IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

EVELYNN C. FOSTER,

Plaintiff,

vs.

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION,

Defendant.

Case No. 3AN-99-8850 CI

ORDER

This case pits the interests of the State of Alaska in maintaining its major north-south highway against an individual who received an allotment of land which contains part of that highway. The question before this court is whether this problem should be in this court, or in the federal courts.

In 1961, Alaska received two interests which conflict with plaintiff's interests: a right-of-way from the Bureau of Land Management for the Parks Highway and a material site. In 1968, the state amended its right-of-way application and in 1969 the Bureau of Land Management approved the modification which altered the location of the right-of-way. In 1971, the plaintiff filed an allotment application with the Bureau of Land Management and it was approved without making it subject to the 1969 modification. Foster had entered the land in 1964. Because the Bureau of Land Management interprets the entry to be the initiation of the interest, plaintiff's allotment is subject to the 1961 right-of-way and material site, but not the 1969 modification. Unfortunately for the parties, the highway is built on the 1969

modification.

The state argues that this court should dismiss the case for lack of jurisdiction over ownership conflicts to Native Allotment Land and for inability of the court to require the presence of an indispensable party, the United States.

The plaintiff opposes the state's effort to dismiss the action, and seeks summary judgment, arguing that this court should give full faith and credit to the Bureau of Land Management's administrative appeal decision affirming that the plaintiff's allotment was not subject to the right-of-way grant of 1969. The plaintiff concludes that, with such treatment, the United States is not a necessary party and the court can proceed to find the trespass has and is occurring and order the state to file a condemnation action in the federal court. The trespass damages action would remain in the state court. This suggested resolution recognizes that a permanent solution requires at least part of the case to be in federal court.

The state expresses its intention to defend the trespass count by relying on the authority granted to utilize the material site. Because the 1969 right-of-way appears to be entirely within the material site to which the allotment is subject, and because only the United States may object to that use (or misuse) of the material site, the state argues that the court must dismiss for lack of jurisdiction over a necessary party, again, the United States.

The court adopts the state's arguments as they relate to the

limit of this court's jurisdiction to hear disputes of ownership of native allotments or of use of any material sites to which they are subject. Only the United States may challenge the use of the material site, and only the federal court can require the federal government's presence.

While this court lacks jurisdiction to resolve the dispute over the use of the material site, this is a situation that cries out for a resolution. The focus of this litigation is the Parks Highway. The plaintiff considers the highway a trespass upon her land while the state maintains vehemently that the highway's current position is both legitimate and of vital importance.

The court suggests a resolution to the parties that may enhance both of their interests while avoiding further litigation in federal court. While the plaintiff's allotment was granted subject to the 1961 material site, it may be that the state has no further need for the site aside from the actual location of the Parks Highway. The court suggests the parties obtain approval of the Secretary of Interior to swap their interests. The plaintiff could relinquish her challenge to the location of the Parks Highway in exchange for the state's abandoning its interest in the 1961 material site and, for that matter, the earlier approved right-of-way to which the allotment is subject. An appropriate application to the Bureau of Land Management could accomplish this goal.

This compromise would enhance both the plaintiff's and the state's interests while furthering several federal policies.

Relinquishing the material site, with the exception of the Parks Highway, and the 1961 right-of-way would restore several acres to the plaintiff's control where previously her allotment was held subject to the 64-acre plot and the 1961 right-of-way. By increasing the plaintiff's rights to her allotment, the original purpose of the Native Allotment Act is achieved. Not only may the plaintiff's land be put to more constructive use, but also with the Secretary's approval the United States insures that its duty to protect the allottee's interest has been fulfilled. Resolving the parties' competing claims by compromise is in harmony with and accomplishes federal trust responsibility.

The state's motion to dismiss is **GRANTED.**

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 17th day of March, 2000.

PETER A. MICHALSKI
Superior Court Judge

I certify that on:
3-17-00
a copy of the above was mailed to each of the following at their addresses of record.
R. Weinig
AG-Athens
Secretary/Clerk

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES
OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

3132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

TEXT: (907) 465-3652
FAX: (907) 586-8365
PHONE: (907) 465-3900

January 8, 1998

	CHIEF R/W AGENT	
	PRE AUDIT	
✓	ENGINEERING	
	APPRAISALS	
✓	NEGOTIATIONS	
	Relocation/Prop. Mgmt.	
	UTILITIES	
CC	JOHNSEN	
	RETURN TO:	
✓	FILE	

Mr. Arthur J. Lake
Tribal Administrator
Native Village of Kwigillingok
Kwigillingok I.R.A. Council
PO Box 49
Kwigillingok AK 99622

Dear Mr. Lake:

We are in receipt of your December 22, 1997 letter regarding a meeting on October 21, 1997 with the undersigned and other departmental staff. The Commissioner asked that I respond to your letter as you have requested.

