be approved only on the basis of a renewable lease. When tentative approval or patent has been received by the State, the lessee may relinquish his lease and acquire patent to the entry by negotiated purchase upon the terms and conditions provided for in this section.

The program contemplated here is a lease with an option to buy at a negotiated price. It is a lease which could at the election of the lessee lead to the acquisition of title.

Under the analysis set forth above, third party interests created by the State are protected regardless of whether they are of a temporary nature or lead to the acquisition of title. However, for purposes of 43 CFR 2650.3-1(a), it must be determined whether land covered by an open-to-entry lease should be excluded from the conveyance, or whether it should be included in the conveyance which would be issued subject to the lease.

After reviewing my original opinion on this issue, I have now concluded that lands subject to open-to-entry leases which were issued prior to December 18, 1971, and which are within a Native selection should not be included in or counted against lands conveyed to Native corporations. Under this procedure the State continues to administer the program in accordance with its laws. If the lessee fails to exercise the option to purchase, the affected Native corporation can either have the land conveyed as part of its original entitlement or, if the entitlement is otherwise satisfied, then by exchange.

By excluding these lands from Native conveyances, this procedure will be in conformity with 43 CFR 2650.3-1(a), which provides for the exclusion from Native conveyances entries which are being maintained in compliance with laws leading to the acquisition of title. Contrary to the conclusion which was drawn in my opinion of November 28, 1977, these open-to-entry leases are analogous to entries made under the Alaska homestead, trade and manufacturing site, homesite, and headquarters site laws which permit entrymen a certain period of time (usually five years) to perfect their notices of entry and thereby gain title to the land. Until the time period lapses and an application to purchase is filed, in most cases BLM does not know whether an entryman has, in fact, met the legal requirements for acquisition of title. As such, this time period is virtually indistinguishable from the time period in which an open-to-entry lessee must meet certain State law requirements to perfect his option to purchase. When an entryman files his application to purchase homestead lands, for example, he is, in effect, exercising an option to buy against the United States. If he fails to file his application to purchase or to meet any of the statutory criteria, his option fails. Because we are excluding from Native conveyances entries which have been noted on the public land records for homesteads, Native allotments, trade and manufacturing sites, and headquarters sites, but which have not been perfected, lands under open-to-entry leases which have been properly issued by the State should likewise be excluded from Native conveyances.

2. Adjudication of Third Party Valid Existing Rights.

Another issue for resolution is to what extent the law and regulations require the Department to identify and determine the validity of (adjudicate) third party valid existing rights.

Clearly the administrative act of listing an interest as a valid existing right or of failing to list it does not create or extinguish the right. Because of this the ultimate validity of all interest may require court litigation.

Nevertheless it is appropriate for BLM to determine in the first instance the validity of those interests which are created by federal law since BLM is in most cases the agency charged with the administration of those laws. It is also appropriate for BLM to identify any interests which appear on the State land records and to serve notice on all parties of each other's possible interests. It was for this reason that the Department promulgated 43 CFR 2650.7(d) requiring that decisions of BLM proposing to convey lands under ANCSA shall be served Aon all known parties of record who claim to have a property interest or other valid existing right in the land affected by the decision. Neither the Department's regulations nor ANCSA require the Department to determine whether third party interests created by the State are valid under the applicable State law and regulations. The Department is not an appropriate forum to adjudicate these interests. If the State created interest is valid on its face it should be deemed valid for purposes of the conveyance document. This position is consistent with the decisions made March 3, 1978, on ANCSA implementation.

3. Retroactive Application of this Opinion.

The final issue concerns the retroactive application of Secretarial Order 3016. This issue was not addressed in my original opinion and was not adequately presented as an issue for

reconsideration. It is, however, an issue which is presently before the Alaska District Court in Richards, et al., v. Andrus, et al., No. A78-170 Civ. We intend to petition the court for a stay of proceedings and to provide a thirty-day comment period on this issue to all parties have who participated in the affected administrative proceedings. A separate opinion on this issue will be written after the submissions are reviewed and analyzed.

