

Fiber Optic Cables: The Oregon Experience
or
“Things Look Different Here”

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Introduction

Ever since Oregon was a territory, it has had a reputation for being independent, for doing things in what is sometimes termed “*the Oregon way*.” The territorial motto, “*She Flies With Her Own Wings*” expressed as early as the 1850s the state’s desire to determine its own destiny, to not be simply a follower. More recently, the Oregon Department of Tourism capitalized on this quality by adopting the phrase “*Oregon, Things Look Different Here*” as the unofficial state motto which it prominently includes on all of its publications to attract more visitors and business to the state.

Given this reputed independent streak, it is not surprising that Oregon sometimes does not act in a way that is expected. And so it has been with the issue of fiber optic cable placement in Oregon’s Territorial Sea, which I am here to talk to you about today.

The Department Of State Lands

Before going any further, let me take a minute or so to “set the stage” regarding the role of the Department of State Lands regarding the placement of fiber optic cables within Oregon’s Territorial Sea, and the legal considerations governing how the Department must operate. The Department is the administrative arm of the Oregon State Land Board, comprised of the Governor, Secretary of State, and State Treasurer. In its regulatory function, the Department is responsible for authorizing the removal, filling, or alteration of more than 50 cubic yards of material within the bed or banks any waters of the state. As a proprietary agency, the Department issues various forms of authorization such as leases, permits, and easements for the use of state-owned land. Revenue received by the Department is deposited in the Common School Fund, which currently stands at approximately \$740 million. The non-reinvested earnings from this fund are distributed twice each year to all of Oregon’s K-12 public school districts.

In managing state-owned submerged and submersible land underlying the Territorial Sea, the Department is guided by its Constitutional mandate to: *“manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state consistent with the conservation of this resource under sound techniques of land management.”* It is also continually mindful in its management role to ensure the collective rights of the public to fully use and enjoy state-owned submerged and submersible land for commerce, navigation, fishing, recreation, and other related Public Trust purposes.

When making decisions concerning the state’s coastal resources, the Department must take into account the requirements of Statewide Planning Goal 19, which mandates, among other things, that Oregon will protect: *“...important biological habitat...and other biologically important areas for marine mammals, marine birds, and commercially and recreationally important fish and shellfish...”* Additionally, the Department must adhere to the provisions of the Oregon Territorial Sea Plan which is currently being amended to include policy guidance concerning the placement of cables and other utilities on the sea floor.

From an administrative standpoint, the Department has had very little statutory or other guidance concerning the processing of applications for fiber optic cables. When processing recent applications for fiber optic cable easements in the Territorial Sea, this lack of guidance often complicated what were often already “difficult” situations. To remedy this problem, the Department recently completed development of administrative rules specifically directed toward the placement of fiber optic cables in the Territorial Sea. I will discuss the provisions of these rules later in my presentation.

Oregon’s Trans-Pacific Fiber Optic Cables

Given this overview of the legal and other considerations under which the Department operates, let me now turn to describing our experiences to date relative to the four trans-Pacific fiber optic cables now in place along Oregon’s coast.

North Pacific 1

The first trans-Pacific fiber optic cable placed in Oregon’s Territorial Sea, called North Pacific Cable 1, was completed in 1990 and landed in Pacific City on the north Oregon Coast. This 5,200 mile long, \$400 million cable, owned by Pacific Telecom Cable, linked both the continental United States and Alaska (via a spur line) with Japan.

In early 1989, the Department received and shortly thereafter began circulating Pacific Telecom Cable’s application for a Removal-Fill Permit and authorization to use state-owned lands for comment to numerous local, state, and federal agencies, as well as persons indicating an interest in the project. At the same

time, the Department requested Oregon's Department of Land Conservation and Development (DLCD) to determine if the proposed project met the requirements of Statewide Planning Goal 19.

Few substantive comments were received as the result of the Department's request for comments, and the project was determined by DLCD to be consistent with Oregon's Coastal Management Program. Consequently, in late 1989, the Department granted Pacific Telecom Cable not only the requisite Removal-Fill Permit, but also a relatively simple easement having a term of 75 years. Although the coastal fishing industry did not voice major objections to the proposed cable, the Department nevertheless made as a condition of its Removal-Fill Permit that:

"Pacific Telecom Cable shall maintain communications with the local dory fishermen at Pacific City concerning cable issues that may affect local nearshore fishing practices. If after cable placement the cable for any reason becomes suspended or otherwise exposed such that it adversely affects the nearshore fishery, Pacific Telecom Cable shall make all reasonable efforts to resolve the problem."

