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MEMORANDUM State of Alaska

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TO Lynn Harnish, Civil Engineer
DOT/PF
State Pipeline Coordinator's Off.
1001 Noble, Suite 450
Fairbanks, AK 99701

DATE January 9, 1981

FILE NO F-66-077-81

TELEPHONE NO.

FILE COPY

FROM Mary E. Greene MEG
Assistant Attorney General
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Fairbanks, AK 99701

SUBJECT State Authority to Permit Northwest Activities on the Haul Road Right-of-Way

You have asked me to examine the "Grant of Right-of-Way for Public Road" by which the United States granted a right-of-way to the State of Alaska for the Haul Road. Specifically you were concerned about the extent of State authority in the permitting of activities for the construction of the gas pipeline. You have informed me that the State filed a map with the Secretary of the Interior as required by Section 3 of the Grant. The issue as to who has the permitting authority, the federal government or the State, for activities in the right-of-way (ROW) is a very close question. Depending on the analytical approach used and other factors discussed below, the courts could reach either result. In essence, I would advise the State to examine how important the issue is. If it is very important, the position that the State has permitting authority can certainly be argued and substantiated. However, there is no certainty that we are right. In any event, it should be noted that the State definitely should have a strong voice in the permitting process inasmuch as our ROW is superior in time and right to Northwest's and thus the United States cannot permit any activity which would interfere with our ROW for the purpose of "operation and maintenance...of a public road and related public facilities."

The initial question in determining whether the State has the authority to issue permits for Northwest's construction activities in the Haul Road ROW is whether federal law or state law applies. If State law applies, A.S. 19.25.010 would control. A.S. 19.25.010 provides:

> A utility facility may be constructed, placed, or maintained across, along, over, under or within a state right-of-way only in accordance with regulations prescribed

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> by the department and if authorized by a written permit issued by the department.[1]

Under A.S. 19.25.010, is is clear that Northwest would have to obtain a DOT/PF permit to conduct activities and construct its pipeline in the ROW. However, the answer if federal law applies is probably otherwise. For example, in Energy Transportation Systems, Inc. v. Union Pacific Railroad Co., 606 F.2d 934 (10th Cir. 1979), the court held that ETSI was entitled to construct its coal slurry pipeline under and across the right-of-way granted by the United States to Union Pacific's predecessor in interest despite Union Pacific's objections. The court reasoned that Union Pacific had no rights to the subsurface and had no right to complain about the subsurface owner's grant of ROW to ETSI.

There is support for the position that State law would apply in this question. In Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 39 L.Ed.2d 73 (1974), the United States Supreme Court stated that although the courts will construe a federal grant of property without regard to state law on the subject, the "incidents or rights" which attach to the conveyance will be construed in accordance with state law. 39 L.Ed.2d at 84, quoting Parker v. Bird, 137 U.S. 661, 669, 34 L.Ed. 819 (1891). It can be argued that one of the incidents which attaches to the Haul Road ROW Grant is the authority to permit utility facility use in the ROW. See also United States v. Oregon, 295 U.S. 1, 28, 79 L.Ed. 1267, 1281 (1934).

There are two cases which are very nearly on point. In United States v. Mountain States Telephone and Telegraph Co., 434 F.Supp. 625 (D. Mont. 1977), the State of Montana had permitted a telephone company to bury a cable line in the highway right-of-way which crossed an Indian

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1. This language resulted from a 1977 amendment. At the time of the Grant, A.S. 19.25.010 provided:

> An electric transmission, telephone, or telegraph line, pole line, railway, ditch, sewer, water, heat, or gas main, flume, or other structure which by law may be constructed, placed, or maintained across or along a highway by a person or political subdivision may be maintained or constructed only in accordance with regulations prescribed by the department. No utility project of this nature may be undertaken until it is authorized by a written permit issued by the department.

reservation without the approval of the Secretary of the Interior or the Indian Tribes. The court upheld Montana's authority to do so. Montana had a statute similar to A.S. 19.25.010 which, under state law, authorized the permitting of the laying of the buried cable. However, the reason the court applied state law was that Congress, in 25 U.S.C. § 311, had adopted state law as the measure of the federal grant. In the congressional authorization statute, the Secretary of the Interior was authorized to grant permission "to proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian Reservation...." The court stated:

> Congress, however, has plenary power over Indian lands and could grant to the states the right to build roads across Reservation lands and delineate the usage of such roads. The terms of the grant could be fixed in the congressional act or could be fixed by reference to state law. State law would then control, not because of the power of the state, but because of the congressional adoption of state law as the measure of the federal grant.

