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MEMORANDUM

TO: Glenda Miller, Realty Officer
Alaska Regional Office
Bureau of Indian Affairs

FROM: Roger L. Hudson, Attorney
Office of the Regional Solicitor
Alaska Region

SUBJECT: Permissible uses of dedicated streets in allotment subdivision

This is in response to Bristol Bay Native Association (BBNA) Realty Officer Patrick Chiklak's request for legal advice, concerning an issue which you have now also indicated an interest in having us address. BBNA asks whether the Bristol Bay Borough, a political subdivision of the State of Alaska, has a legal right to install sewer lines within the road bed of streets created by dedication as a result of the subdivision of an Alaska Native allotment. Analysis of this question has required us to consider several related issues, which we will also comment upon below.

Factual background

An Alaska Native allotment was granted to a Native individual, encompassing land in the vicinity of Naknek, Alaska, within the boundaries of the Bristol Bay Borough. That individual subsequently subdivided two portions of her allotment, by the creation of two successive subdivision plats. The first subdivision plat, creating 24 one-acre lots, was prepared in approximately 1980. The copy provided to us includes: (1) a signed surveyor's certificate; (2) a notarized certificate of ownership, signed by the allotment owner, and declaring that she "adopt[s] this plan of subdivision"; and (3) an approval by the Department of the Interior evidenced by the signature of the Area Director of the Juneau Area Office of the Bureau of Indian Affairs. The legend also contains plat approval signature box, to evidence approval and acceptance of the plat by the Borough Planning Commission. However, no signature evidencing such approval appears on the copy submitted for our review. It is reported that most, but not all, of the lots in the 1980 subdivision have been sold to private purchasers.

The second plat was certified by a professional land surveyor in 1986, and also bears the notarized signature of the allotment owner, above which she recites that she is the owner, and adopts the plat with full consent, and "dedicate[s] all streets, alleys, walks, parks, and other open spaces to the public or private use as noted." Unlike the earlier subdivision plat, this one, which creates 33 numbered lots of varying sizes and configurations, and two tracts, does bear a signature attesting to its approval by the Borough Platting Board. However, whereas the earlier plat bore a signed approval from a BIA official, the copy of this second subdivision plat which was provided to us was not signed by any approving BIA official. Fewer of these lots have reportedly been sold, with a majority either retained by the owner or gift-deeded to her children.

Both plats depict streets laid out to provide frontage to all the lots created. In addition, the earlier plat graphically depicted 10 foot utility easements on each subdivided lot, adjacent to its street frontage. Although not graphically depicted on the second plat, similar 10 foot wide utility easements are referred to in the notes to that plat as being created across all lots, parallel and adjacent to the dedicated road rights-of-way.

The original allotment owner/subdivider passed away some time ago, but Interior Department probate of her restricted estate has only recently been completed. Her remaining interest in the land in question passed to four sons and two daughters, with each inheriting an equal undivided one-sixth interest. One of these heirs has asked whether the Borough has the legal right to install sewer lines under the dedicated streets, which installation the Borough has evidently already undertaken and completed .

Requirements for a valid dedication

One of the first questions which must be asked is whether these subdivisions are in fact validly created. The federal statutes governing allotments make no specific provision for the subdivision of allotment parcels, although sales of interests in allotments are obviously authorized specifically by the Alaska Native Allotment Act, 43 U.S.C. 270-1 *et seq.* (1970), and generally by 25 C.F.R. Part 152. Assuming compliance with applicable rules, there would therefore be no reason to question the validity of any of the BIA-approved sales of individual lots which have actually occurred.

