

# MEMORANDUM

# State of Alaska

Department of Transportation & Public Facilities

TO: Bob Phillips  
Appraisal Supervisor  
Northern Region

DATE: June 20, 1988

FILE NO:

TELEPHONE NO: 474-2417

FROM: John F. Bennett *JFB*  
Engineering Supervisor  
Northern Region

SUBJECT: Project No. RS-130(27)  
Nome-Council 32-42  
Response to Title and  
Engineering Questions

I have reviewed the memo by Sig and Chuck of June 15, 1988 regarding questions brought about by their inspection of the project and have the following comments:

1. Items #1 and #2 question the ownership status of parcels which may be subject to tidal action and parcels adjoining the Solomon River.
  - A. Alaska Administrative Code 11 AAC 62 provides that "All tide and contiguous submerged lands within the boundaries of the State of Alaska. . .from the mean high water line and seaward three geographic miles from the mean low water line. . .are vested in the State of Alaska."
  - B. Alaska Supreme Court Ruling - State Department of Natural Resources v. Pankratz 1975 - The boundary between public and private ownership along navigable waters is the ordinary high water mark. (See attached references for detailed definitions.)
  - C. It is clear that the State of Alaska would own "Tidelands" and lands beneath "navigable" bodies of water as defined by the "ordinary high water line." What is not clear is where the "mean high water line" is located for tidelands within this project, where the "ordinary high water line" is located for navigable rivers and which rivers are to be considered "navigable".

The issue of navigability is a subject of some dispute between the State of Alaska and the Bureau of Land Management. With respect to the Solomon River, the State of Alaska has indicated by virtue of their Draft "Northwest Easement Atlas, Nome Area", submitted to our office for review on April 1, 1988, that they consider the Solomon River to fall under the classification of "State navigable waters". BLM, however, does not appear to consider the Solomon River navigable due to their lack of a reservation for it in the Interim Conveyance Numbers 696, 697, 867 and 868 to Solomon Native Corporation and Bering Straits Native Corporation. The State of Alaska acknowledges the ambiguity of the issue by their statement on the attached page 5 of

their May 1987 paper titled "Ownership and Management of Navigable and Public Waters." The statement reads as follows: "Finally, administrative navigability determinations made by the State or the Federal Government are subject to legal challenge, since only the courts can authoritatively determine title to submerged lands." Once the question of whether tidelands or navigable rivers exist is resolved, their boundaries must be located. This location is made by field observation and survey. The prior Right of Way Engineering Supervisor and the Location Field Supervisor apparently did not consider the Solomon River to be navigable nor did they consider the tidelands issue to affect the project. The plans for this project were developed primarily by the prior engineering staff with the current staff's involvement limited to revisions. The location of the Solomon River as graphically depicted on the plans is based upon aerial photography and is marginally useful for determining the location of the ordinary high water line.

D. In order to answer your question with respect to parcels subject to tidal action or navigable waters, the following must be considered:

1. Right of Way Engineering does not currently have available information which would allow us to determine the existence of navigable waters or tidelands within this project.

2. If tidelands and navigable waters did exist, Right of Way Engineering does not have sufficient information available to make a valid location of their boundaries and compute the size of their takes.

3. A cost/benefit analysis by management should be made to determine whether this information should be pursued at this time. The amount of field and office time required to consider these issues and revise the title and plans may well outweigh the cost of compensation for land which may or may not be owned by the State. More important is that a revision of this magnitude would guarantee the delay of this project until the next construction season.

2. Item #3 comments on the existing Right of Way of the Nome-Council road particularly through the community of Solomon. The question is why does the right of way, defined by PLO as 100 feet each side of the existing centerline, not follow the sinuosities of the existing centerline as shown on the plans? Please note that the existing road through this project was not field as-built nor was it mathematically defined in order to segregate it from the take areas. It's location is graphical only and based upon project aerial photos. The prior right of way engineer under whom these plans were developed took it as his prerogative to define segments of the winding existing road as "best fit" curves and tangents. You will note that this is the case throughout the project. While the definition of an existing feature such as the road is always subject to a certain amount of interpretation, it is unclear exactly how much latitude is to be given to professional judgment and what will be defensible if an objection is raised. It must be pointed out again, however, that any decisions to revise the existing plans to conform with newer interpretations of procedures should be weighed carefully against the cost of a project delay.

3. Items 4, 5 and 6 refer to structures or features noted during the field inspection but not shown on the plans. We will look into obtaining information which will allow us to locate these on our plans. If none is available we will request Sig and Chuck to graphically locate these features on the plan as accurately as possible.
4. Item #7 refers to the common ownership of Parcel 9 and Parcel 4. This is correct and we will show the line separating the parcels on Sheets 15 and 19 with contiguous ownership property hooks and remove the property line symbols.

I realize that I've managed to answer most of your questions with more questions, but the bottom line is that these plans were prepared based upon the judgment and interpretation by the previous engineering staff and to modify the interpretations and revise the plans accordingly now would eliminate any chance of maintaining the current construction schedule.

jap

Attachments: as stated