434 F.Supp. at 627 (footnote omitted).

United States v. Oklahoma Gas and Electric Co., 318 U.S. 206, 87 L.Ed. 716 (1942), is a case very similar to Mountain States. There, the State of Oklahoma had established a highway across allotted Indian lands pursuant to 25 U.S.C. § 311. Later, in accordance with state law, Oklahoma had allowed the building and maintenance of rural electric service lines within the highway right-of-way. The United States Supreme Court held that state law applied and, therefore, that the electric line was properly placed within the right-of-way. The Court stated:

> It is well settled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication, according to the law of the State where the land lies.

218 U.S. at 209-10, 87 L.Ed. at 720 (footnote omitted). The

court noted that there was no reason to withhold this incidental use of the highway right-of-way from the state's control.

Oklahoma Gas and Mountain States provide some support for the proposition that permitting utility use of the highway right-of-way is an incidental use which should be interpreted according to State law under Oneida. The problem with using these cases in that manner is the fact that the phrase "in accordance with the laws of the State" was interpreted as a specific intention that state law be applied.

In our situation, there is no express intention that state law apply. The Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-55, is silent regarding what law should apply. 43 U.S.C. § 1655 provides:

> A right-of-way, permit, lease, or other authorization granted under section 1652(b) of this title for a road or airstrip as a related facility of the trans-Alaska pipeline may provide for the construction of a public road or airstrip.

Since the authorization is silent as to this point, we must look to the language of the Grant. The Grant states:

> This grant is made subject to: valid existing rights; applicable laws and regulations of the United States, now or hereafter in effect; and the following provisions:
>
> 1. The right-of-way shall be used for only the construction, operation and maintenance by the State of a public road and related public facilities. [Emphasis added.]

A court interpreting the phrase "applicable laws and regulations of the United States" might very well determine that this is an intention that federal law apply to the incidents of the grant. Further support for the position that A.S. 19.25.010 does not apply can be found in the use of the word "only." At the time this Grant was executed, a gas pipeline was being considered. In September of 1974, some four months after the Grant was executed, El Paso filed its application with the FPC to transport Prudhoe Bay gas by a pipeline adjacent to TAPS. Given that history, it is entirely possible that the United States was expressly

limiting the authority of the State to allow use of the Haul Road ROW for traditional incidental uses. The general rule is that a grantee of an easement is entitled to do all that is necessary for a full and proper enjoyment of the rights granted, however the extent of the servitude may be fixed by terms of the grant. See, e.g., Pembroke v. Gulf Oil Corp., 454 F.2d 606, 610 (5th Cir. 1971); United States v. Parkway Towers, Inc., 282 F.Supp. 341, 343 (E.D.Va. 1968), aff'd 405 F.2d 500 (5th Cir. 1969).

Even if the State of Alaska does not have absolute authority to permit Northwest's activities in the Haul Road ROW, it certainly has an interest in and legal rights with respect to those activities. The grantee of a ROW (here the State) as owner of the dominant estate holds incorporeal rights although not the land itself. The servient holder (here the United States) has no right to use the land subject to the easement in such a manner as to interfere with the reasonable and prudent exercise and enjoyment of the easement by its owners. Tenneco, Inc. v. May, 377 F.Supp. 941, 943 (E.D. Ky. 1974), aff'd 512 F.2d 1380 (6th Cir. 1975). There are certainly situations in which Northwest's activities would constitute an unreasonable interference with the State's ROW. The most obvious concerns the issue of a thermal workpad where the pipeline is adjacent to the Haul Road. Northwest, as holder of a secondary right-of-way, cannot cause degradation of the Haul Road or interfere with the "operation and maintenance by the State of a public road." In those areas, the State's rights take precedence. Thus, at a minimum, the federal government should obtain the concurrence of the State in matters that affect the integrity of the Haul Road or activities that might interfere with the "operation and maintenance" of the Haul Road.

In summary, it is a close question whether the State has the authority to permit activities in the Haul Road ROW pursuant to A.S. 19.25.010. Should the State decide to attempt to exercise those rights, it is a defensible position. However, in an ultimate legal fight, the resolution of the problem could go either way. My guess, and it is only a guess, is that we would lose. However, it is well established that the United States cannot permit activities which unreasonably interfere with the "operation and maintenance" of the Haul Road or which will result in a degradation of the Haul Road.

If you have any questions or want to discuss this matter in detail, please contact me.

WLC:MEG:bsb

cc: Charles Behlke
State Pipeline Coordinator

Al Ott
Deputy State Pipeline Coordinator