MEMORANDUM

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State of Alaska
Department of Law

TO: John F. Bennett, Chief
Northern Region Right-of-Way

DATE: October 23, 2002

FILE NO: 665-01-0201

TEL. NO.: 451-2811

FROM: Paul R. Lyle
Assistant Attorney General

SUBJECT: Clarification of July 17, 2002 memorandum of advice.

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

This memorandum answers your questions regarding the Klutina Lake trail memorandum dated July 17, 2002.

1. Is there still an issue as to whether an R.S. 2477 crossing private land in Alaska would be heard by a federal or state court?

Yes, there is still an issue. However, the outcome will depend upon the sophistication of Ahtna's attorneys, how the plaintiff formulates its cause of action and the relief Ahtna seeks in federal court. Therefore, we cannot give you a precise opinion as to whether the federal court would have jurisdiction, but we can explain the parameters.

a. Formulating the cause of action

Federal courts are courts of limited jurisdiction. The plaintiff in any federal action must plead and prove federal jurisdiction over a cause of action before the district court will hear the substance of the dispute. Federal courts have jurisdiction in cases concerning a "federal question." 28 U.S.C. §1331. Federal question jurisdiction is the only jurisdictional base that Ahtna could rely upon. If Ahtna is careful about how it formulates its suit, it may succeed in establishing federal question jurisdiction. In my opinion, Ahtna would have to base its cause of action on both R.S. 2477 and ANCSA § 17(b).

The reason why we believe Ahtna would probably have to assert causes of action under both R.S. 2477 and ANCSA is that the federal cases concerning R.S. 2477 seem to concern causes of action against BLM for R.S. 2477-related agency decisions or R.S.

2477's that cross federal lands. Where federal land or federal agency action is not involved, the federal courts do not appear to get involved. For example, in *Standage Ventures*, one of the ninth circuit cases cited in our July 17, 2002 memorandum, the court held that there was no federal question jurisdiction where the issue was whether an R.S. 2477 highway had been established over a Small Tracts Act parcel before patent was issued. The court held that state law controlled the issue of how the highway was established under R.S. 2477. The only conceivable federal question was whether the state law also constituted federal law because R.S. 2477 incorporated state law as the rule of decision. The court rejected this theory of federal question jurisdiction. *Standage Ventures*, 499 F.2d at 250. Federal courts have no jurisdiction where a suit does not substantially involve the validity, interpretation or effect of a federal statute. *Mobil Oil Corp. v. Coastal Petroleum Co.*, 671 F.2d 419 (11th Cir. 1982), *cert. denied*, 103 S.Ct. 300 (1982). Furthermore, the mere fact that competing property rights are derived from federal law is insufficient to support a claim of federal jurisdiction. *Virgin v. County of San Luis Obispo*, 201 F.3d 1141, 1143 (9th Cir. 2000).

If Ahtna were to sue in federal court, it would have to demonstrate not only that R.S. 2477 was at issue, but that federal law controlled the scope issue, i.e. that interpretation of R.S. 2477 was a real and substantial part of its claim. This task would be difficult for the reasons set out in our July 17, 2002 memorandum. There is no federal law to apply: The courts that have spoken to R.S. 2477 "use issues" have looked to state law as the rule of decision, unless there is express federal law addressing a particular use, as was the case in *Gates of the Mountains*, 732 F.2d at 1413. Furthermore, it would be irrelevant that both the state and Ahtna obtained their property rights under federal law.

Ahtna would more likely be successful in bringing an action in federal court if it premised its claim on the ANCSA § 17(b) preemption issue, *i.e.*, that an ANCSA § 17(b) easement supercedes an overlapping R.S. 2477 easement. Ahtna would argue that its ANCSA § 17(b) claim was a substantial question concerning the interpretation of a federal statute. If it were creative, Ahtna would claim that BLM had a continuing duty to monitor or regulate the section 17(b) easement and may try to bring the BLM into the case. For example, the patents covering the Klutina Lake road provide that § 17(b) easements are "subject to applicable Federal . . . regulation." Ahtna may try to base federal question jurisdiction on this provision in the deed.

