Alyeska pipeline SERVICE COMPANY
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November 6, 2000

Alyeska Letter No. 00-16446

VIA FACSIMILE 451-5411, ORIGINAL TO FOLLOW

Mr. John Huber, Jr., P. E.
Regional Utilities Engineer, Northern Region
Alaska Dept of Transportation & Public Facilities
2301 Peger Road, MS 2553
Fairbanks, Alaska 99709-5399

Re: Costs to Relocate Utility Facility (TAPS Fuel Gas Line)
Dalton Highway MP 335-362 Reconstruction

Dear Mr. Huber:

This follows our letter dated October 19 and subsequent telephone conversation as well as the receipt of your email to John Rezek dated October 31, 2000 all on the subject matter. Enclosed is a copy of a white paper prepared for Alyeska by outside counsel. We hope that it is useful to you and your counsel. The complicated history of the matter merits careful consideration.

We note that Alyeska's particular concerns about safety and integrity impacts of the ADOTPF project have been addressed by email dated October 26, 2000 from Alyeska's Steve Sorensen to ADOTPF personnel including yourself.

Please call me at 787-8170 with any questions.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

Peter C. Nagel, SR/WA
Land and Right-of-Way

Enclosure

cc: John Bennett, NRO R/W Engineering Supervisor

November 6, 2000

Outline of Legal Issues:
Responsibility for Fuel Gas Line Relocation Costs

The following legal issues have been identified regarding the issue of whether the TAPS Owner Companies and their agent Alyeska Pipeline Service Company (collectively "Alyeska") may be held responsible for certain costs related to reconstruction of a portion of the Dalton Highway by the Alaska Department of Transportation & Public Facilities (DOTPF). Those costs may be incurred in the necessary accommodation of Alyeska's existing fuel gas line which serves Pump Stations 1 through 4. The fuel gas line was constructed and is operated by Alyeska pursuant to authority contained in the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. Section 1651, *et. seq.*, (November 16, 1973), and the federal Agreement and Grant of Right-of-Way for the Trans-Alaska Oil Pipeline dated January 23, 1974.

The legal issues which are outlined here do not foreclose the possibility that other legal issues relating to responsibility for the costs of fuel gas line accommodation may be identified subsequently, following more exhaustive research.

The relevant legal issues which have been identified to date include the following:

1. Alyeska's prior valid existing right. The United States issued its Agreement and Grant of Right-of-Way over federal lands to Alyeska on January 23, 1974. Stipulation 1.1.1.24 to the Agreement and Grant lists as one of the authorized "related facilities,"

> ... those structures, devices, improvements, and sites, the substantially continuous use of which is necessary for the operation or maintenance of the Oil transportation pipeline, including,
> ....
> (8) a gas fuel line and electrical power lines necessary to serve the Pipeline;
> ....

The federal grant of authority to Alyeska to construct the fuel gas line under the mandate of TAPAA and the Agreement and Grant of January 23, 1974 pre-dated the State's acquisition of the Dalton Highway right-of-way. The State of Alaska was issued its right-of-way for the Dalton Highway from the United States on May 2, 1974. Alyeska's right to construct TAPS and its "related facilities" is therefore a prior valid right, to which the State's Dalton Highway right-of-way is subject.

It has been generally held that a state is obligated to pay for or reimburse utility relocation expenses where the utility's facility was authorized or in place before the state's right-of-way first became applicable. State of Arizona v. Electrical District No. 2, 474 P.2d 833 (Ariz. 1970); Kentucky Utilities Co. v. Commonwealth of Kentucky, 665 S.W.2d 918 (Ky. 1984); Northwest Natural Gas Co. v. City of Portland, 690 P.2d 1099 (Ore. App. 1984).

On November 4, 1975 Alyeska was issued a Temporary Use Permit (TUP) No. F-21770 for construction of the fuel gas line. The purpose of the permit was stated as follows:

> PURPOSE: The lands shall be used for the construction and installation of a Gas Fuel Line which is a related facility to the Trans-Alaska Pipeline.

Three days later, on November 7, 1975, the Alaska Pipeline Office of the Department of the Interior issued Alyeska a Notice to Proceed (NTP) with the construction of the fuel gas line.

On March 19, 1981, the U. S. Bureau of Land Management initiated a separate right-of-way file for the fuel gas line, under file no. F-21770. This file encompassed that portion of the fuel gas line which was on federal land, but was not adjacent to the 48-inch crude oil pipeline. The cited statutory authority for the BLM's 1981 right-of-way permit was the same authority under which Alyeska had first received its federal grant to construct the TAPS line and all "related facilities," *i. e.*, the TAPAA of 1973. The 1981 BLM permit was also stated to have been issued in accordance with the January 23, 1974 Grant and Agreement between the United States and Alyeska's Owner Companies.

Further, Paragraph 1 of the 1981 BLM permit for the fuel gas line states that the line "... shall be deemed to be a related facility within the meaning of Stipulation 1.1.1.24 of Exhibit D to said [Grant and Agreement] ..." As stated earlier, Stipulation 1.1.1.24(8) specifically identifies the fuel gas line as a "related facility" to the TAPS Line as of January 23, 1974.

