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WASHINGTON, D.C.

Memorandum

To: Native Village of Eklutna

From: Julie Gantenbein
Water and Power Law Group PC

Date: April 9, 2024

Re: **Potential amendment of the schedule for the Fish and Wildlife Program for the Eklutna Project**
Confidential and Privileged Attorney Client Communication

1. You asked us to analyze whether the deadlines applicable to the Fish and Wildlife Program can be amended. As explained below, it is our opinion that the deadlines can be amended by mutual consent of the Parties to the “Memorandum of Agreement entered into among the State of Alaska, the Eklutna Purchasers, the Alaska Energy Authority [AEA], and Federal fish and wildlife agencies regarding the protection, mitigation of, damages to, and enhancement of fish and wildlife, dated August 7, 1991” (“1991 Agreement” or “Memorandum of Agreement”).

A. The Parties have authority to amend the 1991 Agreement.

2. The 1991 Agreement, by and among the Municipality of Anchorage (dba Anchorage Municipal Light and Power), Chugach Electric Association, Inc., Matanuska Electric Association, Inc., U.S. Fish and Wildlife Service, National Marine Fisheries Service, Alaska Energy Authority, and the State of Alaska (collectively, “Parties”), established terms negotiated by the Parties to address the Eklutna Project’s impacts on fish and wildlife.¹

3. Rather than apply for a license from the Federal Energy Regulatory Commission (“FERC”) in accordance with the Federal Power Act (“FPA”) and implementing regulations,² the Agreement requires the Eklutna Purchasers to study the Project’s “yet to be quantified impact to fish and wildlife resources”, develop a proposal for protection, mitigation, and enhancement (PM&E) measures in consultation with the other parties to the Agreement, and then submit the proposal to the Governor of Alaska for approval prior to implementation. The Parties found these

¹ 1991 Agreement, p. 2.

² See 16 U.S.C. §§ 791 et seq.; Code of Federal Regulations, Title 18, Chapter 1.

“mechanism[s] to develop and implement measures to protect, mitigate damages to, and enhance fish and wildlife (including spawning grounds and habitat) obviate[d] the need for the Eklutna Purchasers ... to obtain FERC license[.]”³

4. The 1991 Agreement includes a schedule for development, approval, and implementation of a Fish and Wildlife Program containing measures to protect, mitigate damages to, and enhance fish and wildlife resources, as stated in part below:

The consultation process leading to the Programs shall be initiated no later than 25 years after the Transaction Date specified in the respective Eklutna and Snettisham Agreements. The study Plans shall include a schedule for the consultation, comment, and decision making, called for in this Agreement, which shall be adopted by the parties in consultation with the Governor. The schedule shall call for implementation of all provisions of the Fish and Wildlife Program by the Eklutna Purchasers to begin no later than 30 years after the Transaction Date, and to be completed no later than 35 years after the Transaction Date.... The schedules shall call for the issuance of the Fish and Wildlife Program by the Governor at least three years prior to the commencement of the period for implementation.⁴

5. The 1991 Agreement is effectively a contract that gives the Parties binding and enforceable rights and obligations. Section 9 of the Agreement provides, “[t]he provisions of this Agreement ... shall be reviewable and enforceable in the United States District Court for the District of Alaska and the Court may order specific performance thereof.”⁵ Section 10 further provides that, “[e]ach party to this Agreement warrants that it has the legal authority to sign this Agreement and be fully bound by its terms ... This Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns.”

6. The 1991 Agreement is silent on the topic of amendment. Regardless, it is a well-established principle of contract law that the parties to an agreement have inherent authority to modify the terms of such agreement *by mutual consent*.⁶ “A contract encompasses the rights and obligations which the parties were willing to accept, and, to the extent that they struck the bargain, the bargain is theirs to modify.... [P]arties have the right to and are free to amend their

³ 1991 Agreement, p. 1.