If Ahtna were successful in convincing the district court that the court had federal question jurisdiction over the ANCSA claim, then it may be able to establish federal jurisdiction over a state-law R.S. 2477 claim under the concept of "pendent jurisdiction." Where a federal court has federal question jurisdiction over one cause of action, it is authorized to hear non-federal claims if the federal and non-federal issues essentially form a single controversy.

b. Crafting the prayer for relief in federal court

Ahtna would also have to be careful about the relief it requested against the state in federal court: The state enjoys Eleventh Amendment immunity from actions in federal court seeking damages against the state brought by the citizens of Alaska or another state. Federal courts also lack jurisdiction over the state for declaratory relief where the sole usefulness of the declaratory judgment is to present it in state court as preclusive proof of state liability for damages caused by some past wrong by state officials.

However, the state's Eleventh Amendment immunity does **not** protect the state from a suit in federal court against state officials alleging that those officials are violating federal law and seeking only prospective injunctive relief. Therefore, if Ahtna could otherwise establish "federal question" jurisdiction, it may be able to obtain a declaration that the state is not authorized to improve the Klutina Trail in some manner proposed by the state. However, Ahtna could not obtain damages or other monetary recovery from the state treasury for trespass or inverse condemnation recovery.

Ahtna may face an additional hurdle under the Eleventh Amendment, even if the corporation limits itself to prospective injunctive relief. The "prospective-relief-for-violation-of-federal-law" exception to the state's Eleventh Amendment immunity, itself bears an exception: Prospective declaratory relief is barred by the Eleventh Amendment "where the relief sought implicates special sovereignty interests of the state and is the functional equivalent of relief that is otherwise barred under the Eleventh Amendment." *Wolfe v. Ingram*, 275 F.3d 1253, 1260 (10th Cir. 2002).

The holding in *Wolfe* is based on *Idaho v. Coeur d'Alene Tribe*, 117 S.Ct. 2028 (1997). In *Coeur d'Alene*, a tribe sought a declaratory judgment in federal court that it owned the submerged lands of a lake. The Supreme Court held that the normal Eleventh Amendment rule -- which allows prospective declaratory relief -- did not apply because the declaratory relief sought was functionally equivalent to quieting title to the lakebed in the tribe. If granted, the declaratory relief would have shifted "substantially all benefits of ownership and control from the State to the Tribe." *Coeur d'Alene*, 117 S.Ct. at 2040. We may succeed in arguing that a claim by Ahtna seeking a declaration that DOT may not improve the Klutina Lake road functionally deprives the state of most of the benefits of owning its easement, thus requiring the case to be brought in state court.

We may be able to give Ahtna a run for its money on federal question jurisdiction depending on how Ahtna formulates its cause of action and structures its request for relief. To avoid the federal question jurisdictional issue, our July 17, 2002 memorandum recommends that DOT initiate suit in state court if it plans to improve the trail in any

significant way. We can file the case as a "zero-deposit condemnation" or as a declaratory judgment action.

A zero-deposit case simply alleges that the state has the right to do what it plans to do without compensating Ahtna but also alleges that the state will pay compensation if the court rules that the scope of the road is narrower than the state alleges. We used this approach successfully in both the *Bowers* and *Keener* condemnations on Davis Road. A declaratory judgment action would do essentially the same thing, but would not make the offer to compensate.

There are advantages to each option depending upon the state's goals. A zero-deposit condemnation would be preferable if the state wants to build while litigating the scope issue and does not care if it has to pay Ahtna just compensation if it loses the case. A declaratory judgment action would be indicated if the state were willing to wait for a final judgment before building the improvement and wants to ensure that it will not have to pay just compensation.

Even if a case is filed by Ahtna and successfully maintained in federal court, we would still argue that state law controls the "authorized use" aspect of 2477s since there really is no federal law to apply to that issue.

In summary, there is a possibility that Ahtna could succeed in maintaining a suit in federal court over the scope of the R.S. 2477 easement for the Klutina Lake trail. The state has good faith legal arguments against federal question jurisdiction. Given the fact that the state's defenses will be largely driven by the formulation of Ahtna's cause of action, we are unable to be certain of the state's success on a motion to dismiss. However, the state would have a good chance of obtaining dismissal of a federal suit on jurisdictional grounds, especially if Ahtna fails to name the BLM on some theory that BLM has a continuing administrative duty to regulate the § 17(b) easement.