However, in addition to establishing the boundaries of lots for purposes of sales transactions, the subdivisions at issue had the additional function of transferring to the public certain interests in the streets, and perhaps in utility easements as well. The notes to both plats made explicit reference to "dedicated rights-of-way." Moreover, a state statute, A.S. 40.115.080 provides as follows:

Sec. 40.15.030. Dedication of streets, alleys and thoroughfares. When an area is subdivided and a plat of the subdivision is approved, filed, and recorded,

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all streets, alleys, thoroughfares, parks, and other public areas shown on the plat are considered to be dedicated to public use.¹

Thus, it appears that the owner's act of subdividing her land would be regarded under state law as having the effect of alienating an interest in the allotment parcel², consisting of rights-of-way for streets, and in these particular instances, *perhaps* for utilities as well. From a purely *state law* perspective, there is no apparent basis to doubt that at least the street dedications were valid as statutory dedications, since all the requirements set forth in AS 40.15.030 have been satisfied.³

Federal law issues

However, from a federal law perspective, additional requirements come into play because the land in question is an Alaska Native allotment subject to restrictions against alienation. The first major question is whether or not the subdivision is even legally valid. In my opinion it is.

Some might argue that allotments are Indian country, and that the entire state law scheme relating to subdivisions amounts to a species of land use regulation which the state has no jurisdiction to impose upon Native allotments. Indeed, this very argument has recently been presented on behalf of a village in Southwest Alaska which claims allotment land use regulatory jurisdiction on the part of its tribal government. This jurisdictional question is, of course, an unresolved issue legally. In Solicitor's Opinion M-36,975 (1993), on the subject of "Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers," it was concluded that "there is little or no basis for a Native village to claim territorial jurisdiction over an allotment." The U.S. Supreme Court in *Alaska v. Native Village of Venetie Tribal*

¹ This statute was amended after both these plats were prepared, to add the word "filed," and to change the former phrase "deemed to have been" to the present "considered to be." These changes do not affect our analysis.

² A question could be raised as to whether a dedication actually amounts to a transfer of title, or merely the grant of an easement. See generally 26 C.J.S. "Dedication," § 50. The Alaska Statute is silent on this point, but the general rule is that a dedication by map, such as we appear to have in this case, creates an easement, and that a deed is required to convey full title, *if* that intent is evident on the face of the deed. *Id.* This interpretation is at least unofficially subscribed to by the State Department of Transportation, and also most conclusively confirmed by the wording on the face of the plat, which speaks of "dedicated rights-of-way." The nature of the dedication depends on the intent of the dedicator, and here the 1980 certificate of ownership, and 1986 certificate of ownership and dedication, both executed by the land owner, recite "adopt[ion of] this plan," and dedication "as noted," respectively, thereby endorsing the characterization of the dedicated interests as easements.

³ By consulting with the BIA Title Plant, we were able to confirm that the 1980 plat was approved on behalf of the Borough, even though that signature line was blank on the copy which was initially provided to us. Once "approved, filed, and recorded," a plat evidencing a dedication has been accepted on behalf of the public. Cf. *State of Alaska v Fairbanks Lodge No 1392, Loyal Order of Moose*, 633 P.2d 1378 (Alaska 1981) (plat which is not approved and recorded does not establish valid dedication binding on the land owner).

Government, 522 U.S. 520, 140 L.Ed.2d 30, 118, S.Ct. 948 (1998), noted but did not answer this question, stating "Other Indian country [besides the Metlakatla Reservation] exists in Alaska post-ANCSA only if the land in question meets the requirements of a "dependent Indian community" under our interpretation of § [18 U.S.C.] 1151(b), or if it constitutes "allotments" under § 1151(c)." 140 L.Ed.2d at 138, n. 2. In any case, tribal jurisdiction would not oust federal jurisdiction to the extent of any substantive conflict between tribal and federal laws.

In the present situation, no reference has been made to any assertion of tribal authority, but instead, a question has impliedly been raised concerning applicability of state law. Our prior opinion of May 2, 1989, entitled "Juneau City and Borough Municipal Code Enforcement in Juneau Indian Village" therefore seems quite pertinent. A copy of that opinion, *sans* attachments, is enclosed. In it we noted that two older Ninth Circuit decisions⁴ appear to hold in very general terms that states do not have land use regulatory authority over allotments, but also observed that there is some substantial basis for questioning whether the circumstances with respect to Alaska Native allotments might lead to a different conclusion. As in the Juneau context, it does not appear that we are here dealing with either a situation where the state regulation could be said to be infringing on tribal self-government, or one in which the state rules would be pre-empted by applicable federal law.