First, I am sorry if I left you with the impression that we would have specific answers to very difficult leasing issues discussed at our meeting within a two week period. It was never my expectation that resolutions of those issues facing the Kwigillingok Airport Reconstruction project could be obtained in that short period of time.

I do recall committing to an update of activities within several weeks of our meeting and that has not taken place. It turns out that there was nothing of any importance I could have reported. Nonetheless, I sincerely apologize for the delay, and in any event, I should have gotten back. I might add that it has not been for lack of effort on the issue. Since the meeting we have worked diligently to better understand the State's requirement for Sovereign Immunity regarding airport leases. I made it a point to become personally involved to insure the department's position is both reasonable and consistent with other State agencies.

Our research disclosed ~~that, at least~~ since the early 1980's, the State has required an express and unequivocal waiver of sovereign immunity from a native entity when the two have entered into a contractual relationship. Department of Community and Regional Affairs (DCRA), requires a waiver of sovereign immunity for unincorporated community grants, rural development grants and State Revenue Sharing. The Department of Environmental Conservation (DEC) requires a similar waiver for Village Safe Water grants.

As a matter of record Kwigillingok has specifically and recently waived your sovereign immunity for several other state services. You've waived such rights with DCRA to obtain funding from the State Revenue Sharing program; you've waived such rights with DCRA to obtain funding from the Community Project Matching Grant program; and, you've done so with DEC for a grant from the Village Safe Water program.

Having reviewed the above criteria and discussed the matter at length with other departments as well as the Attorney General's Office, I have concluded that our earlier request for a waiver of sovereign immunity from the Native Village of Kwigillingok is both reasonable and consistent with past practices. It, therefore, remains a prerequisite for any long term lease we may develop regarding the Kwigillingok Airport Reconstruction Project.

The department remains prepared to jointly draft a long term lease given assurances from the Village to waive sovereign immunity. We would further agree that such a waiver would relate solely to and prevail only during the term of the lease.

Please contact me if you have any questions or wish to proceed with this issue.

Sincerely,

Boyd J. Brownfield, P.E.
Deputy Commissioner

cc: Regional Directors
Paul Bowers, Director, Statewide Aviation
Barbara Ritchie, Deputy Attorney General

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DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES
OFFICE OF THE COMMISSIONER

December 11, 1997

	CHIEF R/W AGENT
	PRE AUDIT
✓	ENGINEERING
	APPRAISALS
✓	NEGOTIATIONS
	Relocation/Prop. Mgmt.
	UTILITIES
CC	
	RETURN TO
✓	FILE

Mr. Perry Ahsogeak
Director
Tanana Chiefs Conference, Inc.
122 First Avenue, Suite #600
Fairbanks, AK 99701-4897

Dear Mr. Ahsogeak:

I appreciate your letter of November 11 and apologize for the delayed response. As your letter notes, we are diligently working on a similar issue which, if successful, may well form the basis for other agreements. For example, finding dependable local workers through a Project Labor Agreement is presently under review and should be of particular interest to Stevens Village.

Unfortunately there is no quick way to resolve such issues. I can only tell you that we are working on them diligently. In this regard, I recognize your sense of urgency and I commit to working with your representatives as soon as those important issues are resolved.

It is important that Steven's Village understands some of the other hard issues facing any future agreement. The state feels it is very important that any long term agreement include a means of compliance acceptable to both parties. At the present time the department feels that at least a waiver of sovereign immunity is essential. Absent such a provision, the agreement is unenforceable. It is interesting to note that a limited waiver of sovereign immunity is not new. It has been routinely used for several years in many agreements between the state and native entities. In our view such a waiver would be valid only during the life of the lease and pertain solely to the lease.

While we are presently not prepared to commit to a specific date, you will be contacted as soon as practical. In the meantime, I would ask that you give the issue of limited waiver of sovereign immunity or an equivalent more thorough consideration.

Please contact me or Deputy Commissioner Boyd Brownfield if you have any questions.