2. What specific uses would be within the scope of the Klutina Lake trail easement?

The Klutina Lake Trail was used for travel by foot, sled, wagon and cars. In the early years people using the trail camped in the right-of-way. We may be able to find examples of camping along the right-of-way in later years as well. In my opinion, DOT could improve the road for those purposes. The issue would be to what extent.

Given the historic use of the trail and the historic traffic volume, the state may be able to construct turnouts and allow overnight camping. Constructing a turnout with 80 spaces and flush toilets would probably be outside of the scope of the easement. Allowing day-use parking to facilitate recreational access to the river would probably be

within the scope of the 2477. However, letting a contract to a river concessionaire may violate the scope.

As to a bicycle path, if a person can drive on a 2477, that person can also walk or bicycle on a 2477. Gravel or high-float paving may be within the scope of the easement. However, asphalt paving the road or a bicycle path may be outside the scope. The *Hodel* case specifically left open the question of whether the trail at issue in that case could be paved. *Hodel*, 848 F.2d at 1073 n. 2.

Perhaps citing a specific example would be the best way to explain how improving the road to accommodate historic uses would work. In *Hodel*, the historic uses of the trail included driving cattle, facilitation of oil exploration and various other transportation uses. The court concluded that the scope of the 2477 easement was "that which is reasonable and necessary to ensure safe travel for the uses above-mentioned, including improving the road to two lanes so travelers could pass each other." *Hodel*, 848 F.2d at 1084. The court ruled that improving a one-lane dirt road to a two-lane graveled road with ditches and culverts, as dictated by sound engineering standards, was within the scope of the 2477 easement. The court also allowed minor realignment of the road. *Sierra Club*, 848 F.2d at 1073, 1086. However, the court noted that, under the "reasonable and necessary" standard, an R.S. 2477 trail could not be converted into an eight-lane highway without paying just compensation to adjacent landowners. *Hodel*, 848 F.2d at 1083.

By contrast, in 2000, the federal district court in the *Garfield County* case held that the same road at issue in *Hodel* could not be improved across national park lands under the county's theory that it could do anything it wanted within a "disturbed area" adjacent to the road. The court held that the county had gone outside of what was "reasonable and necessary" when it cut into a hillside adjacent to the traveled way and limited the county's improvements to those that were "minimally necessary." The decision rejected the 1965 AASHTO standards -- applicable to the road on the date the adjacent lands were established as park service lands -- as the appropriate measure of allowable improvements. In the court's opinion, those standards went beyond what was "minimally necessary" to improve the road to accommodate anticipated traffic volume.

The court in *Garfield County* also held that both the county and NPS had to consult with each other about road improvements and prohibited unilateral action by the county to improve the road. *Garfield County*, 122 F.Supp.2d at 1264-65. Both *Hodel* and *Garfield County* stress that owners of the dominant and servient estates must exercise their respective rights so as not to unreasonably interfere with each other. In *Garfield County*, that principle dictated that the county and NPS engage in consultation and

negotiation over road improvements. In any event, the standard to which DOT&PF engineering decisions will likely be held is what is "reasonable in light of historic uses."

Consultation and negotiation with Ahtna concerning improvements will undoubtedly present DOT&PF with a challenge. However, especially if DOT wishes to file a no deposit condemnation, it will have to consult and negotiate before doing so in order to demonstrate that a reasonable effort was made to avoid condemnation; a task DOT must accomplish in all condemnation cases.

Given the historic uses of the Klutina trail, DOT could probably, without compensating Ahtna, lawfully improve the trail to two lanes to accommodate two-way traffic, gravel the surface, and construct small turnouts to accommodate overnight camping, rest stops and river access so long as people would not have to cross Ahtna land to get to the river.

What is DOT precluded from doing? DOT could probably not widen the road to four lanes. It may not be able to put in 12-foot shoulders and 8-foot clear areas. Asphalt paving may be problematic. DOT can probably do no more than maintain a two-lane rural gravel road with small turnouts for rest stops and overnight camping. The improvements that may be made to the road without compensating Ahtna will be driven by the historic uses of the trail and what is minimally necessary to safely facilitate those uses in the 21st Century.

If you wish to pass this confidential clarifying advice along to management within DOT&PF, we will need to provide additional case citations. Please let me know if you want this advice formalized. Because this memorandum concerns advice regarding litigation strategy, we do not recommend that it be widely distributed within the department.

Please do not hesitate to contact us if you have further questions regarding this advice or our July 17, 2002 memorandum.