SCOMM

#22:13

RONALD G. BIRCH *
HAL R. HORTON *
WILLIAM B. BITTNER *
BRUCE MONROE *
SUZANNE C. PESTINGER
LLOYD V. ANDERSON
GREGORY C. TAYLOR
ROD CARMAN
RITA T. ALLEE
GORDON P. SCHADT
HARVEY A. LEVIN *
JOSEPH M. CHOMSKI *
MICHAEL R. SPAAN *
FREDRIC R. DICHTER
JAMES D. DeWITT
RONALD NOEL *
CAROL A. JOHNSON
MARK S. BLEDSOE
GERALD D. STOLTZ *
MICHAEL J. O'BRIEN
PETER A. GALBRAITH
JOSEPH W. EVANS
WESTON S. BURBANK
FRANK P. RAMACIOTTI *

* ADMITTED IN D. C.

LAW OFFICES
BIRCH, HORTON, BITTNER AND MONROE
4400 JENIFER ST., N. W. - SUITE 300
WASHINGTON, D.C. 20015
(202) 244-4250
TELEX 9-89-2591

733 W. FOURTH AVE., SUITE 208
ANCHORAGE, ALASKA 99501
(907) 276-1429
TELEX 25-358

1200 AIRPORT HEIGHTS DRIVE
ANCHORAGE ALASKA 99504
(907) 279-9501

751 OLD RICHARDSON HWY., SUITE 349
FAIRBANKS, ALASKA 99707
(907) 452-1696

130 SEWARD STREET, SUITE 314
JUNEAU, ALASKA 99801
(907) 586-2690

September 26, 1977

Honorable Mike Colletta
Alaska State Senator
1016 West Sixth Avenue
Suite C
Anchorage, Alaska 99501

Dear Mike:

I thought this would be of interest to you.

With best wishes,

Cordially,

BIRCH, HORTON, BITTNER & MONROE

Ronald G. Birch

RGB:lra
encl.: Honorable Guy Martin's Testimony before
the Subcommittee on General Oversight
and Alaska Lands
September 23, 1977

LAW OFFICES
BIRCH, HORTON, BITTNER AND MONROE
4400 JENIFER ST., N. W. - SUITE 300
WASHINGTON, D. C. 20015
(202) 244-4250
TELEX 9-89-2591

733 W. FOURTH AVE., SUITE 206
ANCHORAGE, ALASKA 99501
(907) 279-9403
TELEX 25-358

1200 AIRPORT HEIGHTS DRIVE
ANCHORAGE, ALASKA 99504
(907) 279-9501

751 OLD RICHARDSON HWY., SUITE 340
FAIRBANKS, ALASKA 99707
(907) 452-1888

130 SEWARD STREET, SUITE 314
JUNEAU, ALASKA 99801
(907) 586-2890

# MEMORANDUM

To: Ronald G. Birch

Date: September 23, 1977

## Honorable Guy Martin's Testimony before the Subcommittee on General Oversight and Alaska Lands

Secretary Martin was called before the Subcommittee to explain the delays in the implementation of ANCSA. The Subcommittee meeting focused on the reasons for the delay which include litigation by both the native corporations and Interior with respect to designation of easements. The Subcommittee is also considering including amendments to ANCSA in the d-2 bill to implement the conveyances. Interior opposes this because it prefers that these issues be resolved administratively. Despite the administration's protests, it was the clear sense of the committee that unless the conveyances are effected in a year, d-2 will be amended.

Under Martin's direction, the Bureau of Land Management has adopted a policy of aggressive administration which will give the native needs priority in making the land conveyances to the native corporations. Since July, the Bureau of Land Management has submitted 19 option papers to the Subcommittee, the Alaska Federation of Natives, the State Selection Commission and FSLUPC. These groups will respond

with comments and meet with the BLM in late September to discuss the issues presented in the option papers. Martin also plans meetings with the native groups to maximize direct input. By early November, a comprehensive proposal will be prepared which will represent the Administration's policy and the procedures to implement that policy. Certain regulations and guidelines may also be indicated, but that will depend on the nature of the proposal.

The General Administration Office conducted a study which attributed the delay in making the conveyances to the following reasons: the lack of clear and immediate policy-making procedures by the BLM officers; poor management of BLM; and excessive litigation. Due to inadequate channels to resolve the conveyance disputes the parties go to court once the point of impasse is reached.

The selection of easements has been one of the primary sources of litigation between the Department of Interior and the native corporations. ANCSA §17(d)(1) provides that the native and state lands are to be subject to recreational easements, transportation and utility corridors. However, the Act did not specify the procedures by which these easements were to be selected and as a result the conveyances have been delayed until the Department could decide where and how it would choose the easements. For example, a recent decision by Judge von der Heydt declared blanket coastal easements illegal under ANCSA, and the Department must review the question of linear easements and decide whether to appeal. This adds one more delay to the resolution of conflicting claims. The Department has filed a protective notice of appeal, and the Public Easement Defense Fund, a sportsmen's association, have appealed to the 9th Circuit. While the Department has been criticized for litigating each point, Martin pointed out that the easement question is not a simple one. The easement provision in ANCSA did not specify how the easements were to be defined, so the Department developed its own procedures which were challenged at each point. Underlying the easement question are two opposite points of view: One, sees the federal government as a master planner of land use in Alaska while the second believes the question of easements and waterway access rights should be left to the decision of the state. There are four legislative alternatives before the subcommittee:

1. Congress can amend ANCSA to change the public policy which favored the reservation of easements.

2. Congress can amend ANCSA to define what easements shall be reserved and how they will be defined.

3. Interior can convey the land subject to a future determination of the easement. This is a variation of the floating easement.

