United States Department of the Interior
OFFICE OF THE SOLICITOR
ALASKA REGION

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IN REPLY REFER TO:

BIA.AK.322

November 17, 1989

MEMORANDUM

TO: Acting Area Director
Juneau Area Office
Bureau of Indian Affairs

FROM: Office of the Regional Solicitor
Alaska Region

SUBJECT: Request For Opinion as to Whether Utility Lines are Properly Installed Within Highway Right-of-Way

In connection with your request of December 15, 1988, for an opinion as to the proper procedures to be utilized by a public utility company seeking to install utility lines within a highway right-of-way previously granted to the State of Alaska, this office has been in contact with David H. Mersereau, attorney for Harvey Seversen, the allottee whose land was burdened with the utility lines, and Andrew E. Hoge, attorney for Copper Valley Electric Association, Inc., as well as Realty Officers for the Bureau of Indian Affairs. It appears that the facts of the matter are as follows:

On May 9, 1986, Harvey B. Seversen received a Certificate of Native Allotment, Certificate No. 50-86-0198, which allotment was subject to "an easement for highway purposes ... transferred to the State of Alaska pursuant to the quitclaim deed dated June 30, 1959, and executed by the Secretary of Commerce pursuant to the Alaska Omnibus Act, Pub. L. 86-70, 73 Stat. 141." At some point in time after the allotment was granted, Copper Valley Electric placed buried cables within the right-of-way, cutting down trees in the process. Neither BIA nor the allottee gave prior written approval for this action. Copper Valley Electric maintains that it was validly using the State highway easement.

QUESTIONS

1. Does a grant to the State of Alaska of a highway easement encompass use of the easement for utility

line purposes?

2. If the easement does not encompass the location or installation of utility lines, what procedure must be followed to obtain BIA permission for such use of the easement area?

3. If the highway easement does not encompass use for utility lines, what is the standard for computing allottee's damages for unauthorized use?

DISCUSSION

The easement under discussion is part of the Edgerton Highway. The Edgerton Highway approximately follows the old pack trail that connected Chitina and Copper Center. Pursuant to Section 2 of the Act of June 30, 1932, 47 Stat. 446, 48 U.S.C. § 321a (repealed 1959), the Secretary of the Interior in 1951 issued Secretarial Order 2665 which at Section 2(a)(2) fixed the width of the right-of-way for the Edgerton Cutoff as 100 feet on each side of the center line. Section 3(b) of the Order then went on to formally establish the "right of way or easement for highway purposes ... over and across the public lands" for the Edgerton Cutoff. This was the highway easement which was passed to the State of Alaska pursuant to the Omnibus Act by quitclaim from the Secretary of Commerce. This is also the highway easement to which the allotment of Harvey B. Seversen is subject. The State had notice of the granting of this allotment and the terms of the easement, i.e., "highway purposes."

The scope of a federal grant of a right-of-way is a question of federal law. United States v. Oregon, 295 U.S. 1, 27-28 (1935). Grants by the United States are strictly construed against the grantee and pass only that which is stated in clear and explicit language. Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 617 (1978); United States v. Union Pacific Railway, 353 U.S. 112, 116 (1957). In interpreting the extent of activities included within a highway grant by the United States any doubt as to the extent of the grant must be resolved in the government's favor. See Andrus v. Charlestone Stone Products Co., supra. Further, the intent at the time of the grant is controlling as to the extent of the grant. Leo Sheep Co. v. United States, 440 U.S. 668, 682 (1979). One must consider the condition of the country at the time of the grant. Leo Sheep Co. v. United States, supra; Humboldt County v. United States, 684 F.2d 1276, 1281 (9th Cir. 1982). Only pursuant to congressional action (federal statutes) can rights belonging to the United

States be acquired by the State. State law has no bearing except where it has been adopted or made applicable by Congress. Utah Power and Light Co. v. United States, 343 U.S. 389, 404-405 (1916); see United States v. Gates of the Mountains Lake Shore Homes, Inc., 732 F.2d 1411, 1414 (9th Cir. 1984).

It is well established under federal law that rights-of-way for roads and highways do not include utility lines. United States v. Gates of the Mountains Lake Shore Homes, supra; see Utah Power and Light Co. v. United States, 243 U.S. 389 (1966). Congress has adopted another statutory scheme for obtaining rights-of-ways for various public uses other than highways. See the Act of May 14, 1896, ch. 179, 29 Stat. 120 and the Act of February 15, 1901, ch. 372, 381 Stat. 790, codified at 16 U.S.C. § 522 (Agriculture) and 43 U.S.C. § 959 (Interior). The Act of March 14, 1911, ch. 238, 36 Stat. 1253, codified at 16 U.S.C. § 523 (Agriculture) and 43 U.S.C. § 961 (Interior), provides for grants for power transmission and distribution and communication purposes. This legislation and its history, relating to utility lines on federal lands, clearly manifest that Congress intended the Secretaries of the Interior and Agriculture to have the sole and exclusive authority for regulating utility lines on public lands, preempting conflicting state legislation. Hines v. Davidowitz, 312 U.S. 52 (1941); United States v. Stadium Apartments, Inc., 425 F.2d 358, 364 (9th Cir.), cert. denied 400 U.S. 926 (1970).

