Subject: **Re: Utilities in Highway Easements along Native Allottments**
Date: Fri, 05 Jan 2001 09:30:47 -0900
From: "John F. Bennett" <johnf_bennett@dot.state.ak.us>
Organization: Alaska DOT&PF
To: Kasandra Rice <kkim_rice@dot.state.ak.us>
CC: "Martellgreenblatt, Rose" <rose_martell-greenblatt@dot.state.ak.us>,
"Dickinson, Kathleen" <kathleen_dickinson@dot.state.ak.us>,
"Tilton, Karen" <karen_tilton@dot.state.ak.us>,
"Huber, John" <john_huber@dot.state.ak.us>

Kim, in my experience, the issue of platted roads on a native allotment referred by Steve Van Sant and the solicitor's opinion regarding utility rights on a PLO right of way are two different situations. With regard to the subdivision of Native Allotments, they have traditionally not been subject to state or local platting & zoning laws.

25 CFR 1.4 (BIA) "State and local regulation of the use of Indian property." says in Section A that "none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian
or Indian tribe, band, or community that is held in trust by the United States." I believe there have been a couple of Alaska Supreme Ct. cases where a local authority had attempted to foreclose on an allotment due to non-payment of property taxes and lost due to lack of jurisdiction. Therefore, for many years an allotted through BIA could subdivide their restricted property without any approval of a local platting authority. Of course most allotments were in the Unorganized Borough and not subject to platting laws until DNR received the authority for platting in the Unorganized Borough in August of 1998 (AS 40.15). I had heard at that time that there were discussions going on between BIA and DNR to allow subdivisions of allotments to come under DNR authority. Apparently BIA was concerned that without DNR approval, the subdivision could not be recorded, and without recordation, the land would suffer a loss in value as no knowledgeable purchaser would want to acquire such a piece of land. Van Sant's e-mail says that subdivisions that BIA have approved are now having their dedicated rights of way questioned. If this is true then this would be a concern to us although I don't know how many of these types of rights of way we have incorporated into our projects. Generally when we see a townsite plat or a subdivision of an allotment with BIA approval and dedication to the public of rights of way, we believe that they in fact exist.

Van Sant mentions a solicitor's opinion regarding a subdivision in the Bristol Bay Borough. That is what I expected to find in the attachment. However, the attachment had a 1989 solicitor's opinion regarding utility use of a PLO right of way on the Edgerton Highway. Different subject in my mind. Maybe the wrong opinion was attached by mistake.

The attached 1989 opinion is pretty much what we believe the case to be today regarding utilities and PLO rights of way. We had argued with BLM many years ago that a PLO easement for highway purposes gave us the right to unilaterally issue utility permits in those rights of way. BLM disagreed and insisted that the utility also had to obtain a utility permit from the appropriate federal agency who held the underlying fee estate. (BIA in the case of allotments). The argument became moot when the permit from the underlying federal agency became an FHWA requirement. 23 CFR 645.205 "(d) When utilities cross or otherwise occupy the right-of-way of a direct Federal or Federal-aid highway project on Federal lands, and when the right-of-way grant is for highway purposes only, the utility must

also obtain and comply with the terms of a right-of-way or other occupancy permit for the Federal agency having jurisdiction over the underlying land."

For all other lands under the jurisdiction of state law (including ANCSA lands) we argue that the 1983 Alaska Supreme Ct. decision "Fisher v. Golden Valley Electric Assn." gives us unilateral authority to issue utility permits within ROW easements for highway purposes. The argument was that utilities are incidental uses that can be authorized as long as they do not conflict with the primary use. The court suggested that the utility uses were just technological advancements of historical highway uses. For example, a communications line was just a technological advancement of the pony express rider. Therefore the comm line was an allowable use of a "highway" easement. Thanks for the info. JohnB

Kasandra Rice wrote:

> John,
>
> This question/comment came out of the blue from Dept. of Community & Economic Development. Since the referenced & attached 1989 Solicitor General Opinion is about Ederton Road, I thought you may have some insight into the issue and if the Department has dealt with this in the past. I see AG, John Baker has also been copied.
>
> Comments?
>
> kim

John F. Bennett <johnf_bennett@dot.state.ak.us>
Chief, Right of Way
Alaska Dept. of Transportation
Northern Region Right of Way

Subject: Utilities in Highway Easements along Native Allottments
Date: Thu, 04 Jan 2001 09:24:46 -0900
From: Kasandra Rice <kkim_rice@dot.state.ak.us>
Organization: State of Alaska, Department of Transportation
To: John Bennett <Johnf_Bennett@dot.state.ak.us>
CC: Frank Mielke <Frank_Mielke@dot.state.ak.us> ,
Jeffrey C Hill <jeff_hill@dot.state.ak.us> ,
William Strickler <bill_strickler@dot.state.ak.us> ,
"Jim_Sharp@dot.state.ak.us" <Jim_Sharp@dot.state.ak.us>

John,

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Comments?

kim

Subject: [Fwd: Mail System Error - Returned Mail]
Date: Wed, 03 Jan 2001 17:40:21 -0900
From: Keith Jost <keith_jost@dced.state.ak.us>
To: Kim Rice <kkim_rice@DOT.state.ak.us>

Subject: Mail System Error - Returned Mail
Date: Wed, 3 Jan 2001 12:09:17 -0900
From: Mail Administrator <postmaster@state.ak.us>
To: keith_jost@dced.state.ak.us

This Message was undeliverable due to the following reason:

Each of the following recipients was rejected by a remote mail server.
The reasons given by the server are included to help you determine why
each recipient was rejected.

