ALTERNATIVES TO OBTAINING TRIBAL PERMITS FOR CROSSING INDIAN LANDS

by J. W. McCartney

Generally, there are three alternatives to obtaining tribal permits or consents for crossing Indian land: 1. Federal Indian laws allow certain uses, including oil and gas pipelines, right-of-way access across Indian lands. Permission is granted by the Bureau of Indian Affairs and the Secretary of the Interior who issue permits without obtaining the tribal consent.

2. In some cases it is clear that the pipeline company can condemn, in others it's not so clear, but condemnation is a second alternative.

3. Finally, as a third alternative to obtaining permits, go around Indian lands. Although more costly to build, this solution may be the most practical alternative, at least in many instances. Contested legalities by the Indian nation can be costly and time consuming.

4. A theoretical fourth alternative is going to Congress to change the law. It is clear that there is no constitutional prohibition against Congress granting rights or otherwise acting with respect to Indian lands, even where treaties are involved.

The basic problem for those responsible for obtaining rights-of-way across Indian lands is the adversary position some levels of the Department of Interior take. It is the genuine belief that the interest of the Indians is absolute and paramount, even when strong countervailing public interest considerations are involved, such as a railroad serving a defense plant or a pipeline delivering millions of cubic feet of natural gas to domestic and commercial users. This has led to the interpretation of regulations and efforts to structure regulations so as to require tribal consent as a condition to the issuance of oil and gas pipeline permits, notwithstanding what I regard as clear statutory language to the contrary. With this attitude on the part of certain individuals responsible for the issuance of permits across Indian lands it is, of course, to be expected that tribal officials themselves will refuse to give the required consent unless a very substantial payment is made for it.

Let me add a personal point of view here. I see nothing wrong or reprehensible on the part of tribal officials demanding and exacting as much as possible for the issuance of a pipeline permit or any other permits. They are protecting their own personal interests, just as any landowner would be protecting his individual interests when confronted with a request for right-of-way. The difference is that normally the landowner is not in a position to block the construction of the project. The current attitude of the Bureau of Indian Affairs is that the Indians can do so.

My experience with tribal councils has convinced me that they are extremely well represented with legal talent and economic advice. Most of the tribes in the West are members of the Council of Energy Resource Tribes (ERT), nicknamed by the tribes as the "Indian OPEC". The Council receives excellent economic advice.

A recent CERT report discusses pipeline rights-of-way and the opportunity cost approach and states:

> A new method of assigning value to pipeline rights-of-way across Indian land, called the "opportunity cost approach," would "allow tribes to receive an equitable and fair return for the use of their land," according to CERT Economic Advisor Ahmed Kooros.

After noting that it is a common practice for the right-of-way to be granted for a one-time payment to the landowner based on a roddage value the report says:

> The CERT study proposes, instead, that a price per unit of the transported substance be determined, based on the cost the pipeline owner would have to bear if the right-of-way were denied, and an alternative route or means of transporting the substance had to be found.

This appears to be the current standard tribal demand. Since they are armed with an interpretation, at least at certain levels of the Department of the Interior, that tribal consent is required for all rights-of-way, the question is "what can you do other than pay off?" This brings us to the first alternative.

Certain statutes, among them the Act of 1904, codified at 25 U.S.C. §321, conferred on the Secretary the authority to issue permits across Indian land for oil and gas pipelines. The statute provides that compensation to be paid the tribes and individual allottees will be determined in a manner as the Secretary of Interior may direct and shall be subject to his final approval. The right-of-way is for a term of no longer than 20 years, with the right to extend for an additional 20 years. Whatever happens after the second twenty-year term is going to be someone else's problem. When the individual in the Bureau of Indian Affairs or the Department of the Interior refuses to permit the application to be filed, or denies the application, or takes no action on it within a reasonable time after it has been filed, resort can be had through the courts. If the permit is denied, an appeal can be taken under the Administrative Procedure Act to the United States District Court. If the government official does

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nothing, mandamus action can be filed to compel him to act.

There is a very significant case pending in the United States Court of Appeals for the Ninth Circuit. It is styled *Southern Pacific Transportation Company v. Cecil D. Andrus and the Walker River Paiute Tribe of Nevada.*

In that case, Southern Pacific, which had been operating a railroad across the Indian lands for nearly 100 years, thought they had a right-of-way. The Ninth Circuit, in a 1976 decision, told them they did not, and that they would have to acquire a permit for one. They filed for a permit under an 1899 statute which contained no reference to the tribe giving its consent. The officials in the Department of the Interior rejected the application because it did not contain what they regarded as the required Indian consent. The railroad appealed the case to the District Court of Nevada. That court held that the regulations purporting to require consent were invalid with respect to railroad rights-of-way. The case is now on appeal. The briefs have been filed and a decision, although not reached at press time, is expected very soon.