In addition, even if an allotment owner might have the possibility of successfully arguing that the state would have no means of effectively enforcing its rules against him, it has generally been recognized that it is in the allotment owner's own commercial self-interest to voluntarily comply with the state laws relating to subdivisions, so that prospective purchasers will be encouraged and enabled to do business with him or her. A plat cannot be recorded unless it is approved by the platting authority, and it will not be approved unless it includes appropriate dedications. Moreover, lots in unrecorded subdivisions are much less marketable, since obtaining title insurance or financing would be much more difficult for possible buyers, and those individuals might also be uneasy about whether legal access to their parcels was assured.⁵ Because the recording of subdivisions plats, including dedications, has been rightly perceived as being in the economic best interest of allotment owners, the BIA's practice has been to approve such actions in spite of the existence of plausible theoretical grounds for contesting the state's jurisdiction.

⁴ *United States v. County of Humboldt*, 615 F.2d 1260 (9th Cir. 1980), and *Santa Rosa Band v. Kings County*, 532 F.2d 655 (9th Cir. 1975)

⁵ This concern is removed by the recording of a subdivision including dedications, since any who buy in reliance on such recorded plat are beneficiaries of such apparent dedications. 26 C.J.S., "Dedication," § 23.

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In fact, the plats at issue in this case were both approved by the BIA.⁶ What is not as clear as would be desirable, however, is what authority the Bureau was exercising in approving such plats, and the dedications they entailed. If title to the streets and/or corridors for utility installation were deeded to the State or the Borough, it is arguable that such conveyances without direct compensation could be approved under the authority of 25 C.F.R. § 152.25(d), which permits gifts or below-appraisal sales:

... when ... special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance.

However, as noted above, what appear to have been dedicated are rights-of-way rather than outright ownership. Because these dedications for streets or possibly for utility purposes appear to be rights-of-way, it is natural to look to the federal statutes and regulations governing such transfers of interest. Grants of rights-of-way across trust or restricted Indian lands are authorized in and governed by 25 U.S.C. §§ 323-24 and 25 C.F.R. Part 169. 25 C.F.R § 169.12 would appear to be the authority available to cover the situation of allotment owners facing the necessity of dedicating rights-of-way appropriate to a subdivision of their land:

§ 169.12 Consideration for right-of-way grants

Except when waived in writing by the landowners ... and approved by the Secretary, the consideration for any right-of-way granted or renewed under this part 169 shall be not less than but not limited to the fair market value of the right granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal.

This Office is unfamiliar with how closely past practice in BIA approval of allotment subdivision plats, with their accompanying (uncompensated?) dedications, may have conformed to the requirements of this regulation, but it is certainly strongly urged that the appraisal, consultation, and waiver process be followed in all cases, and explicitly documented⁷ whenever possible.

⁶ Although the copy of the 1986 plat furnished to us did not bear an approval signature from the BIA, we were able to confirm with the Title Plant that such approval had been given.

⁷ In other words, I would recommend not only that the required advice as to appraised value of interests to be dedicated be provided to the landowner, but also that such consultation be made the subject of a memorandum to the file, and that the language of the "Certificate of Ownership and Dedication," signed by the owner on the face of the plat itself, be re-worded to make specific reference to the dedication *and waiver of compensation* for the interests transferred thereby to the public.

Since the original landowner/subdivider is now deceased, she is not available to confirm her intention to dedicate to the public the road and utility easements noted on the subdivision plats. However, the objective manifestation of such an intent appears on the face of the plats, which both bear her signature. In this respect her signature indicating her adoption of the subdivision plats might reasonably be viewed as evidencing her consent to the grant of road and utility rights-of-way depicted on the plats, in conformity with the 25 U.S.C. § 324 requirement for owner consent to a grant of right-of-way by the Secretary of the Interior. However, it seems more doubtful that the affixing of a BIA official's signature "approving" such plats amounted to such a grant by the United States⁸.