⁴ *Id.* at 4-5. According to Alaska Power Administration’s “Divestiture Summary Report – Sale of Eklutna and Snettisham” (April 1992) (“Divestiture Report”), the 1991 Agreement’s “timing provisions [we]re designed primarily to reduce uncertainties in financing and repayment of new debt while recognizing that known fish and wildlife concerns [we]re not of the type that will require near future action.” Divestiture Report, p. 19.

⁵ Specific performance is a particularly significant remedy within the realm of contract law that reflects the law’s attempt to honor and enforce the parties’ intentions and agreements. *See* 81A C.J.S. Specific Performance § 1 (“Specific performance requires the parties to perform their respective contractual promises.”).

⁶ “It is well established that parties to a contract can, by mutual agreement, modify or rescind a contract and adopt in its stead a new agreement. An agreement to change the terms of a contract may be shown by the conduct of the parties, as well as by evidence of an explicit agreement to modify.” *Matanuska Valley Farmers Coop. Ass’n v. Monaghan*, 188 F.2d 906, 909 (9th Cir. 1951). “Numerous other cases from various jurisdictions have set forth the same rule.” *Sam Rayburn Dam Elec. Co-op. v. Fed. Power Comm’n*, 515 F.2d 998, 1009 (D.C. Cir. 1975). *Accord Notti v. Hoffman*, 513 P.3d 245, 252 (2022) (“contracting parties generally have an unlimited ability to agree to contract modifications.”).

contract.”⁷ However, a contract may not be unilaterally modified without consent of the other party(ies).⁸

7. Thus, the Parties to the 1991 Agreement have authority to amend the schedule or other term of their Agreement by mutual consent, expressed in writing.

B. The specific implementation schedule under the 1991 Agreement is not a statutory requirement.

8. In 1995, Congress enacted the “Alaska Power Administration Asset Sale and Termination Act” (“APAd Termination Act” or “Act”),⁹ which authorized the sale of the Project, to the “Eklutna Purchasers.”¹⁰ Section 103(a) of the Act states: “The Secretary of Energy is authorized and directed to sell Eklutna to the Eklutna Purchasers in accordance with the terms of this Act and the Eklutna Purchase Agreement.”¹¹ The Eklutna Purchase Agreement is dated August 2, 1989, and thus predates and omits the terms of the 1991 Agreement.

9. Consistent with the terms of the 1991 Agreement, the APAd Termination Act section 104(a)(1) exempts the Eklutna Project from licensing requirements under the FPA. However, the Act does not disturb the Parties’ rights and obligations under the 1991 Agreement:

(2) The exemption provided by paragraph (1) shall not affect the Memorandum of Agreement entered into among the State of Alaska, the Eklutna Purchasers, the Alaska Energy Authority, and Federal fish and wildlife agencies regarding the protection, mitigation of, damages to, and enhancement of fish and wildlife, dated August 7, 1991, which remains in full force and effect.

(3) Nothing in this title or the Federal Power Act preempts the State of Alaska from carrying out the responsibilities and authorities of the Memorandum of Agreement.

10. While the Act does not make the schedule or other terms of the 1991 Agreement conditions of the divestiture authorization, it does make the grant of jurisdiction to the U.S. District Court for the District of Alaska “to review decisions made under the Memorandum of Agreement and to enforce the provisions of the Memorandum of Agreement, including the remedy of specific performance” a statutory requirement. *Id.* at § 104(c)(1).¹²

⁷ 17A C.J.S. Contracts § 551 (internal citations omitted).

⁸ *Id.*; see also *Zuelsdorf v. University of Alaska, Fairbanks*, 794 P.2d 932, 935 (1990).

⁹ Public Law 104–58, November 28, 1995, 109 Stat 557.

¹⁰ “The term ‘Eklutna Purchasers’ means the Municipality of Anchorage doing business as (d/b/a) Municipal Light and Power, the Chugach Electric Association, Inc. and the Matanuska Electric Association, Inc.” APA Termination Act, § 102(3).

¹¹ *Id.* at § 103(a).