Sincerely,

Joseph L. Perkins, P.E.
Commissioner

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Northern Region

To: Boyd J. Brownfield, P.E.
Deputy Commissioner

Date: February 28, 1997

File No.:

Tel No.: 451-5423

From: John A. Miller, P.E., Chair
Statewide Right of Way Committee

Subject: Airport Leases from Tribal Governments

For several years we in Right of Way have been working with **Native Village Councils** to **lease** land for airport development projects. In the Central Region, draft leases have been proposed to the tribal governments of Kwigillingok, Kongiganak and Goodnews Bay. The Village Corporations desire to convey their land to the tribal governments in these cases, and the tribal governments, in turn, seem to be willing to lease the land to the Department for various airport projects. Tribal governments enjoy immunity from suit, including condemnation actions, unless the immunity is expressly and clearly waived by the Tribe.

The consensus of the Statewide Right of Way Committee is that:

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- state control of the maintenance, operation and subleasing activities on the airport is essential in order to conform to federal grant requirements; and

- we should not undertake appreciably greater risks and management burdens by entering into leases with tribal governments rather than acquiring airport land in fee.

Our experience thus far has been that tribal governments perceive the lease as a mechanism of **control** rather than merely an alternative to conveyance of title to Native land. At Goodnews Bay, for example, the council proposed that no land be available to the Department for airport subleasing activity. In addition, even where the terms of a lease ostensibly give us control, we need to be able to enforce those provisions in the event of a breach of the lease by the landlord (Tribe). Waiver of sovereign immunity and consent to condemnation of the leasehold are extremely important to us as available remedies. At Kwigillingok the tribal government was offered a lease provision which would enable the Department to use condemnation "as a last resort". Under this provision, the Department would be forced to go to court to get a decision that previous actions by the landlord in breaching the lease were so onerous that the only way to continue to operate the airport would be for the state to condemn the land. We would, in essence, have had to go to court, and prevail, in order to be able to go to court.

The Statewide Right of Way Committee believes that provisions like the one offered to Kwigillingok regarding condemnation go too far in trying to accommodate the wishes of tribal governments. Kwigillingok, by the way, responded to Central Region's offer by saying that any power of condemnation, even as a last resort, was unacceptable, and has written a letter to the Governor to that effect.

In trying to negotiate these leases, we have expended staff and attorney time far in excess of what is ordinary. These efforts have not resulted in a single negotiated lease. We, the Statewide Right of Way Committee, feels that it is important to retain the control necessary to build, operate, maintain and manage our airports and to that end, we respectfully request the support of the Commissioner's office and the Governor's office to achieve that goal for all users of our multimodal transportation system.

cc: Kurt Parkan
Sam Kito III
John Steiner, AGO

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To Rose M-Greenblatt	From P. Lyle
Co.	Co.
Dept.	Phone #
Fax #	Fax #

State of Alaska
Department of Law

TO: Rose Martell-Greenblatt
Right-of-Way
DOT/PF, Northern Region

DATE: February 26, 1996

FILE NO: 225-95-0095

TEL. NO.: 451-2811

FROM: Paul R. Lyle
Assistant Attorney General

SUBJECT: IBLA decision in *State of Alaska (Heirs of Willie Takak)*, 135 IBLA 1 (1996).

CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

Enclosed is a copy of the IBLA's decision in the above-referenced case. There is good news and bad news in the decision.

The bad news is:

1. The IBLA affirmed BLM's decision to reinstate the Takak allotment application. Thus, the cloud on DOT&PF's title to the access road remains in effect.
2. The IBLA ruled that equitable considerations of laches and estoppel have no place in BLM's decision to reinstate an allotment application.

The good news is:

1. The IBLA agreed that it has jurisdiction to review BLM decisions reinstating allotment applications because the reinstatement decisions do not adjudicate rights in land that has been conveyed out of federal ownership. This establishes our right to appeal in the future in appropriate cases.
2. The State may raise the equitable defenses of estoppel and laches in any adjudication of Willie Takak's allotment application after it is reinstated.
3. The BLM was wrong when it determined that the allotment was legislatively approved in its March 3, 1995

decision. The allotment must be adjudicated because Alaska filed a timely protest in 1981.

This IBLA decision may not be considered a final decision under the federal Administrative Procedures Act (APA). I have not had the time to review the law with regard to whether we can appeal. However, assuming it is a final decision under the APA, we should be able to appeal without worrying about sovereign immunity. Since the land has been conveyed out of federal ownership and no allotment approval decision exists, there can be no valid claim of sovereign immunity under the Indian land exception to the waiver of immunity under the Quiet Title Act, 28 U.S.C. § 2409(a).