I would therefore be inclined to recommend that the BIA act now to formally execute appropriate right-of-way instruments, even at this late date, to remove any question about the validity of the dedications. In my judgment, the authority for such grants continues in spite of the original allotment owner's death, for the reasons discussed in my prior memorandum of October 23, 1984⁹.

Before executing right-of-way grants, the BIA might wish to contact the heirs of the original owner, and provide them with an explanation as to the reasons behind such action. The benefits to the owners of acquiescing in the BIA's course of action would include the following:

- (1) Such belated grants could serve to remove any question about the Borough government's administrative jurisdiction over and responsibility for such rights-of-way, which would insure that the heirs are free of any maintenance responsibility or tort liability for the rights-of-way;
- (2) Such grants would protect the interests of persons who have already purchased lots, having done so in reliance on their apparent legal rights of access as established by the recorded plats. If the heirs at this time were to try to block public access, or private access by subdivision lot purchasers, such purchasers would in all likelihood pursue legal

⁸ An informal survey of Solicitor's Office attorneys from around the country turned up no one who had any experience with subdivisions of restricted property. However, the view was pretty widely held that an alienation of any interest in an allotment other than through the expressly permitted means of sale or grant of right-of-way would not be legally authorized or valid. It might also be argued that a distinction should be drawn between the granting of rights-of-way *by the Secretary*, where the United States holds the property in trust, or rights to be granted *by the owner* (with the Secretary's approval), where the land is held by the Native owner subject to statutory restrictions against alienation. However, as anomalous as it may seem, the Congress drew no such distinction in 25 U.S.C. 323, and instead authorized and empowered the Secretary to grant such rights even across lands, including Alaska Native allotments, to which the United States does not hold title.

⁹ A copy of this memorandum is attached. It concludes that under roughly analogous circumstances the BIA retains authority to "retroactively" approve deeds or leases of restricted Indian property after the death of the grantor or lessor, if the equities of the situation so dictate.

action to protect or establish their access rights. If the land was not part of an allotment, such lot purchasers would almost surely be able to make out a case of estoppel against the heirs, based on their predecessor's actions. See 26 C.J.S., "Dedication," §§ 12, 23. Even if the heirs might ultimately prevail by asserting various jurisdictional defenses¹⁰, they would face all the uncertainty, expense, and delay attendant upon litigation.

- (3) Even apart from these possible direct adverse effects of litigation, a good deal of personal animosity would very likely be generated by any action which could understandably be perceived as reliance on a technicality to renege on an openly made commitment of the original owner. In contrast, consenting to the grants of right-of-way could be viewed as carrying out in good faith the intentions of the original owner, and meeting the legitimate expectations of the people who bought lots in the subdivisions.
- (4) If the legal validity of the dedications is not confirmed, or is even called into open question by a legal dispute, it will no doubt effectively dry up any market for additional sales within the subdivisions.

Scope of the street dedications

I was recently contacted by both the Bristol Bay Native Association and the attorney for the Bristol Bay Borough, each reporting that at least one of the heirs is upset about the fact that the Borough has installed sewer lines within the dedicated road rights-of-way. He is raising a question as to whether such a use of the dedicated road rights-of-way is lawful, or constitutes a trespass against the property interests of the allotment heirs. On September 7, 2000, he sent an e-mail message to the Borough, insisting that the Borough cease using the sewer lines, and refrain from tying any new lines in to those already installed. Even more recently, the interested heir himself has contacted me directly to present his argument that the Borough's installation of sewer lines in the road rights-of-way constituted an unauthorized invasion of the heirs' property rights.