/S/ Leo Krulitz

1. 43 U.S.C. '1601-1629
2. State of Alaska, 19 IBLA 178, March 18, 1975.
3. Appeal of Eklutna, ANCAB VLS 75-10, Dec. 10, 1976, Appeal of Seldovia, VLS 75-14, 15, June 9, 1977.
4. See, for example, the dissenting view of Congressman Saylor appended to House Committee Report No. 92-523, 92d Congress, 1st Sess. (1971), at p. 51.
5. Under A.S. 29.08.030, the term municipality includes first, second, and third class boroughs and first and second class cities.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Nov. 20, 1979

Memorandum

To: Secretary

From: Solicitor

Subject: Amendment of Solicitor's Memorandum of October 24, 1978, Adopted in Secretarial Order 3029 dated November 20, 1978

A sentence in my memorandum of October 24, 1978 entitled Valid Existing Rights Under the Alaska Native Claims Settlement Act (ANCSA) has generated some confusion and requires clarification. Since that memo was adopted by you in Secretarial Order 3029, dated November

20, 1978, in its entirety, amendment requires your concurrence.

The sentence concerned the adjudication by the Bureau of Land Management (BLM) of certain potential third party interests in land being conveyed to Natives. It reads:

> Nevertheless it is appropriate for BLM to determine in the first instance the validity of those interests which are created by Federal law since BLM is in most cases the agency charged with the administration of those laws.

This sentence was not intended to require the adjudication of unpatented mining claims located under the Mining Law of 1872, 17 Stat. 92, 30 U.S.C. ' 22 et seq. Congress, in section 22(c) of ANCSA, specifically treated unpatented mining claims differently from other types of possible pre-existing rights. Section 22(c) and the regulations implementing it provide that the land on which an unpatented mining claim is located, if selected by a Native corporation, will be conveyed unless prior to conveyance the claimant files an application for mineral patent or mineral survey. 43 CFR 2650.3-2. The Department's position that it may convey land which contains unpatented claims, the validity of which has not been determined, was recently upheld in Alaska Miners v. Andrus, A 76-263 (D. Alaska), Memorandum and Order dated October 19, 1979.

Neither was the sentence intended to require the adjudication of rights claimed under RS 2477 which, like the Mining Law of 1872, does not require an application to be filed with BLM. RS 2477, enacted in 1866, provided: The right-of-way for the construction of highways over public lands, not reserved for public use, is hereby granted. 19 Stat. 253, 43 U.S.C. ' 932. It was repealed in 1976, 90 Stat. 2793. BLM did not issue grants of rights-of-way under this statute. The courts have generally considered the issue of whether a right-of-way has been established under this statute to be a question of state law not requiring any federal approval or acknowledgment. See, e.g., Hamerly v. Denton, 35 P.2d 1. (Alaska 1961). Accordingly, the Department has refrained from adjudicating possible RS 2477 interests. See Herb Penrose, A-29507 (July 26, 1963) and Alfred E. Koenig, A-30139 (November 25, 1964).

Where no application of acknowledgment is required of BLM, that agency has no special basis on which to adjudicate the claim. Accordingly, the sentence should be amended to provide for BLM adjudication only where it is the agency charged with administration of the law.

For the foregoing reasons, the sentence should be revised to read:

> Nevertheless, it is appropriate for BLM to determine in the first instance the validity of those interests created by federal laws, which are administered by BLM, other than unpatented mining claims under the Mining Law of 1872, 30 U.S.C. ' 22 et seq., and rights-of-way under RS 2477 (repealed in 1976 by 90 Stat. 2793).

/S/ Leo Krulitz

SOLICITOR

I CONCUR

/S/ _____
Cecil D. Andrus
Secretary of the Interior 11/20/79

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Appendix 3

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

June 2, 1979

Memorandum

To: The Secretary

From: Solicitor

Subject: Retroactivity of Secretarial Order 3029

The question of the retroactive effect of Secretarial Order (SO) 3029 was not decided in that Order. Instead, as you know, it was deferred to allow complete briefing on the question by all interested parties. I have reviewed the submitted briefs, and the applicable law and herewith present my conclusions.