The final proviso in Paragraph 1 of the BLM's 1981 right-of-way file F-21770 states,

> ... *Provided Further*, that whenever the context of said Agreement [of January 23, 1974] so requires for purposes of applicability to the subject right-of-way for a Fuel Gas Pipeline reference to the "Right-of-Way" in the Agreement shall also be deemed to include the subject right-of-way for a Fuel Gas Pipeline.

Thus the terms of the 1975 TUP and NTP, and BLM's 1981 right-of-way permit are premised upon the specific federal authorizations granted to Alyeska for both the TAPS line and the fuel gas line on January 23, 1974. The 1981 BLM right-of-way file was apparently opened for administrative efficiency in managing the fuel gas line once the final as-built drawings were prepared, and was not a "new" authorization for the fuel gas line. Instead, it explicitly referenced the initial rights and authorizations which Alyeska had received in the Grant and Agreement from the United States in January of 1974.

Even if Alyeska's authority to construct and operate the fuel gas line were not a prior right to which the Dalton Highway right-of-way is subject, there have been several developments in Alaska statutes and in the case law since 1974 which clarify the State's liability for relocation and rehabilitation expenses related to the presence of the fuel gas line within the Dalton Highway right-of-way.

2. The State's 1975 utility permit. The State of Alaska issued utility permit 270000-75-131 to Alyeska on October 31, 1975 for a "buried gas line." This permit's terms did not deal with the issue of Alyeska's prior valid right to the gas line right-of-way under federal law. Alyeska cannot be deemed to have knowingly waived the legal protection such status affords it, merely by its officials' execution of this utility permit.

An unnumbered paragraph on page 2 of the State's utility permit 270000-75-131 to Alyeska states that the recipient of a utility permit is responsible for the costs of relocation of the utility if the Alaska DOTPF later decides to improve or alter its highway within the right-of-way. This provision was consistent with Alaska law at the time (AS 19.25.020(b)), which was enacted in 1961 and which imposed utility relocation costs on any utility constructed under a utility agreement with the State executed after July 1, 1960.

3. 1977 changes to state law. In 1977 the general state law which imposed on a utility the financial burden for relocation costs due to highway construction was substantially amended by Chapter 106, SLA 1977. That amendment states at AS 19.25.020(c) as follows:

> (c) The cost of change, relocation, or removal necessitated by highway construction is a cost of highway construction to be paid by the state in accordance with AS 19.05.130(4), notwithstanding the terms or provisions of any existing permit, agreement [,] regulation or statute to the contrary.

[Emphasis supplied]. Thus, to the extent that the State's 1975 utility permit to Alyeska could be interpreted to have imposed relocation costs on Alyeska for the State's highway project -- a position which is not conceded in any event, in view of Alyeska's January

1974 "valid existing right" from the United States – the State's 1975 utility permit must be deemed to have been amended to conform to the Legislature's 1977 statutory shifting of costs to the state, for relocation expenses necessitated by highway construction.

4. 1986 changes to state law. The Alaska Legislature in Chapter 142, SLA 1986 created several different categories under which utility relocation costs would be allocated, as between the State and the utility permittee. These amendments appear at AS 19.25.020(c). Two of these categories exempt Alyeska from utility relocation costs necessitated by Dalton Highway construction:

> (c) the cost of change, relocation, or removal necessitated by highway construction is a cost of highway construction to be paid in accordance with AS 19.45.001(4) as follows:
> ....
>
> (2) by the department as a cost of highway construction, if the facility was installed before June 11, 1986, under a utility permit issued on or after July 1, 1960, and is in the location specified in the permit;
> ....
>
> (4) by the department as a cost of highway construction, if the utility permit that requires the utility to pay the relocation cost was issued more than five years before the contract for highway construction project was first advertised;
> ....

5. 1994 amendment to Dalton Highway statute. The Alaska Legislature in Chapter 50, SLA 1994 added a new subsection (d) to the existing Section 40. 200 of the Dalton Highway chapter of Title 19 of the Alaska Statutes (AS 19.40.010-.290). AS 19.40.200 (d) states:

> (d) Notwithstanding another provision of law, when the department determines and orders that a utility facility located across, along, over, under, or within the [Dalton] highway right-of-way must be changed, relocated, or removed, the licensed public utility owning or maintaining the facility shall change, relocate, or remove it in accordance with the order and is responsible for the cost of the change, relocation, or removal.

This amendment by its terms identifies a single state highway as to which the utility relocation or rehabilitation costs incurred due to highway improvements must be paid by the utility owner, rather than by the State, regardless of circumstances or the factors enumerated in AS 19.25.020(c). The practical effect of this amendment, if it were to be applied retroactively, would be to single out Alyeska as virtually the only utility in the

State which would be newly burdened with liability for an already-installed and existing utility.