I also need to look into whether it would be worth it to appeal on the substance of the IBLA's ruling that equitable considerations can not be taken into account in allotment reinstatement decisions. Please contact me upon your review and the decision so we can discuss our next move.

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IN REPLY REFER TO:

STATE OF ALASKA
(HEIRS OF WILLIE TAKAK)

IBLA 95-295 Decided: February 20, 1996

Appeal of a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application F-02361.

Motion to dismiss denied; decision affirmed.

1. Alaska: Native Allotments—Alaska National Interest Lands Conservation Act: Native Allotments--Applications and Entries: Reinstatement

   The question whether BLM has properly reinstated a Native allotment application is separate and apart from the issue of the Department's ability to transfer the lands described in the application. The Department has jurisdiction to address issues concerning reinstatement even though the lands described in the application have been congressionally conveyed. If an application was initially terminated or rejected because its averments were facially insufficient as a matter of law, reinstatement is not appropriate absent clear evidence demonstrating a significant error in the application.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments—Estoppel--Laches

   The doctrines of estoppel and laches originate in equity rather than law and may be appropriately raised in a proceeding to determine whether a Native holds rights under an allotment application. However, they are not a proper basis for denying reinstatement of the application for review on the merits.

APPEARANCES: Paul R. Lyle, Esq., Office of the Attorney General, Fairbanks, Alaska, for the State of Alaska; Regina L. Sleater, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

IBLA 95-295

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The State of Alaska has appealed a February 10, 1995, decision by the Alaska State Office, Bureau of Land Management (BLM), reinstating Native allotment application F-02361, filed by Willie Takak. BLM has filed a motion to dismiss the appeal or, in the alternative, extend the time for filing an answer to the statement of reasons.

BLM contends that the Department does not have jurisdiction over the land subject to the application because the surface was conveyed to the Shaktoolik Native Corporation and the subsurface to the Bering Straits Native Corporation (BLM Motion at 1). BLM argues that it "is merely conducting an investigation to determine whether or not it is appropriate to seek to recover title to the land in question" and, until it does, "an appeal is not ripe and must be dismissed." Id. at 2. BLM relies upon State of Alaska, 127 IBLA 276 (1993), and Bay View, Inc., 126 IBLA 281 (1993).

Appellant opposes the motion to dismiss, contending that its appeal does not concern an adjudication of title to the land but collateral issues pertaining to reinstatement of the application (Opposition to Motion to Dismiss at 2-3). In particular, the State argues that it "challenges Takak's right to seek reinstatement under the doctrines of estoppel and laches and further challenges BLM's decision to reinstate the application without first considering whether these doctrines should be applied to deny reinstatement." Id. at 2.

The State cites Kootznoowoo, Inc. v. Johnson, 109 IBLA 128, 134 (1989), aff'd sub nom. Kootznoowoo, Inc. v. Spang, Civ. No. A91-254 (D. Alaska Dec. 23, 1992), aff'd, 33 F.3d 59 (9th Cir. 1994) (table), and Matilda Titus, 92 IBLA 340 (1986), in support of its claim that the Department has jurisdiction to decide such collateral issues. It distinguishes Bay View, Inc. and State of Alaska as appeals from BLM's acceptance of amended land descriptions which involved issues of Native use and occupancy. Id. at 1-2. The State contends that the decision to reinstate Takak's application is not an adjudication of title, but a final BLM decision, which is properly subject to appeal. Id. at 2-3.

The record on appeal shows that Willie Takak filed his Native allotment application on April 24, 1959. The record also indicates that by notice dated October 30, 1964, BLM informed him of the date evidence of substantially continuous use and occupancy of the land would be due. No evidence was submitted, and BLM terminated Takak's application by a decision dated May 18, 1965, and closed the file. However, the record does not show that Takak received either the notice or the decision.

On June 1, 1981, the State filed a protest of the conveyances to the Native corporations under sections 905(a)(5) and 1328 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 98-487, 94 Stat.

2371 (1980), codified at 16 U.S.C. § 3215 (1994) and 43 U.S.C. § 1634 (1988), asserting that the land was used for an existing trail. The land Takak had applied for was included in interim conveyances made to the Shaktoolik Native Corporation and to the Bering Straits Native Corporation on September 26, 1983.