The pipelines' situation is similar. The 1904 Act grants the authority in the Secretary to issue pipeline permits for oil and gas transportation upon the payment of fair compensation. Nothing is said about consent. But the Department of Interior has issued a regulation, §161.3, which they read as requiring consent for all rights-of-way.

In the *Southern Pacific* case, the Secretary takes the position that because a statutory authority authorizes the granting of rights-of-way on conditions, he can impose a condition that the Indians' consent be required. It seems clear to me that the Secretary of the Interior cannot delegate his authority to issue permits under the 1899 Railroad Statute or the 1904 Pipeline Act to the Indians, and when he says that their consent is required as a condition to the issuance of such permit, that, in effect, constitutes an unconstitutional and impermissible delegation of authority. I would expect the court to write on this issue. I would also expect that if the court were erroneously to uphold the interpretation that consent is re-

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quired, that the matter is of such public significance that the United States Supreme Court would issue a writ of certiorari and review the court's decision.

The principal problem arises from language contained in what is known as the Indian Reorganization Act, and from a 1948 General Rights-of-Way statute, sometimes known as the Indian Rights-of-Way Act.

The Indian Reorganization Act was passed in 1934, generally to permit the Indian tribes to organize as bodies politic. Section 16 of the Act provided that in addition to powers vested in the Indian tribe or tribal council, the constitution which the tribe might adopt could vest in the tribe or its council, the right and power "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; . . ."

The purpose of this statute was not, however, to empower the tribes to prevent railroads, highways and utility lines from crossing Indian lands and the Supreme Court has held that that section was effective only where there had been a specific recognition by the United States of Indian rights to control tribal lands "absolutely." The Act did not repeal the earlier 1904 statute and indeed Congress could not constitutionally abdicate its authority to regulate commerce with the Indian tribes.

The 1948 Act which appears at 25 U.S.C. §323, *et seq.* is a general grant of authority of the Secretary of the Interior to issue rights-of-way across Indian lands, with the consent of the tribe. This is the statute on which most emphasis and reliance is placed by the Bureau of Indian Affairs, and by attorneys for the tribes. That statute provides that the consent of the proper tribal officials for tribes organized under the Indian Reorganization Act shall first be obtained before any right-of-way is granted across Indian Lands. The statute, however, makes clear that it is not intended to repeal any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands. The general claim is that the 1948 statute superimposes a consent requirement on all permits, including those covered by the specific acts. The clear language of the statute and its legislative history simply does not support that argument. Whether the Court of Appeals for the Ninth Circuit in the *Southern Pacific* case will agree remains to be seen.

To summarize, therefore, on the first alternative, one must look beyond the position which might be taken at the local level by individuals in the Bureau of Indian Affairs or the Department of the Interior, go ahead and assume that the statutes mean what they say, request a permit, request that the Secretary determine the proper compensation, and rely on the courts to force the Secretary to execute the authority conferred upon him by Congress—but allow plenty of time.

This is particularly important where a right-of-way is needed to tie in a gas well in order to commence production. The lease will generally expire at the end of the primary term if it is not held by production in paying quantities. The drilling and completion of the well does not serve to hold the lease. A tactic frequently employed to force renegotiation of leases on which a potentially productive gas well has been completed is simply to do nothing and wait out the primary term. This is somewhat akin to the right-of-way hold out who cons you into waiting until the contractor is at his fence line and then decides he does not want to give you a right-of-way. Act early.

Going now to the second alternative, condemnation, it is necessary to determine what type of Indian land is involved, and what type of condemnation statute is involved. The principal problem here concerns the concept of sovereign immunity. As you know, as a sovereign, the United States Government can only be sued when it consents to be sued. With respect to certain classes of Indian lands, it might be regarded as an indispensable party since it is in the role of guardian or trustee. In some cases, however, the courts have held that the United States has consented to be sued and in some cases it is held not to be an indispensable party. Furthermore the tribes themselves are also regarded in some instances as sovereigns, and frankly the cases on where the suit can be maintained and who has to be joined are in disarray. About all that can be said is that condemnation is available in some cases and may or may not be available in other cases.

To determine whether the alternative of condemnation is available, one must first determine what kind of Indian land is involved. There are three types of Indian lands and federal condemnation statutes.

1. Individual Indian allottee lands.

These lands have been allotted to individual Indians pursuant to various statutes and which are restricted as to alienation. There is direct statutory authority to condemn individual allottee lands. It is found at 25 U.S.C. §357, and it provides simply: can be used at your notations on pg 3, 4. Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

The Secretary of the Interior is not regarded as an indispensable party but suit must be brought in federal court. Where the pipeline has the power of eminent domain granted by the state or by state or federal authority, and the land involved is individual Indian allottee land, the law is clear.