We therefore now return to this question initially posed by the BBNA; namely, did the dedication of street rights-of-way transfer to the public the right to install utilities within the boundaries of such rights-of-way? Of course, to the extent that there may be legal questions

¹⁰ It is unclear whether the courts would have jurisdiction to entertain a quiet title or declaratory judgment action which might be brought by either the Borough or the individual property owners. The state courts would lack jurisdiction because the case would involve questions of title or right to possession of restricted Indian property, which are reserved to the federal courts under 28 U.S.C. § 1360(b). See *Heffle v. State*, 633 P 2d 264, 267 (Alaska 1981), *cert. den.*, 455 U.S. 1000 (1982). And the federal courts might also lack jurisdiction under the terms of the Quiet Title Act, 28 U.S.C. § 2409a, which by its own terms is inapplicable to trust or restricted Indian lands. In practice here in Alaska, the only way the State has been able to establish jurisdiction over this sort of dispute is by filing a condemnation action in the federal court pursuant to 25 U.S.C. § 357, and then arguing that no compensation was owed because nothing new was taken in light of the State's prior title interest.

about the technical validity of the street dedications themselves, as discussed above, those questions would need to be resolved before the issue of the scope of permitted uses is even reached. However, at this juncture, the heir raising the scope question has not questioned the existence or validity of the road dedications themselves¹¹. So it is still presumably worthwhile to address the question as to the scope of the permissible uses of the road rights-of-way.

Although this issue might be analyzed as a matter of either state or federal law, our conclusions concerning the authority for creating the rights-of-way in the first place dictate that we approach the issue from the federal perspective¹². Because this office has previously been called upon to address the question as to whether the federal grant of a road right-of-way carries with it any implied permission to use such property for utility purposes, we will largely rely on such prior analysis, which is set forth in the enclosed memorandum of November 17, 1989. According to that analysis, a federal grant of a road right-of-way does *not* carry with it any right to install utility lines in the affected property.

We are therefore inclined to agree with the apparent position of the allotment heir, to the effect that the Borough's installation of utility lines--in this case, sewer pipes-- within the boundaries of the road rights-of-way dedicated on the subdivision plat, was done without valid legal authority. Even assuming that questions about the validity of the road dedications themselves are eliminated by a BIA grant confirming such interests, there does not appear to be any basis for interpreting such road easements as implicitly including any right to install utilities within their boundaries¹³.

¹¹ It is perhaps unduly optimistic to imagine that all the heirs of the allotment would willingly go along with the grant of confirming rights-of-way. The existing dispute concerning scope of the road dedications probably reflects an argumentative bent on the part of at least one heir, insofar as it is not easy to identify any immediate practical harm resulting from the location of the sewer lines which the heir finds objectionable. It is also speculated that the heir may be aware of the prior opinions of this office, concluding that road right-of-way grants made by the Secretary of the Interior under authority of 25 U.S.C. § 323 do *not* convey to the grantee the right to install utility lines.

¹² If the subdivisions in question were not created on restricted Indian land, such that state law controlled, it might be the case that installation of utilities within road rights-of-way would be permissible. Under AS 40.15.030, the approval, filing, and recording of the plats would effectively dedicate the streets to the public. Also, with respect to *State*--as contrasted with *local*--highways, placement of utilities in highway rights-of-way may be permitted under certain circumstances. AS 19.25.010. However, based on the case discussed in the next footnote, it is also plausible to imagine that the application of state law would lead to the conclusion that installation of utility facilities is not authorized. In any event, this memorandum does not attempt to fully analyze the question under state law, or under any law of the local borough which might exist or be relied upon, because of the conclusion that federal law controls as to any issue regarding the scope of the federal grant.

¹³ Even traditional approaches to interpreting the land owner's intent would suggest that the road rights-of-way did not include any implied rights to install utilities. Under the common law, the intent of the dedicator, as

Next steps

Assuming the correctness of the conclusion that the Borough did not have a legal right to install its sewer lines in the dedicated road rights-of-way, the question arises as to what the consequence of this state of affairs should be. In my view, the most reasonable and logical course of action would be for affected parties to negotiate for the prospective granting of a right-of-way for such sewer lines, as well as for other utilities that could foreseeably be required. In anticipation of such a negotiation, BBNA should obtain an appraisal of the interests to be granted to the Borough. In addition to compensation in exchange for the present transfer of utility easements, the owners would theoretically be entitled to compensation for the Borough's past unauthorized invasion of their property rights. However, it seems apparent that the monetary value of such rights, or the damage suffered by the original owner or her heirs, by virtue of the installation of the sewer lines, is quite minimal, if a value can even be placed upon it.