Pursuant to AS 1.10.070(a), (b), the effective date of the amendment to AS 19.40.200 was August 24, 1994, which was 90 days after the date it was signed by the Governor. The 1994 amendment was not specifically made retroactive by its terms, which is required if a statute is to be given retroactive effect. Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985); Alaska Dep't of Revenue v. Alaska Pulp America, Inc., 674 P.2d 268 (Alaska 1983). Thus subsection (d) of Chapter 50, SLA 1994 should be interpreted to apply to utilities which are issued permits and are constructed within the Dalton Highway right-of-way *after* the effective date of subsection (d). To apply it to a utility whose facilities are already in place would be to give the amendment retroactive effect. Such a retroactive application would deny a utility the ability to choose whether to install its facilities inside or outside of this particular highway right-of-way, based on the utility's prior knowledge of the statutory benefits and liabilities affecting such a decision.

The retroactive application of the 1994 amendment to AS 19.40.200 would deprive a utility with existing permits and in-place construction the valuable property rights which had previously been granted it by AS 19.25.020 in 1986. This would include AS 19.25.020(c)(2) and (c)(4), which specifically allocate to the State the costs of relocating a utility which was installed before June 11, 1986, and under a utility permit issued more than five years before the highway construction which necessitates the relocation. The retroactive application of AS 19.40.200(d) in a manner which would expropriate valuable benefits earlier granted under AS 19.25.020(c) with regard to existing permits and in-place utilities would raise the issue of an uncompensated taking under the Fifth Amendment to the U. S. Constitution and Article I, Sections 7 and 18 of the Alaska Constitution.

6. Constitutional implications of 1994 Dalton Highway amendment. The fact that the Alaska Legislature in 1994 singled out the Dalton Highway as the only highway in Alaska as to which the general cost-allocation formula of AS 19.25.020(c) would not apply has federal Equal Protection implications. In Virginia, a statute was enacted which authorized the reimbursement to utilities of their relocation costs necessitated by highway construction within cities and towns, but did not authorize such reimbursement within counties (*i. e.*, the areas lying outside cities and towns). Litigation was brought on several grounds, including federal Equal Protection arguments.

In Potomac Electric Power Co. v. Fugate, 275 F.Supp. 566 (D. Va. 1967), the federal district court determined that some of the issues in the case involved state law issues of first impression. It referred the case to the Virginia Supreme Court for a decision interpreting state law. The Virginia Supreme Court upheld the general effect of

the statute, but did not decide the federal Equal Protection claim. Potomac Electric Power Co. v. Fugate, 180 S.E.2d 657 (Va. 1971).

A three-judge panel of the U.S. District Court subsequently ruled on the federal Equal Protection claim, holding that statutory reimbursement distinction (between cities and towns on the one hand, and counties on the other), violated the utilities' federal Fourteenth Amendment guarantee of equal protection of the laws. Potomac Electric Power Co. v. Fugate, 341 F.Supp. 887 (D. Va. 1972). The District Court held that no rational geographic difference for the distinction had been shown which was sufficient to overcome the Fourteenth Amendment guarantee.

The Court of Appeals later vacated and remanded the District Court decision on other grounds, but the District court finding the unconstitutionality of the geographic distinction in the reimbursement statute was not disturbed. Potomac Electric Power Co. v. Fugate, 574 F.2d 1163 (4th Cir. 1978).

7. Conclusion. Analyzing the legal arguments outlined above either separately or collectively, Alyeska believes that any costs which may be incurred in relocating the fuel gas line or the highway to permit reconstruction of the Dalton Highway cannot lawfully be allocated to Alyeska.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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April 16, 2002

Mr. Peter C. Nagel, SR/WA
Land and Right-of-Way
Alyeska Pipeline Service Company
1835 South Bragaw Street
Anchorage, Alaska 99512

Re: Utility Reimbursement
Our File No. 665-01-0059

Dear Mr. Nagel,

I am an Assistant Attorney General assigned to the Department of Transportation. Mr. Huber asked me to respond to the white paper that you provided to him on November 6, 2000. Please be advised that my remarks are not in the nature of legal advice to you. I am the State's attorney and represent only the State of Alaska. Further, this not an Attorney General's opinion. It is a discussion of an issue that you have raised with the Department. I understand that there is no active conflict at the moment, but we would like to advise you of our position for future reference.

Your white paper raises three basic responses to DOT's position that utility relocation costs are not reimbursable along the Dalton Highway. First, it asserts that Alyeska has a title interest from the federal government that supercedes state authority. Secondly, it suggests that when AS 19.25.020 was amended to require reimbursement Alyeska gained a property right that could not be extinguished without due compensation. Thirdly, it argues that AS 19.40.200(d) is invalid because it treats the Dalton Highway (and Alyeska) differently from other rights-of-way.

In reviewing the situation that prompted the production of the white paper, I had to notice that both the grant of the right-of-way permit under the original statutory scheme and the construction which raised the relocation question, took place in a statutory climate in which the utility must bear the cost of relocation. The decision to place the pipeline was undeniably made when reimbursement was unavailable, and indeed the original construction was underway in 1976 prior to the first amendment of AS 19.40.200(d). The white paper's assertions suggest that reimbursement from public funds

is required when no such reimbursement was contemplated when all relevant decisions were made. The end result of the white paper's logic would be something akin to a windfall at the expense of the public after the legislature specifically determined that relocation reimbursement would not be available along the Dalton.