AT&T Trans-Pacific 5

In 1994, AT&T applied for a Removal-Fill Permit and an easement to place two fiber optic cables near Bandon on the southern Oregon Coast. When this \$1.4 billion project was completed, one of these cables would connect Bandon directly with Japan; the other extended southward to San Luis Obispo, California.

As in the case of the North Pacific Cable 1, the initial processing of AT&T's request for a Removal-Fill Permit and easement in 1994 was a fairly routine matter, and the Department received relatively few comments concerning the proposed project. However, in 1996, as public awareness of the cables became greater and the impacts of their placement on fishing were better understood, the Department began to receive letters from fishing organizations and other interested persons concerning the location of the cables through prime fishing grounds. An objection often raised by many local commercial fishers was that they felt left out of the decision-making loop; that by the time they learned about the cable it was too late to do anything about it. At that point, the Department could do little to mitigate the situation. Because AT&T did not violate any of the terms and conditions of its easement or Removal-Fill Permit, the Department had no reason to withdraw these authorizations or call for public hearings as was requested by some groups.

Alaska Northstar Communications

Based on its experiences with the AT&T Trans-Pacific 5 Cables, the Department recognized that to offset many possible problems, it was critical that cable

owners and local fishers communicate directly with each other very early in the permitting process and, if possible, work together in siting cables. Consequently, upon receipt of the applications for an easement and Removal Fill Permit from Alaska Northstar Communications in 1998, the Department began to assume the role of a facilitator as well as of a regulator and proprietor.

Once the proposed Alaska Northstar project became known, the Department began to receive numerous comments from various interests. Among the most vocal groups were trawl fishers, many of whom contended that as more cables are placed in the Territorial Sea, the greater is the likelihood of their losing their gear or facing financial ruin either through damaging a cable or being precluded from using prime fishing ground increases. A number of fishers further contended that by the time the Department received an application for a cable easement, the project was a “done deal” from the design standpoint with no rerouting to less productive fishing areas possible.

At virtually the same time that the easement and Removal-Fill Permit applications for the Alaska Northstar cable were being considered by the Department, two other closely related events occurred.

The first involved the Oregon Ocean Policy Advisory Council (OPAC) which was prompted by the number of recent fiber optic cable projects in the Territorial Sea to meet to discuss issues relating to the approval of routes for such cables. As a result of its meetings, OPAC developed proposed policy guidance for possible adoption in the Oregon Territorial Sea Plan. Among the provisions of the proposed guidance were that:

- Common conduits or corridors should be used to reduce the multiplication of areas in which fishing may be limited and to minimize adverse impacts on other ocean users and resources.
- Cables should be designed to carry the greatest number of calls possible to reduce the need for additional cables.
- All cables shall be buried to a sufficient depth to reduce the risk of snagging deep fishing lines.
- The permitting process should be used to ensure that cables stay buried.

The second event to occur was the formation by a group of fishers of the Oregon Fishermen’s Underwater Cable Committee (OFUCC) to represent the commercial fishing industry with regard to the Alaska Northstar cable. As envisioned by the fishers, among the proposed tasks of this committee, if sanctioned, would be to review incidents of gear loss, reports of ROV inspections, etc. To finance the committee and to pay for the cost of lost or damaged fishing on or near the cable, the fishers asked Alaska Northstar to create a \$150,000 fund.

In a first of its kind agreement, the fishers and Alaska Northstar did agree to the formal establishment and funding at the \$150,000 level requested of the Oregon Fisherman's Underwater Cable Committee. In addition to the committee functions already mentioned, the agreement provided that Alaska Northstar would bury its cable to a depth of 1500 meters, with additional post lay burial to 2000 meters. To ensure that the requirements of the agreement were fully met, the Department included it as a condition of the Alaska Northstar easement.

“Grantee shall comply with the Agreement To Create And Establish The Oregon Fisherman's Undersea Cable Committee as outlined in Attachment A to this easement.”

Another condition the Department included in the Alaska Northstar easement which it had not stipulated in prior fiber optic cable easement involved compensation for the use of the Territorial Seabed. As I have already mentioned, Oregon State statute prohibits any state agency from charging “consideration” for the use of publicly owned land outside of incorporated areas. In early 1998, the Department decided to develop a legislative concept for consideration by the 1999 Oregon State Legislature which would allow all government land-managing agencies to be compensated for the use of publicly-owned land for easements. To ensure that the Department would have an opportunity to receive compensation for fiber optic easements in the Territorial Sea should the legislation be enacted and administrative rules specifying compensation be adopted by the Land Board, the Department began with the Alaska Northstar easement to insert the following provision:

“This easement is granted with the express understanding and proviso that it may be subject to the future imposition of a consideration payment and/or usage fee to be established by the Oregon State Land Board as authorized by law.”