Following the resolution of Mary Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985), Takak filed an affidavit attesting to his use and occupancy of the land and requested reinstatement of his application. Letters from BLM to the State of Alaska dated January 21 and August 19, 1994, state that the application would be reopened in accordance with Heirs of Saul Sockpealuk, 115 IBLA 317 (1990). BLM conducted a field examination on September 7, 1994. By the decision on appeal, BLM reinstated Takak's application because it had been terminated without an opportunity for a hearing, citing Heirs of Edward Peter, 122 IBLA 109, 115 (1992), in support of its decision. BLM also published notice that the application would be processed under the stipulated procedures negotiated by the parties to Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), and approved by the court on February 9, 1983. By letter dated March 3, 1995, BLM informed the Shaktoolik Native Corporation that, under the Aguilar procedures, it had determined the application was legislatively approved, and requested reconveyance of the surface estate as well as the subsurface estate which had been conveyed to it by the Bering Straits Native Corporation. By memorandum also dated March 3, 1995, BLM requested that its hearing officer schedule a hearing to determine rights of bona fide purchasers because the "parcel encompasses half of the town of Shaktoolik and there are approximately 25 to 30 houses sitting on this parcel." In addition to the homeowners or occupants, BLM identified those holding interests in the land as the City of Shaktoolik, the State of Alaska Department of Transportation, and the Bering Straits Regional Housing Authority.

[1] We agree with the State that State of Alaska and Bay View, Inc. do not preclude consideration of the appeal. BLM is correct that the Department cannot adjudicate interests in land to which it does not have title. Bay View, Inc., supra at 287. The matter on appeal is not the adjudication of Takak's right to the allotment (or the State's rights to lands within it). The State has appealed BLM's decision to reinstate Takak's application. This circumstance was not addressed by State of Alaska or Bay View, Inc. As the State notes, both of those decisions concern cases in which BLM accepted amended descriptions of land for allotment applications which were properly before it. Neither addressed reinstatement of a closed Native allotment application. "The question of the validity of the application is separate and apart from the issue of the ability to transfer the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application may have been congressionally conveyed * * *." Kootznoowoo, Inc. v. Johnson, supra at 134.

In accord with Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Olympic v. United States, supra, the decision whether to reinstate a Native allotment application turns on fairly narrow questions. In Heirs of Saul Sockpealuk, supra, relied upon by BLM when it reopened Takak's application, the Board held that BLM had erred when it denied three petitions by the heirs of applicants seeking reinstatement of applications which had been terminated and closed for failure to submit proof of use and occupancy within 6 years. Id. at 321. Following the reasoning of Olympic and State of Alaska, 109 IBLA 339 (1989), the Board ordered the applications reinstated so that they might be approved or adjudicated under Pence. Id. at 324-26. In contrast, if an application has been terminated or rejected because its averments on the face of the application were insufficient as a matter of law, reinstatement is not appropriate, absent clear evidence demonstrating a significant error in the application. Lena Baker Maples, 129 IBLA 167, 170-71 (1994); Franklin Silas, 117 IBLA 358, 364 (1991), (On Judicial Remand), 129 IBLA 15 (1994), aff'd sub nom. Silas v. Babbitt (A93-35 CV (JKS) July 31, 1995 (mem.)); cf. Pence v. Andrus, 586 F.2d 733, 739-40 (9th Cir. 1978) (noting that hearings are not held when applications are rejected as a matter of law). 1/

[2] Takak's application stated: "This land has been used by me and my ancestors for 50 years." The asserted use and occupancy is sufficient to preclude finding the application invalid as a matter of law. See Heirs of Edward Peter, supra. Although the State contends that BLM should be required to first consider its arguments as to estoppel and laches, it overlooks the origin of these doctrines in equity rather than law. While they may be appropriately raised in a proceeding to determine whether Takak holds rights under his application, they are not a proper basis for denying reinstatement of the application for the purpose of review on the merits. See Armstrong v. Maple Leaf Apartments, Ltd., 436 F. Supp. 1125, 1147-50 (D. Okla. 1977), aff'd in part, 622 F.2d 466 (10th Cir. 1979), cert. denied, 449 U.S. 901 (1980); Evelyn Alexander, 45 IBLA 28, 36 (1980). We conclude that BLM correctly determined that Takak's application should be reinstated.

Our review of the record, however, reveals that BLM has erred in ascertaining the status of the application. The Native Allotment Act, 34 Stat. 197 (1906), codified as amended at 43 U.S.C. §§ 270-1 through

1/ BLM's citation of Heirs of Edward Peter, supra, in the decision on appeal appears to have been based upon its interpretation of Heirs of Saul Sockpealuk. Edward Peter rejected an argument that a Native allotment application should be reinstated, finding that it had been properly terminated as a matter of law because it did not assert on its face 5 years of use and occupancy and further evidence had not been provided. Heirs of Edward Peter, supra at 115. It relied upon Franklin Silas, supra, in ruling that "no hearing is required by Pence where termination of an allotment application occurred as a matter of law * * *." Heirs of Edward Peter, supra at 115.