2. Land held by the tribes in fee simple.

These lands are principally those which lie outside the reservations which the tribes have purchased. The law is also relatively clear here, at least under the Federal Power Act, 15 U.S.C. §791 *et seq.* The Supreme Court held in *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99 (1960), that the Federal Power Act conferred on a licensee the power to condemn lands held by Indians in fee off a reservation. The distinction made by the Court was between lands held by the United States in trust for the benefit of the tribes, and lands purchased or otherwise acquired by the tribes. It was argued that the condemnation provisions under the Federal Power Act did not refer specifically to Indian tribes, and therefore should not be construed as applicable to them. The Court concluded, however, that the provision was broadly written and did apply to the Indians, and that accordingly Congress had authorized the taking by the licensee of lands which they owned.

There is no such holding under the

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comparable section of the Natural Gas Act for natural gas pipeline companies holding certificates of public convenience and necessity, 15 U.S.C. §717, but the rationale is identical and the language of the statute is very similar. The Federal Power Act applies to licensees from the Federal Power Commission, now the Federal Energy Regulatory Commission (FERC). The Natural Gas Act refers to holders of certificates of public convenience and necessity issued by FERC.

3. Lands held by the United States in trust.

These are basically reservation lands set aside by treaty or executive order. As I mentioned earlier, one of the questions here is whether the United States has consented to be sued and whether the tribe is subject to the court's jurisdiction. Where the United States has delegated its authority to a licensee or certificate holder, such as under the Federal Power Act and the Natural Gas Act, it would be anomalous to conclude that the exercise of that authority—which presupposes that findings have been made that the project is in the public interest and is required by the public convenience and necessity—could be thwarted by the defense of sovereign immunity. The United States has delegated to the licensee or certificate holder its authority to take property for public use. It would be inconsistent for the United States to invoke the doctrine of sovereign immunity from suit to thwart the implementation of the delegation, or for the court to say that the United States, through its licensee, could not acquire the land of its ward, the Indians, upon the payment of fair and just compensation.

In short, you should not assume that just because property is Indian property, your company cannot exercise powers of eminent domain. Look into it carefully. There is, of course, no federal power of eminent domain with respect to oil or products pipelines. Those pipelines derive condemnation powers from the various states and condemnation under state statutes poses different problems. But at least where allottee land is involved, it is clear that condemnation is available. It is also clear that if the Indian OPEC persists in its insistence that no permits will be granted or renewed unless the cost of locating the pipeline around the reservation is paid, and if the Department of Interior persists in refusing to issue permits without tribal consent, the courts will be called upon to determine whether Indian lands can be used as barriers to utility operations.

One final point in dealing with particular Indian tribes: Note should be taken of any treaties. For example, the Treaty with the Navajos made at Fort Sumner in the Territory of New Mexico on June 1, 1868 contains this very interesting provision:

> "They [meaning the Navajos] will not in future oppose the construction of railroad, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe."

The significance of their agreement not to oppose "other works of utility or necessity which may be ordered or permitted by the laws of the United States" is immediately apparent. There are many treaties of course, but the point is that in dealing with the Indian tribes you should not overlook the possibility that a treaty may contain some helpful provision.

Summarizing, I would suggest to you that:

1. Insofar as pipeline applications are concerned, rejection by the Bureau of Indian Affairs on the ground of no consent by the tribe should *not* be taken as conclusive;

2. It should not be assumed that because Indian land is involved, no power of eminent domain exists; but,

3. Finding out what the answers are can be costly both in terms of time and dollars spent. Alternative routes which avoid the problem may very well be the most practical alternative to permitting.

Team (cont. from pg. 15)

In essence, the Property Management Team, especially during the operational stages of leases or concession agreements, is a procedure for management by exception. Using the Palo Alto Municipal Golf Course as an example, the Recreation Department has appointed a Golf Course Manager who is responsible for the day-to-day coordination of the Golf Professional, the Golf Course Coffee Shop operator and the City's maintenance crews. When problems with concessionaire noncompliance occur, e.g. operational deficiencies, insurance lapses, financial statements not received when due, etc., the City's Golf Course Manager will work with the concessionaires to seek compliance. After a reasonable time has lapsed without securing tenant performance, the Golf Course Manager will inform the Real Property Administrator of the continuing deficiencies. The Real Property Administrator then attempts to secure tenant compliance. Should the Real Property Administrator's efforts not result in tenant compliance after a reasonable period of time, the Attorney's office will be asked to initiate necessary legal action to insure performance. This has proven to be an effective procedure in managing limited staff resources and in securing tenant performance. Such a procedure, however, does require a great deal of cooperation between the operating departments and the Real Estate staff.

The Property Management Team concept can be modified to meet the needs of any agency. A centralized Real Estate staff and an organizational commitment to the Property Management Team concept, should result in significant improvements in the management of public agency real estate assets. A survey of former students of the **IRWA** Property Management Leasing course, to whom centralized real estate staff and property management team concepts were presented, reveals that implementation of the Property Management Team concept results in improved effectiveness and efficiency of their property management programs.

In today's environment of rapidly appreciating real estate values and growing taxpayer concern regarding public agency performance, it is important to re-

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