¹² Section 104(c)(2)-(3) establish time limitations to bring claims against the Memorandum of Agreement. However, as stated below, those deadlines are based on implementation milestones under the 1991 Agreement, not specific dates:

11. In sum, the APAd Termination Act observes the 1991 Agreement, but does not make the schedule or any other specific term under the 1991 Agreement, aside from the grant of jurisdiction to the U.S. District Court for the District of Alaska, a statutory requirement that would require Congress' approval to amend.

C. The procedures for amending the schedule in the 1991 Agreement should follow standard procedures for amending multi-lateral agreements.

12. As described in Section A above, the 1991 Agreement is a multi-lateral agreement that is binding and enforceable as a matter of contract. It is similar to other agreements involving state and federal governmental authorities and other interested stakeholders seeking to resolve disputes related to construction and/or operation of infrastructure affecting public and private interests in the management of land, water, and other natural resources.¹³ There are numerous examples of amendments to such agreements that could provide a useful model here.¹⁴

13. Steps that would be key to successful amendment of the 1991 Agreement are summarized below.

- 1) Articulate the proposed modification(s) to the Agreement. “[A] contract modification must have an offer of modified terms and acceptance of those terms.”¹⁵
- 2) Distribute the proposed modification(s) to the Parties for review.
- 3) Negotiate any revisions to the proposed modification(s) to obtain consensus.

(2) An action seeking review of a Fish and Wildlife Program (“Program”) of the Governor of Alaska under the Memorandum of Agreement or challenging actions of any of the parties to the Memorandum of Agreement prior to the adoption of the Program shall be brought not later than 90 days after the date on which the program is adopted by the Governor of Alaska, or be barred.

(3) An action seeking review of implementation of the Program shall be brought not later than 90 days after he challenged act implementing the Program, or be barred.

¹³ For example, FERC has adopted a policy in favor of multi-lateral settlement agreements resolving disputes related to the licensing of non-federal hydropower projects under the FPA. FERC, “Policy Statement on Hydropower Licensing Settlements” (Sept. 21, 2006), available at <https://www.ferc.gov/sites/default/files/2020-06/PL06-5-000.pdf>.

¹⁴ See, e.g., Erie Boulevard Hydropower, LP, Settlement Amendment and Signature Pages for E.J. West Project (P-2318) et al., FERC eLibrary no. 20020814-0159 (Aug. 14, 2002); BIF III Holtwood LLC, Settlement Agreement Section 3.4(a) – Revision for the Wallenpaupack Hydroelectric Project (P-487), FERC eLibrary no. 20221028-5326 (Oct. 28, 2022); Constellation Energy Commodities Group, Inc., Joint Offer of Settlement to Amend the 2009 Constellation – California Parties Settlement Agreement under EL00-95-000 et al., FERC eLibrary no. 20170330-5368 (Mar. 30, 2017).

¹⁵ 17A C.J.S. Contracts § 565.

4) Prepare formal, written amendment to the 1991 Agreement.¹⁶ The amendment should clearly state the modified terms, the Parties' intent that original terms not expressly modified shall remain in effect, recite the Parties' joint findings that are the basis for the amendment, and list the individuals who have authority to sign the amendment on behalf of their respective Party. These recitals should address the consideration that supports the proposed modification.¹⁷ In other words, the Parties should explain what benefits they will receive from or in exchange for a schedule extension.

5) Execute the amendment, with each Party responsible to comply with their internal procedural requirements prior to execution.

6) Provide public notice of the amendment and continue to implement the 1991 Agreement, as amended.

¹⁶ “[P]arties to a written contract may modify the contract through an additional writing.” 17A C.J.S. Contracts § 552.

¹⁷ Even though additional consideration may not be strictly necessary to support the amendment, an explanation of the mutual benefits provided by the modification(s) appears appropriate in these circumstances where there is public interest in the Parties' performance under the 1991 Agreement. *See* 17A C.J.S. Contracts § 569.