270-3 (1970), was repealed by section 18 of the Alaska Native Claims Settlement Act, P.L. 92-203, 85 Stat. 688, 710 (1971), codified at 43 U.S.C. § 1617 (1988). Subsequently, ANILCA provided for legislative approval of pending applications except in circumstances identified in the statute. Among the exceptions, subsection (a)(5) provides that an application is not approved and shall be adjudicated under the Native Allotment Act if:

> The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist * * *.

43 U.S.C. § 1634(a)(5)(B) (1988). As noted above, the State filed its protest on June 1, 1981. 2/ Accordingly, Takak's application was not legislatively approved and must be adjudicated in accordance with established procedures. State of Alaska (Heirs of Lucy Charlie), 126 IBLA 204, 208 (1993); State of Alaska (Harvey Pootoogooluk), 121 IBLA 363, 367-68 (1991); State of Alaska (Molly Tocktoo), supra at 3, 6 (1991). The statement in BLM's March 3, 1995, letter to the Shaktoolik Native Corporation was erroneous.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's motion to dismiss the appeal is denied and the February 10, 1995, decision of the Alaska State Office reinstating Native allotment application F-02361 is affirmed.

R. W. Mullen
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

2/ The filing was timely, as May 31, 1981, was a Sunday. See Kootznoowoo, Inc. v. Johnson, supra at 131 n.3, citing State of Alaska, 95 IBLA 196, 198 n.2 (1987); see State of Alaska (Molly Tocktoo), 118 IBLA 1, 2 (1991) (protest filed June 1, 1981).

TONY KNOWLES, GOVERNOR

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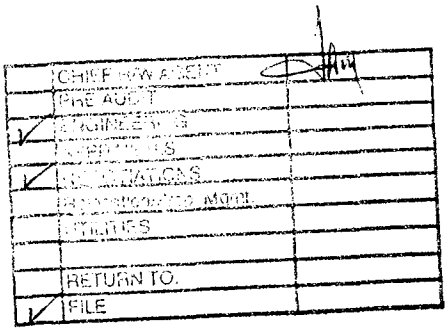
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

December 5, 1995



Mr. Randy Mayo
Native Village of Stevens
General Delivery
Stevens Village, AK 99774

Dear Mr. Mayo:

This letter is being sent in response to your letter dated May 20, 1995. I apologize for the delay in responding, we have been working through many issues which relate to our airport program and still have many issues to resolve, but this response should bring us one step closer to the Stevens Village airport project. Our Statewide aviation group has reviewed the village's request for co-sponsorship with the state for the construction of the Stevens Village airport. Following are comments on the proposal and a review of the situation as it appears to the Department of Transportation and Public Facilities.

You stated that the major issues from the perspective of Stevens Village are:

- Assurance that local people within the community have an opportunity to work on the project; and
- Minimize the potential impact of outside influence on the subsequent utilization of the airport.

1. **Local Hire:** At this time, some effective methods for the state to legally increase local hire are to perform the project on a force account basis or through project labor agreements.

   The key to administering a force account project is compliance with Federal requirements, active project management and a positive working relationship between DOT&PF and a village. There is a practical limit on the size of a force account project. It may sometimes be possible to divide portions of a project out in order to provide a smaller more manageable project. However, the Stevens Village airport is too large for the Force Account method to be practical.

   In a co-sponsorship role, DOT&PF and Stevens Village would both be responsible for complying with the provisions of the Davis-Bacon Act, Federal Fair Labor Standards Act, Civil Rights Act, Equal Employment Opportunity, 49 CFR Part 21 and other requirements. Because of the requirements, it does not appear that Stevens Village would be able to increase local hire by exercising this option.

The options available for providing local hire in a competitive bid construction project include the following:

- Stevens Village can negotiate a project labor agreement with the unions supplying the project workforce and the Associated General Contractors. The agreement could potentially include provisions for hiring based on geographic proximity to the project. Please contact Deputy Commissioner, Ed Flanagan, at the Department of Labor (907-465-2700) for more information on Project Labor Agreements.

- The USDOT has a program entitled "school to work." Through this program, a student in the village school system is chosen by the community to participate. The program will provide for the training of one student prior to the project so that he/she will be able to work on the project. For more information on this program, please contact Kay Rollison with the DOT&PF Civil Rights Office at (907) 762-4267.