Superceding federal interests

The federal pipeline right-of-way grant to the seven sisters was made on January 23, 1974 and therefore did precede the federal road right-of-way grant to the State made on May 2, 1974. However, the pipeline grant was itself preceded by a federal/state cooperative agreement (January 8, 1974) which anticipated Alaska's right-of-way. In the pipeline grant, the seven sisters waived the right to challenge any future state lease or grant on the basis of the 1974 federal grant. Federal Pipeline right-of-way grant of January 23, 1974, 1(G). That provision reads:

> G. Permittees agree that they will not challenge the validity of the State's right-of-way lease or other grant on the basis of the existence of the Federal Right-of-Way and other authorizations or their interests therein.

Furthermore, when Alyeska accepted the terms of its 1975 permit for the specific gas line in question, it explicitly agreed to be bound by the provisions of AS 19.25.020 which at the time required the utility to bear its own cost.[1] Alyeska waived any right it may otherwise have had at that time for reimbursement when it's predecessors knowingly accepted the 1975 permit. The white paper's assumption that the waiver is ineffective is unsupported and perplexing in the context in which the waiver was made.

Differential treatment

In 1977 and in more detail in 1986, AS 19.25.020 was amended to require utility reimbursement under most circumstances. In relevant part it states that the Department is responsible for reimbursement "...if the utility permit that requires the utility to pay the relocation cost was issued more than 5 years before the contract for the highway construction project was first advertised." AS 19.25.020(c)(4).

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[1]/At common law utilities in a road right-of-way which are required to relocate must do so at their own expense. *E.g. Meadowbrook-Fairview Metropolitan District v. Jefferson County*, 910 P.2d 681 (Colo. 1996). The US Supreme Court has observed, "Under the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities. 12 E. McQuillin, The Law of Municipal Corporations § 34.74a (3d ed. 1970); 4A Nichols, The Law of Eminent Domain § 15.22 (J. Sackman rev. 3d ed. 1970)." *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co. of Virginia,* 464 U.S. 30, 35 (1983).
The 1975 version of AS 19.25.020 reflected the common law in this regard.

In 1994, the legislature adopted AS 19.40.200(d) which specifically disallows reimbursement for relocated utilities along the Dalton Highway. In relevant part it states, "...when the department determines and orders that a utility facility located ... within the [Dalton] highway right-of-way must be changed ..., the licensed utility ... is responsible for the cost of the change...." AS 19.40.200(d). It makes no reference to permits and contains no exceptions. By its terms, this provision supersedes conflicting provisions elsewhere in the statutes. The legislature has clearly decided to treat the Dalton Highway differently from the rest of the federally funded road system.

The white paper refers to a 1972 federal case from Virginia as authority that it is unconstitutional to refuse to provide reimbursement in rural areas when utility reimbursement is provided in urban areas.[2] This case, "*Potomac,*" arose in the context of state legislation enabling the Virginia portion of the interstate highway system to be built. The state legislation provided for reimbursement for utility relocation within city limits but not within counties. The Court's rejection is based on its finding that there was no *rational basis* upon which to distinguish between urban and rural areas under the particular circumstances in Virginia. The Court specifically noted that no evidence was presented to establish any difference in cost of relocation between the two areas, and noted that many of the "rural" counties were in fact remarkably urban.[3] Had Virginia provided evidence of a cost differential, it is likely that the Court would have allowed the distinction to stand. There is little controversy surrounding the fact that construction and maintenance costs on the Dalton are significantly higher than in more urbanized parts of the state.

Retroactivity

The white paper is correct that new legislation in Alaska will not be granted retroactive effect unless the legislation specifically states that it will be retroactive, or there is a necessary implication that the legislature intended a retroactive effect.[4]

AS 19.40.200(d) is triggered by a "determination" and "order" of the department that a utility facility must be altered. The plain language of the statute applies to orders to relocate from its enactment into the future. It concerns itself with orders to relocate, not with permits. Application of the statute's plain, facial meaning to utility facilities affected by a project initiated after the adoption of AS 19.40.200(d) is clearly not retrospective. Had the legislature intended to grandfather 1975 utilities along the Dalton into the reimbursement program, it could easily have adopted language that does so, rather than employing language that turns on a relocation decision of the Department.

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[2]/*Potomac Electric Power Co. v. Fugate*, 341 F. Supp. 887 (E.D. Virginia 1972).
[3]/*Potomac*, 341 F. Supp. at 890.
[4]/AS 01.10.090. *Thompson v. United Parcel Service*, 975 P.2d 684 (Ak. 1999).

In determining retroactivity, it is also appropriate to consider whether pre-enactment actions would have a different legal effect than post enactment conduct. *Eastwind, Inc. v. State*, 951 P.2d 844, 847 (Alaska 1997). As noted above however, the permit at issue when the white paper was drafted was returned to its original status by the enactment of AS 19.40.200(d).

The white paper asserts that AS 19.40.200(d) can only be applied to utilities *installed* after the effective date of that statute. It suggests that Alyeska gained a "valuable property right" in reimbursement when AS 19.25.020 was amended in 1986, and that the earlier amendment in 1977 also effectively amended its permit to allow for reimbursement. The question posed then is whether the existence of a period in which reimbursement was available preserves reimbursement.