BACKGROUND

On March 18, 1975, the Interior Board of Land Appeals (IBLA) decided In Re Appeal of State of Alaska (Alaska), 19 IBLA 178. In that case, the State of Alaska had obtained tentative approval (TA) of its selection of a tract of land and had thereafter issued a state patent to the land to the Bristol Bay Borough. Later, that tract was selected by the Native Village Corporation of Naknek. The Bureau of Land Management (BLM), vacated tentative approval and rejected the state selection applications. IBLA reversed the BLM decision holding that the Borough had a valid existing right protected by section 14(g) of the Alaska Native Claims Settlement Act (ANCSA), Public Law 92-203, 85 Stat. 704, 43 U.S.C. ' 1613(g) (1976). The Board stated:

While [Section 14(g)] of ANCSA does not explicitly state that patents issued by the State of Alaska are to be considered valid existing rights, when read in conjunction with [Section 11(a)(2)] of ANCSA, that conclusion is virtually inescapable.

19 IBLA at 181.

On December 10, 1976, the Alaska Native Claims Appeal Board (ANCAB) decided In Re Appeal of Eklutna (Eklutna), ANCAB No. VLS 75-10, 1 ANCAB 190, 83 I.D. 61. The facts there were similar to those in Alaska. In Eklutna, a tract of land which had been TA'd to the State of Alaska was conveyed by the state to the Greater Anchorage Area Borough (which later became the Municipality of Anchorage). Subsequently, Eklutna Native Village Corporation selected the land. BLM, following Alaska, rejected this Native selection. ANCAB reversed BLM and ordered the tract conveyed to the Native Corporation. ANCAB held that the interest of the Municipality was not protected by section 14 (g) of ANCSA, but stated that the Municipalities' rights, if any, would be protected by section 14(c).

On June 9, 1977, ANCAB decided In Re Appeals of State of Alaska and Seldovia Native Association (Seldovia), ANCAB Nos. VLS 75-14 and 75-15, 2 ANCAB 1, 84 I.D. 349. In that case, the State of Alaska had created a number of third party interests on land which had been TA'd to the State including several open-to-entry (OTE) leases. Subsequently, Seldovia Native Village Corporation selected the same land. On an appeal by the State, ANCAB upheld BLM's decision that the OTE leased land should be conveyed to Seldovia. ANCAB ruled that the interests of the lessees were protected by section 14(g) of ANCSA during the lease term, but that the OTE lessees' statutory option to purchase could not be enforced against Seldovia Corporation.

In an effort to resolve these conflicting decisions, you issued SO 3016 on December 14, 1977, adopting my memorandum of November 28, 1977. In SO 3016, you concluded that pre-ANCSA conveyances by the State of Alaska of TA'd lands to third parties created valid existing rights which were protected under the provisions of ANCSA. Land conveyed to Boroughs was to be excluded from ANCSA conveyances. Land covered by a State OTE lease was to be included in the conveyance to a Native Corporation, but the lessees' option to purchase the land would be enforceable against the Native Corporation. SO 3016 stated that it was not intended to disturb any administration determination contained in a final decision by the Department. It was expressly not intended to reverse Eklutna or Seldovia.

SO 3016 was not greeted with unanimous acclaim. At the request of various Native corporations, you agreed to reconsider its conclusions. The result was SO 3029, published on November 27, 1978, adopting the Solicitor's opinion of October 24, 1978. SO 3029 reaffirmed the conclusion that third party interests which had been created by the State prior to ANCSA on land TA'd to the State were valid existing rights protected under ANCSA, although it modified the earlier decision on some procedural points. In particular, land covered by a State OTE lease was now to be excluded from ANCSA conveyances. SO 3029 also stated that (t)he question of retroactive application of this Order shall be addressed by the Solicitor under procedures which shall be announced by him within thirty days of this Order's effective date.

PRINCIPLES OF RETROACTIVITY

Departmental policy can be established through either adjudication or rulemaking. Rulemaking develops general principles. Adjudication is the resolution of a particularized dispute, applying general principles to a contested case.

The Secretary has delegated adjudicative power to several appeal boards within the Department. 43 CFR ' 4.1 (1978). These boards are authorized to made final decisions for the Department for purposes of exhaustion of administrative remedies as a prerequisite to judicial review. Id. The Secretary, however, has retained the adjudicative power to review and reverse board decisions. 43 CFR ' 4.5 (1978).