Several months following issuance of the Alaska Northstar easement, the Port of Tillamook Bay (which has an agreement with Alaska Northstar allowing the company to place its cable along port district right-of-way) approached the Department with the request that this provision be removed from the Alaska Northstar easement. Because the Port of Tillamook Bay acted on behalf of Alaska Northstar to obtain all of the requisite easements, permits, leaseholds, etc. to the fiber optic cable, it wanted to ensure that neither it nor Alaska Northstar would be subject to future payment of consideration for the use of state-owned land should the Department's proposed legislation be enacted. The port believed that it had acted in good faith in securing the authorizations required for any fiber optic cable in the Territorial Sea, and was not told of this provision when it began obtaining the requisite permissions for the Alaska Northstar cable. After considerable discussion and research, the Department concurred with the port's position and recommended to State Land Board that the Port of Tillamook Bay's offer of \$20,000 to remove this provision from the subject easement be accepted.

AT&T US-China Cable

In late 1998, AT&T submitted an application to the Department for a Removal-Fill Permit and easement for two fiber optic cables landing at Bandon, Oregon. This \$1,400 million project consisted of one cable connecting the United States at Bandon, Oregon, with China, and the other extending from Bandon to San Luis Obispo, California.

Shortly after receipt of this application, the Oregon Fishermen's Undersea Cable Committee (OFUCC) contacted the Department suggesting that AT&T should be required to *"...to work out an agreement with the fishermen most affected prior to (the) Department's permit approval."* Soon thereafter, the Oregon Department of Land Conservation and Development (DLCD) requested that AT&T explain how it planned to coordinate with the state's commercial fishing industry regarding cable route location, installation, and related issues to avoid to the maximum extent possible conflicts with this industry. The DLCD further recommended that AT&T enter into some type of agreement with south coast fishers similar to that negotiated by OFUCC and Alaska Northstar.

As the result of circulating the AT&T application for a Removal-Fill Permit and easement, the Department received considerable public input. The issues of concern were much the same as those expressed for the Alaska Northstar cable: specifically, extent and depth of burial, loss of valuable fishing grounds, replacement of lost gear, responsibility for damage to the cable, etc. Again, as it the case of the AT&T Trans-Pacific 5 cables, questions were raised how the cable routes were selected and whether AT&T met early enough in the planning process with fishers or considered their input.

Although AT&T initially did not want to enter into an agreement with OFUCC concerning its proposed Bandon cables, it eventually met on a regular basis with representatives of that organization to discuss various issues. Adding to the urgency of reaching an agreement were that:

- The cable ship Dock Express was in March on its way to Oregon to begin laying cable for the route;
- Segments of the cable specifically designed for the route selected had already been manufactured; and
- It was critical that the cable be operative by the end of 1999.

As the fishing industry continued to analyze the impacts of the proposed cables on its activities, it determined that their placement as proposed by AT&T would result in substantial losses in fishing area (removing a reported 300 square miles of ocean bottom) and revenue.

In late March, 1999, the impasse between AT&T and Oregon's fishing industry reached a point wherein the state's governor became directly involved. In a letter to AT&T, Governor Kitzhaber requested that the company:

- Either bury the cables out to a water depth of 1500 meters, or look for a less costly alternative.
- Work with Oregon's coastal communities to help them realize some benefit from the proposed cable.
- Do its best to resolve all outstanding issues prior to the April 6th Land Board meeting at which the easement would be considered.

Shortly after Governor Kitzhaber's letter, AT&T and the fishers reached an agreement wherein AT&T will/would:

- Reroute a segment of the Bandon-San Luis Obispo cable to minimize the increase in the cable buffer zone, and avoid some key traditional fishing grounds.
- Bury its cable to the extent possible to a water depth of 1,800 meters.
- Provide 100% value replacement for snagged and sacrificed gear, plus 50% of a value nuisance payment.
- Provide a \$500 payment to each signatory fisherman to this agreement to update their communication and navigation equipment.
- Establish the Bandon Submarine Cable Council and contribute \$150,000 annually during the commercial life of the cables to a fund to cover council expenses and fisheries research projects.
- Provide a one-time payment of \$1.25 million to establish a Fisheries Improvement Fund to cover the costs of fisheries enhancement and research projects.
- Indemnify any ship owner who is a signatory to the agreement for sacrificed gear.
- Consult with the council on selecting future cable routes which minimize the negative impacts to the commercial fishing industry.