Vested rights

A right, privilege or liability may not be extinguished without express language to that effect in the statute. AS 1.10.100(a). This applies only to "vested" rights.[5] In general, the legislature is free to repeal legislation which curtails benefits so long as it does not damage a "vested" property interest.

The Alaska Supreme Court has held that there is a vested property right in retirement benefits,[6] accrued child support payments,[7] and actually grandfathered legal land usage in a zoning scheme,[8] but not in the terms of continued public employment,[9] continued child support,[10] non-conforming land use,[11] a statutory defense to a crime,[12] or a particular utility service area.[13] The Illinois Supreme Court long ago observed:

> The concept has been referred to as something more that a mere expectation, based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to

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[5]/*Bidwell v. Scheele*, 355 P.2d 584 (Alaska 1960). A right can also become vested if it is a contractual right. In this case the legislative change allowing reimbursement will have to be interpreted as intentionally amending the permit to create a contractual right for reimbursement in the permit. This interpretation is strongly disfavored. ***

[6]/*Municipality of Anchorage v. Gallion*, 944 P.2d 436, 441(Alaska 1997); *State v. Allen*, 625 P.2d 844, 847 (Alaska 1981).

[7]/*State, Dept. of Revenue, Child Support Enforcement Div. ex rel. Inman v. Dean*, 902 P.2d 1321, 1323 (Alaska 1995).

[8]/*Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 262 (Alaska 2000).

[9]/*Alaska Public Employees Ass'n v. State, Dept. of Admin., Div. of Labor Relations*, 776 P.2d 1030, 1034 (Alaska 1989).

[10]/*Dowling v. Dowling*, 679 P.2d 480, 482 (Alaska 1984).

[11]/*Balough*, 995 P.2d at 262.

[12]/*Bidwell v. Scheele*, 355 P.2d 584 (Alaska 1960).

[13]/*Tlingit-Haida Regional Elec. Authority v. State*, 15 P.3d 754, 765 (Alaska 2001).

> the present or future enjoyment of the demand, or a legal exception from a demand made by another.[14]

The Federal Supreme Court has considered whether a benefit bestowed by legislation can be repealed at will. Through the Rail Passenger Service Act of 1970, Congress allowed the Interstate Commerce Commission to set the rates at which Amtrak would be reimbursed for passes on Amtrak trains for the employees and retirees[15] of the five private rail roads that declined to become part of Amtrak. In 1979, Congress decided that these rates were too low. Therefor it raised the rates legislatively, necessarily raising costs to the five private railroads. All five railroads sued claiming that this raised rate was a violation of a contractual and property right in the lower reimbursement scheme. The Supreme Court held that no such rights were created through the legislation. *National Railroad Passenger Corp. v. Atchison,* 470 U.S. 451 (1985). Justice Marshal noted:

> For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Board of Education*, 302 U.S. 74, 79, 58 S.Ct. 98, 100, 82 L.Ed. 57 (1937). *See also Rector of Christ Church v. County of Philadelphia*, 24 How. 300, 302, 16 L.Ed. 602 (1861) ("Such an interpretation is not to be favored"). This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104-105, 58 S.Ct. 443, 447-448, 82 L.Ed. 685 (1938).

National Railroad Passenger Assn., 470 U.S. 451, *465-466.

More recently the Rhode Island Supreme Court considered whether a state reimbursement plan could be repealed. The Court held it could be repealed, and observed:

> The mere fact that a state enacts laws that benefit the interests of some people does not automatically create contract rights to those benefits. *See National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432, 446 (1985). Rather, a statute will be treated as creating a binding contract with its beneficiaries only when the language and the circumstances of the

[14]/*Orlicki v. McCarthy*, 122 N.E.2d 513, 515 (Ill. 1954).
[15]/Many of these employees and retirees claimed to have vested rights in free or reduced fare rail travel.

> statute's enactment evince a clear legislative intent to create private and enforceable contract rights against the state. *E.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 n. 14, 97 S.Ct. 1505, 1515 n. 14, 52 L.Ed.2d 92, 106 n. 14 (1977); *Brennan*, 529 A.2d at 638. Moreover, there is a strong presumption against construing a statute to create such contractual obligations, and individuals alleging its creation bear the heavy burden of overcoming this presumption. *E.g., National Railroad Passenger Corp.*, 470 U.S. at 466, 105 S.Ct. at 1451-52, *1346
> 84 L.Ed.2d at 446; *Brennan*, 529 A.2d at 638.

Retired Adjunct Professors of the State of R.I. v. Almond, 690 A.2d 1342, at 1345 – 1346 (RI 1997). *See also, Coroso Excavating v. Poulin*, 747 A.2d 994 (RI 2000).

After reviewing the white paper and the cases I have described above, I have to think that utilities along the Dalton with facilities permitted prior to the general provision of reimbursement have enjoyed a benefit for the interim period until AS 19.40.200(d) curtailed that benefit. The situation Alyeska finds itself in is close to that addressed in *National Railroad Passenger Assn.* in which the plaintiff railroads found that they did not have a vested right in a particular rate cost which was mandated legislatively.