2. **Contract Award:** DOT&PF can only use the state procurement system as outlined in AS 36.30. Under AS 36.30.700, DOT&PF could enter into a cooperative purchasing agreement with the village council to procure construction services, if the council qualifies under the law as a "local public procurement unit." AS 36.30.005(b) states that DOT&PF's construction contracting authority must be exercised in accord with the procedures of the procurement code. So it appears as though the village council and DOT&PF could enter into a cooperative procurement agreement for the project; however, all procurements would have to conform to AS 36.30.

3. **Airport Operations/Land Leasing:** If Stevens Village maintains control of the principal source of potential airport revenue (Land Rent), and DOT&PF is still responsible for all other airport operations, then the council will have to transfer all the money earned from land leasing to DOT&PF for use in operating the airport. This is due to FAA grant assurance number 25 which requires that all revenue generated by the airport be "expended....for the capital and operating costs of the airport." The council would not be directly involved in airport operations so the money would have to go to DOT&PF.

We want a project which will benefit Stevens Village and the state. Within the idea of co-sponsorship, Stevens Village and DOT&PF will have to share equally in the responsibility of maintaining and operating the airport as both parties will be liable for any problems with safety and FAA Grant Assurance non-compliance.

According to AS 02.15.120, DOT&PF is authorized to assist others in the construction or improvement of an airport; however, it also requires that any airport that has been constructed or improved with the department's assistance must remain open and accessible for use by the public and be maintained as a public airport. If the state is to participate in any project, we have to insure that it will be a benefit to all of the state's residents. We can help to protect the unique nature of Stevens Village by offering to restrict leasing of property to "aviation use only." We may also be able to limit the number of airport lease lots.

Following is a summary of the possible options which Stevens Village can use to complete the airport project.

1. Stevens Village can sponsor the airport without help from the state. This option would still require compliance with FAA grant assurances.

2. Stevens Village can enter into a co-sponsorship agreement with the state. This option spreads the liability for FAA compliance beyond just DOT&PF while not providing any real benefit to Stevens Village. This option also requires that the project be constructed according to state requirements.

3. DOT&PF can construct the project as planned and in accordance with state statute and FAA grant assurances. DOT&PF can offer to lease airport land for "aviation use only" thereby providing some restriction on the use of airport property. This option is probably the best as far as getting the state and federal government to participate with funding. If the state proceeds with this option, it may be possible for Stevens Village to negotiate a Project Labor Agreement which would get more residents working. Stevens Village can also provide a list of contacts at the village, which could be included with the bid documents. A contact would be a person or persons who would be able to assist the bidding contractors in selecting qualified local personnel for their work-force.

We hope to be able to resolve this issue positively.

If you have any questions on specific items contained within this letter please contact Deputy Commissioner Kurt Parkan at (907) 465-3900.

Sincerely,

Joseph L. Perkins, P.E.
Commissioner

cc: Kurt Parkan; Deputy Commissioner, DOT&PF
Ed Flanagan; Deputy Commissioner, Dept. of Labor
Kay Rollison; DBE/EEO Office, DOT&PF

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Statewide DBE/ExEEO Office

TO: John Horn
Central Region Director

DATE: February 13, 1995

FROM: Margaret Holland
Legislative Liaison, Central Region

SUBJ: Questionnaire - DOL
Native Governance Review

The following response has been prepared to the questionnaire from the Native Governance Review.

(1) Identify all contexts in which DOT&PF is currently working with Tribal and other Native entities. As a general rule, the context within which the Department deals with Tribal and/or other Native entities is in the same manner as it would with any other land owner, contractor, minority organization, or minority individual within the responsibilities and services provided in planning, right-of-way, design and construction, maintenance, employment and special program delivery.

Examples of ADOT&PF dealings with Native entities:

Entities:
Native Corporations
Village Corporations
IRAs
Traditional Tribal Councils
Non-profit arms of Native Corporations
Native Organizations (ANCET, AFN, AVCP...)
Native assistance governmental agencies (BIA, CRA, PHS, DOL...)
Governmental agencies dealings with Native land issues (BLM, DNR, DEC)
Native owned businesses (individuals or corporate subsidiaries) in construction, maintenance, consulting, supply, etc.

Functions/Activities::

Highway/Airport Design or Construction contracts- through advertised bid; Native entities could be ANCSA subsidiaries or businesses owned by Native individuals performing as consultants or contractors (primes, JVs, subcontractors, suppliers, manufacturers).