AT&T also agreed to work with coastal communities in the vicinity of the cable landing to help them access and benefit from the cable project.

To ensure compliance with the agreement, the Department made it a condition of the easement it issued to AT&T. Included in that easement, as well, was the consideration payment/governing law recovery provision I discussed previously.

State Fiber Optic Cable Policy Survey

As you might imagine, for a state with little experience in the placement of oceanic cables, the past 10 years has been quite an adventure. As it became clear in early 1998 that additional fiber optic cables would likely be placed in Oregon's Territorial Sea, the Department undertook a survey of how other coastal states regulated this use. During this survey, twenty coastal states and British Columbia were contacted. What became quickly apparent from the survey results was that:

- Nearly every state requires some form of authorization for the placement of fiber optic cables along their coastline. Although the specific form of authorization varies widely among states, an easement is the most common instrument issued.
- Few states have any administrative rules addressing the placement of fiber optic cables.
- As in the case of forms of authorization, the terms of these authorizations vary widely. One-half of the states, however, issue authorizations which are either for the project life or in perpetuity.
- The majority of the states have established some nominal application, filing or processing fees.
- When compensation is required by a state for the use of the state-owned submerged and submersible land, it typically consists of a one-time payment. Relatively few states require an annual "rental" for the use of state-owned lands by cables.
- Compensation for the use of state-owned submerged and submersible land, when charged, is most often based on a per linear foot basis.
- Nearly every state recognizes that the placement of fiber optic cables on state-owned submerged and submersible land is subject to controversy often involving other users of marine resources.
- Similarly, most states realize that fiber optic cables are a high value use of state-owned land.
- The easements and other forms of authorization, and methods of charging for the use of state-owned land for fiber optic cables used by most states are extremely simple when compared to some of the complex contracts negotiated between major private, and even public holders of rights-of-way and telecommunications companies.
- Although the establishment of cable corridors has been considered by many states, few have gone any further than discussing this approach of restricting where cables may be placed.

Rule Making

Because the Department had little policy guidance with regard to granting easements in the Territorial Sea, it began in early 1998 to develop administrative rules concerning this activity. In determining the direction of these rules, the Department reviewed its experiences to date in processing requests for fiber optic cable easements in the Territorial Sea. Particular effort was placed on

identifying those issues which developed that could have been resolved if specific written policy guidance in the form of administrative rules had existed. In addition, the Department also reviewed the administrative rules used by other coastal states to glean ideas which might prove helpful. As first proposed, the Department's administrative rules provided, among other things, that:

- Easements for fiber optic cables must be located to protect public trust values, conserve living marine and other seabed resources, and avoid or reduce conflicts with other ocean users and industries.
- Fiber optic cables be placed in corridors that already have cables, or which may be identified by the Department or in the Territorial Sea Plan.
- All cables must be buried whenever bottom conditions permit to avoid conflicts with other ocean users.
- The Department would not recommend approval of a cable unless all substantive issues concerning public trust values, resource protection, and user conflicts were resolved.
- The initial term of a fiber optic cable easement would be 10 years; renewable for an additional 10 years.
- Applications must be submitted at least 180 days prior to placement of any part of the fiber optic cable on state-owned land.
- Applicants must pay all Department's costs required to process an easement. Each application for a fiber optic cable must be accompanied by a non-refundable check in the amount of \$5,000. As costs beyond the \$5,000 are incurred, applicants will be periodically billed.
- Cable must be removed within one year of abandonment or expiration of the easement.

In June 1999, the Department held public hearings along the Oregon coast to solicit public input on the proposed administrative rules. Based on the comments received at and subsequent to those hearings, the Department made the following changes to its proposed rules:

- The requirement that cables be placed only in corridors was eliminated. The Department will, however, consider each cable application on a case-by-case basis, and consult with the easement applicant, affected state and federal agencies, and other interested persons to determine the route which best meets the goals of the rules.
- The requirement that "all" substantive issues concerning public trust values, resource protection and user conflicts be resolved before the Department would recommend approval of a cable easement to the Land Board was eliminated. Instead, approval will be contingent on the Department's determination that the applicant has met the provisions of these rules and the requirements of Statewide Planning Goal 19.
- The rules now clarify that cables shall be buried to the greatest extent possible using best available proven technology. Furthermore, burial is

required to a sufficient depth to avoid conflicts with other ocean users and industries.