I hope that this general response is helpful to you and will aid Alyeska in its planning decisions. As there is no current controversy, we consider the matter concluded. The Department will certainly review each specific situation as it arises in the future and looks forward to continuing to work with Alyeska in resolving these matters in a positive and forthright manner.

Sincerely yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Leone Hatch
Leone Hatch
Assistant Attorney General

LH/vlg

cc John Huber
DOT&PF Utilities Supervisor

MEMORANDUM

State of Alaska
Department of Law

TO: John H. Huber, P.E.
DOT&PF

RECEIVED
APR 08 2002

DATE: April 3, 2002

FILE NO: 665-01-0059

TEL. NO.: 451-2811

FROM: Leone Hatch LH
Assistant Attorney General

SUBJECT: Alyeska's claim for reimbursement

CONFIDENTIAL
ATTORNEY-CLIENT PRIVILEGE

Alyeska has raised three basic responses to DOT's position that utility relocation costs are not reimbursable along the Dalton Highway. They assert that they have a title interest from the federal government that supercedes state authority, that when AS 19.25.020 was amended to require reimbursement Alyeska gained a property right that could not be extinguished without due compensation, and that AS 19.40.200(d) is invalid because it treats the Dalton Highway (and Alyeska) differently from other rights-of-way.

For the reasons discussed below, I believe that AS 19.40.200(d) is valid and controlling. Utility relocation along the Dalton is not reimbursable under the circumstances described.

Please keep in mind that you did not ask for, and this is not, an official Attorney General's Opinion. This advice is specific and applies only to the specific circumstances at issue.

Is there a superceding federal grant?

The federal pipeline right-of-way grant to the seven sisters was made on January 23, 1974 and therefore preceded the federal road right-of-way grant to the State made on May 2, 1974. All other things being equal, this precedence would likely make the road grant subject to the pipeline grant where they overlap.[1] However, the pipeline grant was itself preceded by a federal/state cooperative agreement (January 8, 1974) which anticipated Alaska's right-of-way, and in the pipeline grant, the seven sisters waived the

[1]/From the documents I have reviewed, it is not clear to me how much, if any, physical overlap there is.

right to challenge any future state lease or grant on the basis of the 1974 federal grant. Federal Pipeline right-of-way grant of January 23, 1974, 1(G). That provision reads:

> G. Permittees agree that they will not challenge the validity of the State's right-of-way lease or other grant on the basis of the existence of the Federal Right-of-Way and other authorizations or their interests therein.

Further, when Alyeska accepted the terms of its 1975 permit for the specific gas line in question, it explicitly agreed to be bound by the provisions of AS 19.25.020 which at the time required the utility to bear its own cost.[2] Alyeska waived any right it may otherwise have had at that time for reimbursement when it's predecessors knowingly accepted the 1975 permit.[3]

Therefor it is unlikely that Alyeska can use the prior federal pipeline grant to defeat the State's regulatory authority in the road right-of-way.

Can the Dalton Highway be treated differently from the rest of the highway system?

In 1977 and in more detail in 1986, AS 19.25.020 was amended to require utility reimbursement under most circumstances. In most relevant part it states that the Department is responsible for reimbursement "...if the utility permit that requires the utility to pay the relocation cost was issued more than 5 years before the contract for the highway construction project was first advertised." AS 19.25.020(c)(4).

In 1994, the legislature adopted AS 19.40.200(d) which specifically disallows reimbursement for relocated utilities along the Dalton Highway. In relevant part it states, "...when the department determines and orders that a utility facility located ... within the [Dalton] highway right-of-way must be changed ..., the licensed utility ... is responsible for the cost of the change...." AS 19.40.200(d). It makes no reference to permits and

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[2]/Contrary to Alyeska's assertion, in the absence of a statute or a permit provision to the contrary, at common law utilities in a road right-of-way which are required to relocate must do so at their own expense. *E.g. Meadowbrook-Fairview Metropolitan District v. Jefferson County*, 910 P.2d 681 (Colo. 1996). This is generally so because the use is secondary, permissive, and subject to the police power of the state. The US Supreme Court has observed, "Under the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities. 12 E. McQuillin, The Law of Municipal Corporations § 34.74a (3d ed. 1970); 4A Nichols, The Law of Eminent Domain § 15.22 (J. Sackman rev. 3d ed. 1970). This rule was recognized and approved by this Court as long ago *as New Orleans Gas Co. v. Drainage Comm.*, 197 U.S. 453, 462, 25 S.Ct. 471, 474, 49 L.Ed. 831 (1905) (holding that the injury sustained by the utility is damnum absque injuria)." *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co. of Virginia*, 464 U.S. 30, 35 (1983).
The 1975 version of AS 19.25.020 reflected the common law in this regard.

[3]/One caution, my copy of the permit is missing the attached map. I am assuming that the map itself does not make any exceptions along the road right-of-way in favor of the pipeline right-of-way.

contains no exceptions. By its terms, this provision supersedes conflicting provisions elsewhere in the statutes. The legislature has clearly decided to treat the Dalton Highway differently from the rest of the federally funded road system.

