John F. Bennett

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Sent: Thursday, May 06, 2004 11:23 AM
Attach: Bennett, John F..vcf
Subject: Van Horn '47 Act parcel

Jim, I've reviewed the Ancely parcels (E-1168A dated April 26, 1961 and E-1178 dated March 7, 1961) and I'm not sure that we are ready to throw in the towel yet. The case we rely upon for the "one take only" rule on '47 Act Utilizations is the Hillstrand v. State of Alaska which was a federal district court case decided on February 19, 1960. The court stated "While I agree that the original reservation and election provided for in 48 USCA 321d is without limitation as to initial choice on the part of either the Federal Government or the State of Alaska, I find that, once the right-of-way has been selected and defined, later improvements, necessitating the utilization of land upon which the road is not already located, can only be accomplished pursuant to the condemnation and compensation....." I then reviewed an old document titled "A Summary of '47 Act Opinions" by the Dept of Law dated April 1965. Under the heading "First Take", the author states that "An exception to this rule may be made in the event a change in the right-of-way is necessitated soon after notice of utilization is served in which case an amendment of the original notice may be possible." (3 April 1962).. The date refers to a memorandum of advice or opinion issued by the AGO regarding this issue. I went to the AGO database and could not find an opinion of that date although there were a couple of '47 Act opinions noted in close proximity on either side of that date.

Rather than issue an amended Notice of Utilization for the Ancely property by amending parcel E-1178, they issued another notice of utilization under parcel E-1168A. The question is whether E-1168A constitutes a second taking or an amended taking. I have requested copies of some of the old AGO opinions regarding '47 Act issues in hope that I get the one dated April 3, 1962. The fact that we don't have an "amended" notice should not be critical as I have never seen any legal requirements for the form of a "notice of utilization". The utilization of the Ancely property was for the same project and the notices were within 2 weeks of each other. If one notice was issued for one construction project and a second for another separate project at a later date, I would agree that the second notice would be a prohibited second taking. Right now I am of the opinion that E-1168A is an amendment of the initial notice for the same project and may not constitute a second taking. I'll update you once I see if there is anything in the old AG opinions that either supports or rejects this conclusion. JohnB