If the owners are unwilling to give their consent to the grant of appropriate rights-of-way without compensation, and they are unable to reach agreement with the Borough as to the proper amount of compensation to be paid, the matter will have to be presented to a court for resolution. This could come about in one of two ways. Either the Borough could file a condemnation action pursuant to 25 U.S.C. § 357, or the heirs (or the United States on their behalf) could bring a trespass action against the Borough. In either case, both the ownership of the utility rights-of-way, and the amount of compensation owing to the heirs of the original owner, are likely to be addressed. If the Borough is plaintiff/condemner, it can argue that the just compensation owing is nothing, because the Borough already has the necessary rights-of-way. The heirs will surely counterclaim for past trespass damages, as well as arguing for a generous determination of just compensation. If the Borough is the defendant in a trespass action, it would presumably respond by seeking to condemn the interests at issue, rather than face possible ejectment.

Although these potential legal actions form the backdrop for a possible negotiation, it is

objectively manifested, is controlling. In the case of the subdivision plats in question, any argument that the road rights-of-way were intended to include the right to install utilities is undercut by the observation that such plats separately identify the intended location of ten foot wide utility easements. The earlier plat depicts such easements graphically, and the later one makes explicit reference to them in a note. Ironically, even if the sewer lines had been installed in the ten foot strip adjacent to the road, identified on the plats as a utility easement, Alaska law would appear to require rejection of the Borough's claim that the installation was proper. The treatment of the designated utility easements in the plats at issue is almost identical to that analyzed in the case of *Chugach Electric Association v. Calais Company*, 410 P.2d 508 (Alaska 1966), in which it was held that such utility easements were not dedicated by the subdivider, and that the utility company had therefore committed a trespass by installing an electric transmission line within the utility easements identified on the plat. Like the plat at issue in the *Chugach* case, the 1986 plat in this case explicitly dedicates "all streets, alleys, walks, parks, and other open spaces," but does not purport to expressly dedicate the utility easements, even though a location for such easements is designated on the plat.

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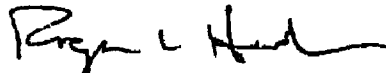
my firm conviction that the modest dollar amounts at stake would by no means justify litigation over this matter. If appraisals are obtained, and the heirs, after receiving appropriate counseling, insist upon demanding an unsupportable amount of compensation, the United States Attorney's Office might very well exercise its discretion not to represent them in litigation against the Borough. Of course, the heirs are free to obtain private representation at their own expense in any case, but in my experience many restricted property owners have an expectation that they will be afforded legal representation at government expense, so that they are subject to being influenced by the positions the United States is willing to advocate on their behalf.

Conclusions

This matter arose when an heir to a subdivided allotment parcel questioned the Borough's authority to install sewer lines in the dedicated road rights-of-way, without first obtaining a federal grant of easement for that purpose with the owners' consent. Based on our analysis, it appears that his point is well taken, although it does not appear that the monetary damages suffered by the heirs are very significant. It is therefore our recommendation that BBNA try to work cooperatively with the Borough and the heirs to put in place a new grant of easement for utilities, pursuant to 25 U.S.C. § 323, based on the heirs' consent and informed waiver of compensation, or on an agreement between the parties as to the amount to be paid by the Borough

As a separate matter, it is recommended that the BIA proceed to issue formal grants of rights-of-way corresponding to the roads already dedicated on the face of the subdivision plats. It is also urged that this approach be followed in the future with respect to any new subdivisions of allotment land presented for BIA "approval."

If you have any additional questions, please feel free to contact this Office.


Roger L. Hudson

attachments:

- Memorandum of May 2, 1989 (enforcement of land use regulations on restricted land)
- Memorandum of October 23, 1984 (retroactive approval of leases)
- Memorandum of November 17, 1989 (installation of utility lines in highway rights-of-way)