Alyeska's attorney refers to a 1972 federal case from Virginia as authority that it is unconstitutional to refuse to provide reimbursement in rural areas when utility reimbursement is provided in urban areas.[4] This case, called *"Potomac"* arose in the context of state legislation enabling the Virginia portion of the interstate highway system to be built. The state legislation provided for reimbursement for utility relocation within city limits but not within counties. The Court's rejection is based on its finding that there was no *rational basis* upon which to distinguish between urban and rural areas under the particular circumstances in Virginia. The Court specifically noted that no evidence was presented to establish any difference in cost of relocation between the two areas, and noted that many of the "rural" counties were in fact remarkably urban.[5] Had Virginia provided evidence of a cost differential, it is likely that the Court would have allowed the distinction to stand.

As long as Alaska can show a rational basis, such as increased cost, to disallow utility reimbursement along the Dalton Highway, AS 19.40.200(d) will most likely pass constitutional muster with respect to equal protection, unlike the situation brought to the Virginia Court. It makes no reference to permits and contains no exceptions.

Can reimbursement be rescinded once granted?

New legislation in Alaska will not be granted retroactive effect unless the legislation specifically states that it will be retroactive, or there is a necessary implication that the legislature intended a retroactive effect.[6] The general rule that changes in law should apply prospectively is based on the notion that it is unfair to change the rules to a citizen's detriment once they have been relied on in good faith. In the situation you have described, Alyeska is in the unusual position of being returned to the original playing field.

There are two approaches to this issue. Read literally, AS 19.40.200(d) is triggered by a "determination" and "order" of the department that a utility facility must be altered. Application of the statute's plain, facial meaning to utility facilities affected by a project initiated after the adoption of AS 19.40.200(d) is clearly not retrospective. Application to utilities affected by a project that included such a determination and order which began prior to the adoption of AS 19.40.200(d) would probably be retroactive and impermissible.

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[4]/*Potomac Electric Power Co. v. Fugate*, 341 F. Supp. 887 (E.D. Virginia 1972).
[5]/*Potomac*, 341 F. Supp. at 890.
[6]/AS 01.10.090. *Thompson v. United Parcel Service*, 975 P.2d 684 (Ak. 1999).

Alyeska, however, asserts that AS 19.40.200(d) can only be applied to utilities *installed* after the effective date of that statute. This reading looks beyond the plain language of the statute and into the affect of the legislation. Alyeska essentially argues that it has been given a right to reimbursement which cannot be rescinded.

Alyeska claims that it gained a "valuable property right" in reimbursement when AS 19.25.020 was amended in 1986, and that the earlier amendment in 1977 also effectively amended its permit to allow for reimbursement. The question that Alyeska poses is whether the existence of a period in which reimbursement was available preserves reimbursement despite subsequent legislative changes. This would be a more difficult question if Alyeska had relied in good faith on the availability of reimbursement when it decided to move into the right-of-way.

Both the grant of the right-of-way permit under the original statutory scheme and the current construction which has occasioned the relocation, took place in a statutory climate in which the utility must bear the cost of relocation. The decision to place the pipeline in the road right-of-way was undeniably made when reimbursement was unavailable, and indeed construction was underway in 1976 prior to the first amendment of AS 19.40.200(d).[7] Alyeska's position would allow the utility to avoid the application of the law in effect at the time the state permit was issued.

Does Alyeska have a vested right in reimbursement?

A right, privilege or liability may not be extinguished without express language to that effect in the statute. AS 1.10.100(a). This applies only to "vested" rights.[8] In general, the legislature is free to repeal legislation which curtails benefits so long as it does not damage a "vested" property interest. The question of whether or not a right has "vested" is complex.

In the State of Alaska the Supreme Court has held that there is indeed a vested property right in retirement benefits,[9] accrued child support payments,[10] and actually grandfathered land usage in a zoning scheme,[11] but not in the terms of continued public employment,[12] continued child support,[13] non-conforming land use,[14] a statutory defense

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[7]/Memo dated June 24, 1976 from W. Johansen of ADOT to F. Therrell of Alyeska re ongoing construction issues.
[8]/*Bidwell v. Scheele*, 355 P.2d 584 (Alaska 1960).
[9]/*Municipality of Anchorage v. Gallion*, 944 P.2d 436, 441(Alaska 1997); *State v. Allen*, 625 P.2d 844, 847 (Alaska 1981).
[10]/*State, Dept. of Revenue, Child Support Enforcement Div. ex rel. Inman v. Dean*, 902 P.2d 1321, 1323 (Alaska 1995).
[11]/*Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 262 (Alaska 2000).
[12]/*Alaska Public Employees Ass'n v. State, Dept. of Admin., Div. of Labor Relations*, 776 P.2d 1030, 1034 (Alaska 1989).

to a crime,[15] or a particular utility service area.[16] There are an astounding number of cases from other jurisdictions on the subject of repeal and vested rights, but none that I have found on this precise question. They are not entirely consistent. The Illinois Supreme Court long ago observed:

> The concept has been referred to as 'something more that a mere expectation, based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exception from a demand made by another.[17]

A right can also become vested if it is a contractual right. In this case the legislative change allowing reimbursement would have to be interpreted as intentionally amending the permit to create a contractual right for reimbursement in the permit. This interpretation is strongly disfavored and not really very likely to succeed.

