MEMORANDUM

State of Alaska

#28.8

TO Keith Morberg
Chief
Highway Design & Construction
DOT/PF, Central Region

DATE: July 29, 1983

FILE NO

TELEPHONE NO:

FROM Norman C. Gorsuch
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SUBJECT: Decisional documents in connection with the Declaration of Taking.

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As you are aware, the Supreme Court on its own motion has requested briefing on the question of whether DOT/PF and other agencies should prepare a decisional document prior to the filing of a Declaration of Taking. A decisional document is a written document that reflects the facts and reasons relied upon by the agency when it exercises its discretionary authority. Here the decisional document is required to support the determination that the taking will provide for the greatest public good and the least private injury. It should indicate why the project is needed, what alternatives were investigated, the Department's assessment of the impact upon the landowner, and those factors and reasons which entered into the agency's deliberations. In Federal Aid projects much of this documentation may be present and may be incorporated by reference.

This memorandum is to advise you that as a result of my research, it is my opinion that the court is very likely to require a decisional document to support future Declarations of Taking. At a minimum, they will almost to a certainty require there be a written record that reveals the basis for the decision to condemn. See, Moore v. State, 553 P.2d 8, 36 (Alaska 1976).

I will discuss the case-law that support this position below. However, all should be on notice that if any condemnations are to be filed in the near future, especially where timing of possession is critical to the timely inception of the project construction, a decisional document should be prepared to avoid likely litigation delay.

In Mobil Oil Corporation v. Local Boundary Commission, 518 P.2d 92, 97 (Alaska 1974), the court rejected an argument that a non-statutory duty to make written findings of fact should

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be imposed on the local boundary commission. However, they noted that

> in the usual case findings of fact would be required even in the absence of a statutory duty in order to facilitate judicial review, insure careful administrative deliberation, assist the parties in preparing for review and restrain agencies within the bounds of their jurisdiction. See 2 K.Davis, Administrative Law Treatise §1605 at 446-48 (1958).

Id. at 97 n. 11. Finding the standard of review to be whether the agency action had a reasonable basis, the court stated the agency action would be supported if the record discloses a reasonable basis for the agency action. Id. at 99.

In Moore v. State, 553 P.2d 8 (Alaska 1976), the court referred once again to the "in the record" language of Mobil Oil Corporation v. Local Boundary Commission. In a challenge to a DNR determination to sell oil and gas leases in Kachemak Bay, the issue was whether the agency had properly determined that the sale would best serve the interest of the State. The best interest of the state standard was imposed by statute, but there existed no statutory duty to make findings. The court did not impose a decisional document requirement, however, it again reiterated that a record must be established to disclose the basis for the decision.

It is my opinion that this requirement to establish a record is extremely likely to be extended to Declarations of Taking. This is especially so given that the court is presently going beyond Moore and Mobil Oil in requiring more than an adequate record i.e., the decisional documents. Thus you should ensure that documentation exists in your files to support the ultimate decision to condemn. It is not enough to say that such documents as exist may be supplemented at an A&N hearing by oral testimony. Courts tend to view such testimony as a "post-hoc" rationalization:

> Moreover there is an administrative record that allows the full prompt review of the Secretary's action that is sought without additional delay which would result from having a remand to the Secretary.
>
> That administrative record is not, however, before us. The lower courts based their

> review on the litigation affidavits that were presented. The affidavits were merely "post hoc" rationalizations, ... which have traditionally been found to be an inadequate basis for review ....

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419, 91 S.Ct. 814, 825 (1971).

Although some supplementation of the record may be allowed, it is fair to say that the major factors relied upon should be referred to and identified in the record prior to condemnation. cf. State v. Cooper, 613 P.2d 829 (Alaska 1980) (all important factors must be considered).

