

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

(see Permits, pg. 12)

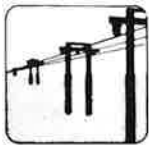
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During his practice, he has handled more than 500 right-of-way and condemnation matters; has tried right-of-way cases before the courts in the States of Texas, Louisiana, New Mexico, Arizona, Oklahoma, Arkansas, Missouri, Illinois, Tennessee, Pennsylvania and New Jersey; and has handled right-of-way and condemnation cases for pipelines carrying oil, gas, petroleum products, ammonia and residual fuel oil.

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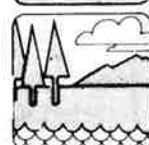
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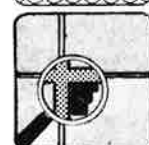
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Permits (cont. from pg. 11)

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-

(see Consent, pg. 13)