

## John F. Bennett

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To: ethan\_birkholz@dot.state.ak.us; SHARI HOWARD  
Subject: RE: Noorvik OHW question

Ethan, I think you gave a very good answer. The answers vary from conservative interpretation to liberal interpretations depending on whether you're the upland owner or the water owner (State of Alaska). From the State's (DNR's) policy manual: "According to the Alaska Supreme Court, the ordinary high water mark is a natural physical characteristic placed upon the lands by the action of the water. It is not a highly technical boundary requiring a surveyor to locate. It has been defined as the mark along the bank or shore where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to leave a natural line impressed on the bank or shore. That line may be indicated by erosion, shelving, changes in soil characteristics, destruction of terrestrial vegetation, or other distinctive physical characteristics. (See State Department of Natural Resources v. Pankratz, 1975) The same question often arises in the case of wide, braided streams. A braided stream is simply a river with numerous channels that are constantly changing. Thus, the test for determining they boundary is the same. Is the area so regularly covered with water as to deprive it of terrestrial vegetation? If so, it is considered part of the bed of the stream and is subject to the public rights of use. On the other hand, if upland vegetation has taken hold, the area should be considered part of the adjacent uplands or, if isolated, an island. Islands are not part of the riverbed and, if privately owned, are not subject to the same public rights. However, newly formed islands belong to the owner of the river bed."

> -----Original Message-----

> From: Ethan Birkholz [mailto:ethan\_birkholz@dot.state.ak.us]

> Sent: Thursday, July 09, 1998 3:45 PM

> To: SHARI HOWARD; JOHN BENNETT

> Subject: Noorvik OHW question

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>

> Blaine Galleher the P.E. at Noorvik asked a question concerning the

> contractor continuing to mine MS3 on the beach.

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> I answered back based on my discussions with the habitat biologist

> from anchorage when I was in marshall looking at similar beach sites.

>

> Please verify that what I said was true or let Blaine know what the

> legal answer is and copy me.

>

> Thanks

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> Blaines Q:

>

> "I was hoping that one or both of you could

> enlighten me as to the legal definition of

> "ordinary" as it's used in the term "ordinary

> high water". I ask because KIC has expressed

> interest in returning to material site #3 on

> the river bank and attempting further mining

> there during the summer. When asked how he

> proposed to do this, he said he would expand

> the pit to the east (towards the dump). I

> submitted that this would be beyond the

> ordinary high water line, but it's his

> interpretation that this includes seasonal

> floods that extend past the dump, clear up to

> the small bluff beyond.

>

> Obviously this needs to be clarified, because

> I'm sure that further permitting and royalty

> agreements would be required if OHW is

> exceeded. HELP!"

>

> My answer:

>

> Ordinary high water is usually pretty easy to identify. Permanent

> vegetation along the beach such as willows or brush are a good

> indication. If there is a bit of grass or a few spindly twigs of

> willow sticking up these aren't really OHW. look for a definite break

> of vegetative growth were the sandbar quits and brush is growing. I

> would try and get a village corporation representative to agree on the

- > break if one is handy or get photos to show. If it isn't that obvious
- > or you can't agree we could get someone there to make a command
- > decision.
- >
- > If I remember the pit was pretty close to the edge of brush already
- > wasn't it?
- >
- >
- > Seasonal flooding doesn't count. we are talking ordinary high water
- > not occasional high water. The dump is a fair ways beyond OHW. in fact
- > that slough or trail adjacent to the pit is above OHW. Where they wer
- > parking equipment along the edge of the pit parallel to the beach, if
- > my memory serveas me was pretty close to OHW. They really shouldn't
- > even be parking equipment above OHW (exept on public roads) without
- > agreement with the village corporation.
- >