Recipient: <kkimrice@DOT.state.ak.us>
Reason: Invalid recipient <kkimrice@DOT.state.ak.us>

Please reply to <postmaster@state.ak.us>
if you feel this message to be in error.

Reporting-MTA: dns; ancmail1.state.ak.us
Received-From-MTA:dns; dced.state.ak.us (146.63.144.8)
Arrival-Date: Wed, 3 Jan 2001 12:09:01 -0900

Subject: [Fwd: Platting Issue]
Date: Wed, 03 Jan 2001 12:12:21 -0900
From: Keith Jost <keith_jost@dced.state.ak.us>
To: Kim Rice <kkimrice@DOT.state.ak.us>
CC: Samuel J Bacino <sam_bacino@dot.state.ak.us>,
Steve Van Sant <steve_vansant@dced.state.ak.us>

Hi Kim,
We've been in touch with the Bristol Bay Borough on a problem that involves platted streets on Native allotments. I've attached an e-mail that I have sent to the DNR that explains the problem. I've also attached a PDF file in Adobe Acrobat that contains a copy of the solicitors opinion. This may be a problem for some of the State maintained roads (such as airport access roads) that are located on platted streets that are subdivisions of Native allotment land. The Borough's attorney intends to meet with the Solicitor this week in Anchorage. The Borough has invited State people to participate in the meeting. We thought that the DOT or the DOT's Attorney General should be apprised of the issue so that you could make a call on DOT involvement. We are not aware of any State involvement at this time and have not involved DCED's AG since this is more of a right of way issue than a DCED issue. Would you be able to pass this note on to the appropriate State people so that this opportunity is not lost? I am sure that the Borough would appreciate the State weighing in on this. Thanks for the help. OK to give me or Steve Van Sant a call if you have any questions.

Subject: Platting Issue
Date: Tue, 26 Dec 2000 18:19:30 -0900
From: Keith Jost <keith_jost@dced.state.ak.us>
To: Gerald D Jennings <gerald_jennings@dnr.state.ak.us>
CC: Steve Van Sant <steve_vansant@dced.state.ak.us>,
John T Baker <john_baker@law.state.ak.us>

Hi Gerald,
Steve Van Sant, the State Assessor recently passed on to me a copy of a solicitor's opinion regarding the use of platted roads on a subdivided Native allotment in the Bristol Bay Borough. The opinion concludes that although the BIA did approve the subdivision and the dedication of the roads and utility easements, a formal right of way under BIA regulation was not granted because BIA regulation was not adequately followed. The opinion recommends to the Bristol Bay Native Association (BIA reality contractor) that it work with the Borough and allotment heirs to create easements in the subdivision. The solicitor also recommends that "the BIA proceed to issue formal grants of rights of ways corresponding to the roads already dedicated on the face of subdivision plats". This potentially could involve many easements on subdivided Native allotment land through out the State. If new easements are needed, the process requires approval by the allotee or heirs and would include compensation unless waived. Understandably the Bristol Bay Borough is discouraged with having to acquire easements for a sewer and water project on a subdivision Borough staff thought had dedicated corridors for roads and utilities. They have asked our office if there is a State position on the issue (the solicitor admitted to having only looked at the Federal pespective). Since our office's lands work is limited to property assessments and ANCSA 14(c) we do not have a direct connection. We thought that perhaps the State's platting authority in the unorganized borough or other sections within the DNR or the DOT&PF would have role in articulating a State position on the issue. In addition to this memo I have routed to your office a copy of the solicitors

opinion and attachments. Would you be able to pass this information on to the appropriate Division or program that would likely have a direct role in these type of public easements? Please give me or Steve Van Sant a call if you have any questions. -Keith

BLM_11-17-89_ltr.pdf	**Name:** BLM_11-17-89_ltr.pdf **Type:** Acrobat (application/pdf) **Encoding:** base64 **Download Status:** Not downloaded with message

Subject: ROW Presentation
Date: Mon, 18 Dec 2000 10:49:35 -0900
From: Steven Roscovius <steven_roscovius@dot.state.ak.us> **Internal**
To: johnf_bennett@dot.state.ak.us
CC: Lon Krol <lon_krol@dot.state.ak.us>

The dates are pretty much up in the air now. It depends on how many presenters you think will be necessary.

The format I think we should go for is to begin with the presenter giving a short talk about what they do, when they begin working on the project (i.e.. after planning but before design), how it works into the end project and maybe anything they could help with during the actually construction. Then we can have a question and answer session.

The earlier presentations from other sections have been about an hour long. If everyone, if we go with different presenters, can explain their part and answer questions in a hour, we could combine everyone. Otherwise we should shoot for 2 different presentations.
I'm sure we could stretch the presentation to an hour and a half, but that's about it.

We would like each presentation to be done twice.

I checked the conference room's calendar and it's wide open for January.

How does January 17th and 18th, at 1:30 pm sound?

Thanks
Steve Roscovius
x4502

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

222 West 8th Avenue, #34
Anchorage, Alaska 99513-7584
(907)271-4131

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