The Federal Supreme Court has considered whether a benefit bestowed by legislation can be repealed at will. Through the Rail Passenger Service Act of 1970, Congress allowed the Interstate Commerce Commission to set the rates at which Amtrak would be reimbursed for employee passes on Amtrak trains for the employees and retirees[18] of the five private rail roads that declined to become part of Amtrak. In 1979, Congress decided that these rates were too low. Therefor it raised the rates legislatively. All five railroads sued claiming that this raised rate was a violation of a contractual and property right in the lower reimbursement scheme. The Supreme Court held that no such rights were created through the legislation. *National Railroad Passenger Corp. v. Atchison*, 470 U.S. 451 (1985). Justice Marshal noted:

> For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Board of Education*, 302 U.S. 74, 79, 58 S.Ct. 98, 100, 82 L.Ed. 57 (1937). *See also Rector of Christ Church v. County of Philadelphia*, 24 How. 300, 302, 16 L.Ed. 602 (1861) ("Such an interpretation is not to be favored"). This well-established presumption is grounded in the elementary proposition that the principal function of a

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[13]/*Dowling v. Dowling*, 679 P.2d 480, 482 (Alaska 1984).
[14]/*Balough*, 995 P.2d at 262.
[15]/*Bidwell v. Scheele*, 355 P.2d 584 (Alaska 1960).
[16]/*Tlingit-Haida Regional Elec. Authority v. State*, 15 P.3d 754, 765 (Alaska 2001).
[17]/*Orlicki v. McCarthy*, 122 N.E.2d 513, 515 (Ill. 1954).
[18]/Many of these employees and retirees claimed to have vested rights in free or reduced fare rail travel.

> legislature is not to make contracts, but to make laws that establish the policy of the state. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104-105, 58 S.Ct. 443, 447-448, 82 L.Ed. 685 (1938).

National Railroad Passenger Assn., 470 U.S. 451, *465-466.

More recently the Rhode Island Supreme Court considered whether a state reimbursement plan could be repealed. The Court held it could be repealed, and observed:

> The mere fact that a state enacts laws that benefit the interests of some people does not automatically create contract rights to those benefits. *See National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432, 446 (1985). Rather, a statute will be treated as creating a binding contract with its beneficiaries only when the language and the circumstances of the statute's enactment evince a clear legislative intent to create private and enforceable contract rights against the state. *E.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 n. 14, 97 S.Ct. 1505, 1515 n. 14, 52 L.Ed.2d 92, 106 n. 14 (1977); *Brennan*, 529 A.2d at 638. Moreover, there is a strong presumption against construing a statute to create such contractual obligations, and individuals alleging its creation bear the heavy burden of overcoming this presumption. *E.g., National Railroad Passenger Corp.*, 470 U.S. at 466, 105 S.Ct. at 1451-52, *1346
> 84 L.Ed.2d at 446; *Brennan*, 529 A.2d at 638.

Retired Adjunct Professors of the State of R.I. v. Almond, 690 A.2d 1342, at 1345 – 1346 (RI 1997). *See also*, *Coroso Excavating v. Poulin*, 747 A.2d 994 (RI 2000).

Because the original permit was granted specifically without a right for reimbursement, consistent with common law, I believe that a court is more likely to interpret this particular situation as a loss of a benefit than as a loss of a vested right. Alyeska was not enticed into placing its fuel pipeline in the road right-of-way by promises of reimbursement (like public employees lured into government employment with the promise of tier I benefits). Nor did it have a pre-existing right to reimbursement like a grandfathered use when a zoning scheme is imposed. It is more like an at-will employee who has hope, even the expectation of continued employment on the accustomed terms, which can be cruelly but lawfully disappointed.

Federal participation.

Federal reimbursement is a further complication. The federal statute reads, "Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State." 23 USC § 123(a). In this case there is both a permit and a state law which appear on their faces to deny reimbursement. If a Court tells us that the permit was amended by the statute and AS 19.40.200(d) only applies to permits issued after 1995, then federal reimbursement should be clearly available. Absent such a judicial ruling, I advise caution on the point as the usual federal reimbursement may be unavailable.

Conclusion

If DOT can demonstrate a rational basis for treating the Dalton differently from other federal aid highways in the state, the legislature may treat the Dalton differently with respect to reimbursement. As the Dalton is notoriously costly to maintain and is subject to relatively little public use, it is likely that an Alaskan Court would uphold the distinction.

Alyeska's burden of proof is a heavy one if it seeks to prove that the legislature amended the 1975 permit. While there is a little more uncertainty on the point, it is likely that the Court would hold that the permit was not amended and Alyeska is subject to a non-reimbursement clause. As its original decision to proceed with the installation in the right-of-way was made under the assumption that it would be liable for relocation, Alyeska cannot claim that it detrimentally relied on a State promise, but is rather in the more uncomfortable position of complaining that it has lost a windfall.

We undeniably have a statute that declines utility reimbursement along the Dalton. The plain interpretation is that the statute applies to orders to relocate from its enactment into the future. It concerns itself with orders to relocate, not with permits. However caution should be exercised with respect to permits that were issued during the period of time that reimbursement was available, and which contain provisions allowing reimbursement.