- The application processing/cost recovery fee has been capped at \$5,000.
- The Department requires easement holders to inspect cables on a frequency to be determined by the Department in consultation with the easement holder. The purpose of this inspection is to ensure that the cables remain buried and within the authorized area.
- The initial term, and term of renewal for a cable easement was increased from 10 to 20 years.
- The Department may now require that easement applicants obtain a performance bond to ensure their compliance with terms and conditions of these rules and the easement.

This past August, the State Land Board approved these rules.

Conclusion: What a Long, Strange Trip It's Been

During the past twenty-five minutes, I have tried to convey to you what has happened in Oregon concerning trans-oceanic fiber optic cables. As the result of our experiences, we would recommend that any coastal state involved in authorizing a fiber optic cable in the Territorial Sea take the following steps. We recognize, of course, that in many states statutory and other constraints may preclude the taking of any of the actions we have in Oregon.

- Learn all you can about the fiber optic cable industry; it is new, its terminology is different. Recognize that the industry is already very experienced in negotiating with, for example, railroads and even some state highway authorities in securing rights-of-way. The terms and conditions of those agreements are extremely comprehensive and detailed.
- Learn all you can about the federal and, as applicable, your state's laws governing telecommunications cables, particularly fiber optic cables. Also, become familiar with the international treaties governing the placement of such trans-oceanic cables.
- Know what other states are doing; how they authorize cables. Remember, a cable usually comes from somewhere else...and if that somewhere else is another state, find out how the agencies in that state authorized it.
- Be aware that considerable interest has been expressed throughout the world in the agreements which have been struck here between Oregon's commercial fishers and the cable operators. Such negotiations may become part of your future.
- Be sure that you have enough time to adequately process an application for an authorization, and encourage telecommunications companies to meet with ocean users as early in the process as possible to ensure mutually satisfactory route selection

Thank you for your time.

FIBER OPTIC CABLES: THE OREGON EXPERIENCE or “THINGS LOOK DIFFERENT HERE”

by Jeff Kroft, Senior Policy Specialist, Oregon Department of State Lands

Abstract

During the past decade, six oceanic fiber optic cables have landed in Oregon. The first cable, completed in 1990, was relatively non-controversial. However, as additional cables were proposed, the coastal fishing industry became increasingly concerned about the loss of fishing ground resulting from cable placement, and their liability should they come into contact with a cable. When the fourth cable was proposed in 1998, a number of coastal fishers formed a committee to represent their interests. After numerous discussions, the fishers and the cable owner reached a landmark agreement that has served as the basis for later agreements between these two groups in Oregon.

The Department of State Lands (Department) plays a major role in the placement of oceanic cables because of its regulatory and proprietary responsibilities. In its regulatory role, the Department is responsible for implementing Oregon’s Removal-Fill Law, an activity guided by statute and administrative rules. From a proprietary standpoint, the Department grants easements for the use of state-owned submerged and submersible land. In this latter function, however, the Department has had little statutory or other direction concerning the placement of cables in the Territorial Sea. To remedy this situation, the Department recently developed draft administrative rules governing easements for fiber optic cables in the Territorial Sea. As a part of this effort, the Department undertook a survey of the policies of other coastal states.

This presentation discusses the history of oceanic fiber optic cable authorization by the Department; the development of the Department’s administrative rules to guide future cable placement; and the results of the Department’s coastal state survey.

Biographical Sketch

Jeff Kroft is the Senior Policy Specialist at the Oregon Department of State Lands. In this capacity, he develops Department operating policies and procedures, conducts public hearings, prepares administrative rules, and undertakes special projects and research. Much of Jeff’s time over the past several years has been spent on issues associated with navigability, waterway and rangeland leasing, asset management planning, and the granting of easements on state-owned land. During his 11 years with the Department, Jeff has also held the positions of Manager, Policy Development, and Manager, Mineral Resources and Waterway Leasing.

Jeff joined the Department after working 15 years in the mining industry. He was previously Manager, Market Research and Special Projects with BHP Minerals, an international mining company, and before that, Principal Minerals Economist with Dames & Moore.

Jeff received his Ph.D. in Mineral Economics-Applied Earth Sciences from Stanford University, and both a M.S. in Economic Geology, and B.A. in Geology and Political Science from the University of Washington.

Jeff has published numerous articles on geopolitics and international mineral supply-demand. He is a Fellow in the Society of Economic Geologists, and has held many offices in professional organizations.