4. No easements or access rights of way will be reserved and the state can use its power of eminent domain if necessary to later obtain land.

Since recreational easements and access rights are to be determined on the basis of past use, the BLM has used questionnaires and meetings with the local people to determine the patterns of use. In addition, the staff accepts any recommendations from concerned parties. The definition of an established pattern of use takes into account how much an area is used, how many people use it, how long has it been used, etc. Leaders of the native corporation are also consulted. The recent litigation has centered on the scope and kind of easements which the BLM attempted to reserve. Intertribe disputes over access to waterways have also had to be resolved in the courts. A Board of Arbitration has been proposed by both the GAO study and Seiberling to settle these conflicts on a case-by-case basis and keep the issues out of court.

Another source of litigation has concerned resolution of homestead claims under the 1906 Native Allotment Act. Prior to passage of the ANCSA, the BLM had encouraged homestead filing which provided that each person could file 160 acres per person. From 1906 to 1971, only about 3,000 claims had been filed. When ANCSA repealed the Homestead Act, except for any pre-existing claims which meant any claims pending at the passage of the Act, there was a mad rush to file claims before its passage. At the time of the passage there had been 9,000 claims pending, of which 6,500 claims are still pending. The litigation has concerned the claims which were denied and the BLM has since implemented procedures to protect the due process rights of the claimants. The processing of the homestead claims is also delayed by the necessary field investigations.

The GAO report suggested two steps to decrease the amount of litigation by the BLM. The first was to provide formal procedures for the resolution of disputes within the Bureau of Land Management. Presently, disputes over easements policy or any other policy are settled informally or in court. The second solution would be to create an administrative tribunal to resolve disputes which arise in the administration of ANCSA. This is presently being studied by the Department. Martin did point out that an administrative board may not be the real answer because the native corporations may prefer having direct access to the courts instead of being submitted to another administrative board.

Another problem that the Bureau of Land Management faces is acquiring Alaskan land held or controlled by other federal agencies which they have not used for a long time. ANCSA provided that the other agencies should declare it surplus and then submit it to the Bureau of Land Management to be included in the pool of land for native-state site selection. However, other agencies generally have not been cooperative about giving up any of their land to another federal agency. The GAO study recommended the establishment of a commission to identify this land and compel the agencies to give it to the BLM. Seiberling suggested the OMB also but Secretary Martin disagreed on the grounds that the Department of Interior has sufficient administrative authority to obtain the surplus land.

Additional staff was also part of the GAO recommendations but Martin disagreed. Since the ANCSA conveyances involve so many complex issues, Martin believes that additional staff members could not develop the necessary expertise soon enough to be of any value. With respect to additional survey crews in the regional office, Martin agreed that they had a heavy workload. However, survey delays do not delay the conveyances because the Department makes an interim conveyance subject to the final survey. Since this is an established practice, loan companies are willing to make housing loans after the interim conveyance so individual natives are not delayed in building homes.

The GAO study also criticized the BLM's failure to monitor the distribution and use of federal funds to the native Alaskans. However, Interior takes the position that it has not been charged with the duty of overseeing the use of the federal funds, once they are distributed to the native corporations. The native corporations file financial statements with the Department of Interior and would probably resent a federal audit. Seiberling suggested a management consultation facility be established to aid the native corporations in the investment of their funds, but the BIA may be in a better position to offer this kind of assistance. Seiberling also raised a subsidiary issue with respect to the shareholder's rights in management of the native corporations. This is totally unrelated to the Interior's jurisdiction and it is doubtful that the native corporations fall within the scope of SEC regulation.

While the Department is attempting to limit future litigation, the d-2 proposal will lead to controversy where lands selected by native corporations have been incorporated into the d-2 proposal. So long as the bill is in mark-up it will not be possible to settle any native selections on land which is potentially subject to dual withdrawal.

The subcommittee's Alaskan trip raised two final problems. The first concerns the Congressional appropriation of $10 million in 1976 to the natives as prepayment of pipeline royalties. This amount was to be repaid from the actual royalties received but the natives would have had the money immediately. This appropriation was never made part of the Department of Interior budget and no payments were ever made. Since the natives are presently receiving royalties, the Department takes the position that it does not have to make the payments at this late date.

The second problem concerns the erosion problems in the Noatak Village which is built on the edge of the river. The river is shifting its course and the Army Corps of Engineers has refused to build a levy to stop the erosion because the village is too small for their jurisdiction. Meanwhile, HUD is building a water and sewer system which will be of little value if no village is left. To Seiberling, this was one more example of Interior's insensitivity to native problems.

Constance E. Brooks CB