The principles of law announced in an adjudication always have prospective effect. In addition, they usually have retroactive effect in the sense of applying from that time forward to future cases even though their facts have occurred prior to the first decision. Safarik v. Udall, 304 F. 2d 944, 949 (D.C. Cir. 1962); Vanderbark v. Owens Illinois Glass, 311 U.S. 538 (1941); Guillory v. Humble Oil and Refining Company, 310 F. Supp. 230, 233 (D.C.E.D. La. 1970). See also 1 K. Davis, Treatise on Administrative Law, ' 5.09 (1958). On occasion an adjudication will be inferred to have retroactive effect to undo the results of prior final decisions. In Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court reviewed at some length the history of retroactivity, tracing it back to the English common law. The Court concluded:

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Id. at 629.

It cannot be doubted that the Secretary, as the final appellate adjudicator of the Department under 43 CFR ' 4.5 (1978), has the power expressly to declare an adjudication of his retroactive, even to the extent of undoing the results of prior final decisions. The Secretary's discretion in this regard should be guided by balancing the same factors applied by the courts. These factors should include: (1) whether the decision announces a new principle of law and whether prior litigants had justifiably relied on the older overruled principle, Safarik v. Udall, supra, at 949; (2) whether the purpose of the new rule is served by making it retroactive so as to reverse prior final decisions, Linkletter v. Walker, supra; and (3) whether making a decision retroactive so as to overrule a prior final decision would produce an inequitable result, Warner Bergman, On Reconsideration, 31 IBLA 21 (1977). Finally, it is necessary to determine whether the arguments for retroactivity are so strong as to overcome the Department's interest in not reopening final decisions. Union Oil Company of California et al., 71 I.D. 169, 175-76 (1964); Schroeder v. 171.74 Acres of Land More or Less, 318 F. 2d 311 (6th Cir. 1963). See Chevron Oil Company v. Huson, 404 U.S. 97 (1971); Litwhiler v. Hidlay, 429 F. Supp. 984 (M.D. Pa. 1977).

The second way in which the Department can formulate general policies is by promulgating rules. There are two types of rules: legislative and interpretive. An agency adopts legislative rules when it acts pursuant to the delegation of law-making power from the legislature. It

adopts interpretive rules when it attempts to clarify the meaning of a statute.

Legislative rules are generally prospective only. PBW Stock Exchange, Inc. v. Sec., 485 F. 2d 718 (3rd Cir. 1973); Maceren v. District Director, Immigration and Naturalization Service, Los Angeles, 509 F. 2d 934 (9th Cir. 1974); 1 K. Davis, Treatise on Administrative Law, ' 5.08 (1958). In addition, to being prospective, interpretive rules are also usually deemed retroactive to the time of enactment of the statute. Enfield v. Kleppe, 566 F. 2d 1139, 1142 (10th Cir. 1977); 1 K. Davis, Treatise on Administrative Law, ' 5.09 (1958). Cf. Safarik v. Udall, supra. As with an adjudication, if a rule is deemed retroactive it is applied to facts which may have occurred prior to the rule's adoption. A retroactive rule applies to proceedings then in progress even though they may have been commenced before the new rule was announced. Pacific Molasses Co. v. FTC, 356 F. 2d 386 (5th Cir. 1966). Further, a retroactive rule can be applied to alter antecedent rights and effectively reverse a Department decision otherwise final for purposes of judicial review. Greene v. United States, 376 U.S. 149, 160 (1964); Springdale Convalescent Center v. Matthews, 454 F. 2d 943 (5th Cir. 1977).

There can be little doubt that the Secretary has the power expressly to make a rule retroactive to apply to future proceedings. Lohf v. Casey, 330 F. Supp. 356 (D.C. Colo. 1971); Segars v. Gomez, 360 F. Supp. 50, 53 (D.C.S.C. 1972); Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Railway Co., 284 U.S. 370, 389 (1932) Rush v. Gardner, 273 F. Supp. 753, 755 (D.C.N.D. Ga. 1967); 1 K. Davis, Treatise on Administrative Law, " 18.09, 18.03, 18.12 (1958). Further, he can make a rule retroactive so as to overrule a decision of the Department that is final for purposes of judicial review. Springdale Convalescent Center v. Matthews, supra; 200 D.M. 1.1 and 1.9.