It is clear that under the federal scheme utility lines are not considered appurtenant structures to road and highway easements, but are in fact new uses being imposed upon the land. United States v. Gates of the Mountains Lake Shore Homes, supra. This is especially true when the lines and cables are lain underground instead of on the surface. The Alaska Attorney General Opinion of April 12, 1967, referred to by the attorney for Copper Valley Electric Association, is not persuasive because it is an interpretation of State law which cannot control on the issue of the scope of the federally granted highway easement. Since the right to lay utility lines within its highway right-of-way was not included in the United States grant to the State of Alaska, the utility company could not acquire such by a right by operation of state law, and must therefore apply pursuant to the applicable federal regulations for a right-of-way.

Since the land is subject to a Native allotment, any request for a utility right-of-way must be submitted to the Bureau of Indian Affairs under 25 CFR Part 169. This requirement is not necessarily in conflict with Title 17 of the Alaska Administra-

tive Code, ch. 15.021(h), which requires that the utility obtain written approval from the Bureau of Indian Affairs for use of a right-of-way which crosses restricted land since it is up to the Bureau to establish the procedure for applying for written approval, and this procedure has been set out in the appropriate regulations. Even if the utility may have received a permit for installing its cable from the State of Alaska pursuant to 17 AAC 15.011(a), that fact would not relieve it of the obligation to acquire a federal right-of-way as well. Indeed, 17 AAC 15.021(h) explicitly recognizes the requirement of federal "approval" as a matter of state law, thereby reinforcing the conclusion that the utility's actions exceeded any legal authority upon which it may mistakenly have relied. Accordingly, it must be concluded that the utility company has committed a trespass by its act of installing cable without first acquiring a valid right-of-way across the Seversen allotment pursuant to 25 U.S.C. § 323, and 25 CFR Part 169.

Given the current status of the matter, the most amicable means of meeting the needs of both the land owner and the utility would be through the latter's submission to the BIA of a right-of-way application pursuant to 25 U.S.C. § 323 and 25 CFR Part 169. However, the granting of such an interest should be conditioned on both the owner's consent, and the BIA's fulfillment of its fiduciary obligation to fully protect the allottee's interests. 25 U.S.C. § 324; 25 CFR §§ 169.3, 169.5, and 169.13. Since Copper Valley's past actions were in effect trespassory, the present grant of a right-of-way should be conditioned upon payment not only of the current fair market value of the desired right-of-way, but also trespass damages for past use of, and injury to, Mr. Seversen's allotment. Elements of such damage would ordinarily include compensation for deprivation of possession, as measured by the fair rental value of land occupied by the trespasser from the time of its unlawful entry until the date of grant of a right-of-way, plus treble damages pursuant to AS 09.45.730 for trees and shrubs removed. The treble damages remedy clearly seems appropriate under the holding in Matanuska Electric Association, Inc. v. Weissler, 723 P.2d 600 (Alaska 1986), and the payment of fair rental value for the period prior to the acquisition of a valid right-of-way was deemed an appropriate measure of compensation in State of Alaska v. 13.90 Acres, 625 F. Supp. 1315, 1321 (D. Alaska 1985); aff'd. sub nom. Etalook v. Exxon Pipeline Co., 831 F.2d 1440, 1444 (9th Cir. 1987). In setting the compensation for the easement to be conveyed, severance damages, if any, may also be considered.

Assuming that the parties are able to reach agreement on a figure calculated to fully and fairly compensate Mr. Seversen for

both the past invasion of his property rights and a present grant of a right-of-way to Copper Valley, the Area Director could then issue such a grant pursuant to 25 U.S.C. § 323. Of course, the allottee's consent is required under 25 U.S.C. 324, but he should recognize that the utility could in all likelihood acquire an easement over his objection by exercise of the power of eminent domain, and would very probably elect to do so. Cf. State of Alaska v. 13.90 Acres, supra. However, in the event that the utility were to file a condemnation action, Mr. Seversen and/or the BIA on his behalf would undoubtedly bring a counter claim for trespass damages, so that the same elements of compensation would be owed whether the matter were to be resolved by negotiation or by litigation.

In other cases where no entry of an allottee's property has yet occurred, the utility company can simply apply to the BIA Area Director for grant of such rights-of-way in accordance with procedures established in 25 CFR Part 169.

CONCLUSION

Therefore, it is concluded that in answer to question 1, a federal grant of a highway easement does not include an easement for underground utility lines; question 2, BIA can require the utility companies to apply for an easement through the established procedures in 25 CFR, Part 169; question 3, Mr. Seversen's consent to, and the BIA's grant of, an easement can properly be conditioned upon payment of compensation for the utility's past use of and injury to the allotment, as well as payment of the present value of the easement to be conveyed.

Regina L. Sleater

Roger L. Hudson

cc: Realty Office, JAO, BIA
" " Area Agency, BIA