Subsequent to Moore, the court has become more aggressive in requiring decisional statements. In Kenai Peninsula Borough v. Ryherd, 628 P.2d 557, 562 (Alaska 1981) the court stated that although courts were more hesitant to require a statement of reasons in the Moore situation, i.e., informal agency discretionary decision-making, the requirement of written reasons for formal adjudicatory action was clearly required even in the absence of a statutory duty. There the assembly sat in review of a subdivision plat submittal. Formal adjudicatory action basically refers to those situations where the interests of an identified individual or individuals is determined. Informal agency action would extend to general policy decisions entrusted to agency discretion generally subject to reasonable basis review.

Subsequent to Ryherd, the court has indicated its willingness to go further and require decisional documents for even informal agency action. In Hammond v. North Slope Borough, 645 P.2d 750 (Alaska 1982) (the Beaufort Sea case) the court reviewed whether the DNR leasing sale comported with standards imposed by the Alaska Coastal Management Act (ACMA). There the Commissioner noted in a "conclusory" manner that the sale was consistent with the AMCA. The court remanded the issue to the Commissioner to make specific findings. Id. at 762. Explaining this rationale, the court stated:

> In order for a court to review the consistency "finding" of the Commissioner required by the ACMP, the Commissioner must at a minimum establish a record which reflects the basis for his decision. Moore v. State, 553 P.2d 8, 36 (Alaska 1976). The plaintiffs argue that the Commissioner must not only establish such a record, but must also submit

adequate written findings and reasons explaining his consistency determination in order to facilitate the process of judicial review.

Courts have frequently required findings and reasons to be provided by administrative agencies for formal proceedings which are judicially reviewable. These findings and reasons have been required on the common law basis of needs of judicial review. 3 K. Davis, Administrative Law Treatise §14.22 at 104 (2d ed. 1980). As stated by the United States Supreme Court "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." Secretary of Agriculture v. United States, 347 U.S. 645, 654, 74 S.Ct. 826, 832 98 L.Ed. 1015 (1954) (quoting United States v. Chicago M., St. P. & P.R. Co., 294 U.S. 499, 511, 55 S.Ct. 462, 467, 79 L.Ed. 1023 (1935); accord, S.E.C. v. Chenery Corp., 318 U.S. 80, 94, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943). However, the courts have been more hesitant in requiring findings and reasons to support informal administrative actions absent an express statutory requirement. Moore v. State, 553 P.2d 8 (Alaska 1976) and Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971) are two cases which illustrate this hesitancy. Both decisions stop short of requiring findings and reasons to be articulated by the decisionmaker. Moore v. State, 553 P.2d at 36; Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 417, 91 S.Ct. at 824, 28 L.Ed.2d. at 154. Moore, however, does require "a record which reflects the basis for [the administrator's] decision." 553 P.2d at 36 (emphasis added) (footnote omitted). If the reviewing court cannot divine the basis for the decision from a bulky record, this language clearly leaves the door open for the requiring of findings under common law as a basis for reviewability. See, Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 91, 97 n. 11 (Alaska 1974).

Id at 762 n. 7 (emphasis added).

Finally, in Southeast Alaska Conservation Council, Inc. v. State of Alaska, __ P.2d ___ Op. No. 5855 (Alaska April 29, 1983) (SEACC), the court again reiterated the reasons why a decisional document should be required by the courts:

> "It facilitates judicial review by demonstrating those factors which were considered. It tends to ensure careful and reasoned administrative deliberation. It assists interested parties in determining whether to seek judicial review. And it tends to restrain agencies from acting beyond the bounds of their jurisdiction.

Id. at 12 (citations and footnote omitted. In SEACC a decisional document had been prepared. Although the court criticized it as sparse, it instructed the court to focus on the decisional document and if it is inadequate, to remand for supplementation. Id. at 13.

This development is not necessarily all negative. It is clear that the court will be prepared to insist on deferential reasonable basis review if a fair effort at preparing a decisional document is made. Thus such a requirement may mark a desire to depart from the extreme close scrutiny employed by the court in State v. Hodges, __ P.2d __ Op. No. 2575 (Alaska Oct. 15, 1982).

In conclusion, you should be aware that in future condemnations a record of decision will be required and that a decisional document will probably be required. Preventative measures taken now will avoid delays later.

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