The Secretary, however, must use discretion in exercising this power. 1 K. Davis, Treatise on Administrative Law, ' 5.09 (1958). In fact, the Department's policy has been one of reluctance to interfere with prior decisions. Safarik v. Udall, supra; Appeal of Franko Western Oil Co. et al., 65 I.D. 427 (1958). In deciding whether to make a rule retroactive, the factors which the Secretary must balance are similar to those applied in adjudications. These factors include: (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of the law, (3) the extent to which the party against whom the rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, (5) the statutory interest in applying a new rule despite reliance of a party on the old standard, (6) whether retroactive application would benefit or harm third persons, and (7) whether retroactive application would benefit or harm the United States. Lodges 743 and 1746, etc. v. United Aircraft, 534 F. 2d 422, 453 (2d Cir. 1975); Safarik v. Udall, supra; Maceren v. District Director, Immigration and Naturalization Service, Los Angeles, supra; Anderson, Clayton and Co. v. United States, 562 F. 2d 972, 981 (5th Cir. 1977).

APPLYING THE PRINCIPLES

It seems clear, at the outset, that although the issue could have been resolved through an exercise of your adjudicatory power, SO 3029 was an exercise of rulemaking power. You did not take jurisdiction over the Seldovia and Eklutna appeals under 43 CFR ' 4.5 (1978). You did not

specifically request briefs from those parties. Nor did you accept briefs from only those parties with standing in those appeals. In determining whether SO 3029 should be made retroactive as an exercise of your rulemaking power, it is necessary to consider the effect of retroactivity on the lands in the Eklutna and Seldovia cases and on any other lands still within the Department's jurisdiction.

A. Eklutna

As noted above, in Eklutna ANCAB ordered BLM to convey to Eklutna Corporation a tract of land which had been conveyed by the State of Alaska to the Municipality of Anchorage. ANCAB stated that the rights, if any, of the Municipality were protected by section 14(c) of ANCSA. We are informed that Eklutna Corporation and the Municipality of Anchorage have recently reached an agreement whereby the Municipality will obtain title to some of the disputed tract as part of a settlement package of the Municipality's section 14(c) rights. It is apparent, therefore, that even though Eklutna was not a long-standing decision, it has been relied upon by the parties in interest who have apparently reached an amicable settlement. Further, the disputed tract of land has been conveyed and is no longer within the Department's jurisdiction. The Department's power to recover this land through court action is limited. See Le Marchal v. Tegarden, 175 F. 682 (Ark. 1909); section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. ' 1746. Therefore, it would appear based on the principles discussed above that SO 3029 should not be made retroactive to affect the land involved in Eklutna.

B. Seldovia

In Seldovia, ANCAB ruled that OTE land should be included in the IC, but that OTE lessees had no right to exercise their options to purchase against Seldovia Corporation. ANCAB remanded the DIC to BLM for conformance with its decision. BLM then published a new DIC concerning these same lands. The State of Alaska and the OTE lessees have appealed the new DIC to ANCAB, requesting that their appeals be treated as motions for reconsideration. Additionally, many of the OTE lessees have appealed the original Seldovia decision to the Federal District Court of Alaska. Cook Inlet Region, Inc., the region in which Seldovia lies, has stated that the OTE acreage involved is minuscule and that it did not wish to have the equities of the Native corporations confused with those of private entrants.

Additionally, the land in dispute in Seldovia has not yet been conveyed. The Department still has jurisdiction over this land. Further, in the case of one of the OTE lessees, ANCAB did in fact agree to reconsider its decision in Seldovia pursuant to 43 CFR " 4.21(c) (1978), and upon reconsideration, reversed the decision as to that lease. In Re Appeal of Raymond E. Miller, ANCAB No. 78-39, decided May 11, 1979. Therefore, the rights of the parties in the Seldovia case have not been substantially vested. There has been no substantial reliance on the part of the lessees, many of whom have continued to seek relief from the Department as well as the courts. Since ANCAB's decision protected the lessees for the duration of the term of their leases, and since Seldovia Native Association has been made a party to the various actions by the lessees challenging the ANCAB decision, substantial reliance by Seldovia is unlikely. Neither third parties, nor the United States would be hurt by making SO 3029 retroactive here.

C. Other Land

Eklutna was decided on December 10, 1976. SO 3029 was published on November 27, 1978. It is likely that some of the DIC's published during that interval identified municipality, OTE or other third party lands, for conveyances to Native corporations. Under SO 3029, these lands should not be conveyed to the Native corporations. The factors discussed above favor making SO 3029 retroactive as to all such lands still within the jurisdiction of the Department.

/s/ Leo M. Krulitz

3/27/80 #2246
Replaces 5/8/79 #2172