Airport Maintenance Contracts - through advertised bid; in addition to businesses, successful bidder has been a city or village council who performed the contract work with its own workforce.

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Transportation Services Contracts - through advertised bid; Native owned business could provide service.

Leases - air taxi agreements with Native owned businesses.

Material suppliers - agreements with owners (surface/subsurface ownership issues with more than one Native entity) directly with DOT rather than contractor to provide materials.

Right-of-Way - land ownership relations (surface vs. subsurface ownership, fee simple, allotments) for property purchase, conveyance, relocation; eminent domain issues; relationship would be the same as with any other land owner. However, we are currently discussing proposed projects and land issues with the IRA and Traditional Councils at Kongiganak, Kwigillingok and Goodnews Bay in the Central Region. Although title has not transferred at this time, DOT&PF is being told that the ANCSA Village Corporations of these communities will transfer title in the future. If title to the surface estate of ANCSA lands is conveyed to either an IRA or Traditional Council in the future, DOT&PF will have to acquire a sufficient title interest to satisfy FAA regulations, give DOT&PF the jurisdiction and control over the maintenance and operations of the airport, and ensure uninterrupted public use of the airport by both native and non-native entities.

With respect to Native Allotments/BIA/BIA Contractors/BLM - these lands are conveyed to the allottee pursuant to the Native Allotment Act of 1906. They currently have a restricted status and the BIA acts as a Trustee for the allottee.

Planning - public interest input as with any other ethnic or public group/individual.

Civil Rights - Title VI requires the Department to monitor and report on non-discrimination in most phases of its mission: planning, right-of-way, D&C, Professional Services Agreements. The Department assists Native businesses through the DBE program on construction projects, Native individuals through the On-the-Job Training program on projects and EEO for both internal, Departmental employment and external, contractor employment. Native entities are routinely contacted, as with other ethnic groups, to provide information and assistance on protections and opportunities.

(2) Indicate the legal basis (statutory or otherwise) upon which these relationships are based. Existing federal legislation and state statutes govern the relations with Native entities, e.g. state procurement code in state contracting, property ownership/leasing/conveyance laws and regulations, public input requirements on project planning, environmental impact studies, program development, etc. Whatever special rights or privileges Native entities may possess have been granted by the Department to them, as with other ethnic groups, in recognition of existing, racially oriented federal legislation (non-discrimination Title VI and affirmative action programs). The Department does not negotiate with any of these entities over the acquisition of land or materials, access, or the provision of services from a position of political or sovereign authority over Native owned lands and non-members.

ISTEA legislation (23 USC, Section 135, (d)(3)) directs the State to involve Tribes and Tribal Employment Rights Officers (TEROs) in the planning of projects. Coordination with TERO's

on the planning of projects can be accomplished within the context of public interest input. FHWA's interpretation of other relevant federal legislation "allows for" an Indian Employment Preference on almost any FHWA funded construction project in Alaska. That permission or allowance does not provide the force of law necessary to abridge the individual employment rights of other Alaskan citizens, like that found in federal affirmative action legislation, and, therefore, has not been incorporated into contracts. NEPA legislation (42 USC, Section 4371-et-seq.) also requires tribal involvement in environmental impact statements.

Other statutes/regulations include:

AS 02 - Aeronautics
AS 19 - Highways
AS 34.60 - Relocation Assistance and Real Property Acquisition Practices
AS 35 - Public Facilities
AAC 17 - Transportation
14 CFR
49 USC Sec. 47101 - 47153
FAA Order 5100.38A
49 CFR, Part 24
ANCSA
ANILCA
BIA Regulations & CFR's
BLM Regulations & CFR's

(3) Identify all potential impacts to DOT&PF if the State decides to acknowledge the existence of federally recognized tribes. The Department already recognizes that the federal government, Department of Interior (USDOI), has identified approximately 229 tribes in Alaska. It is the Department's understanding that this tribal designation entitles them to services from the federal government, but does not infer or attempt to confer tribal sovereignty to these tribes or attempt to establish Indian Country in Alaska. (See USDOI, Memorandum, January 11, 1993, Conclusion, page 131). As previously indicated, to date, we have interacted with Native entities as we would with any other property owner, business, protected minority, or general public. If, however, the Department were to begin interactions with Tribes as sovereign governments, the overall impact would depend upon the number and powers of these new governments. See impacts under #4.

(4) Identify all potential legal effects upon DOT&PF programs if the State acknowledges the existence of "Indian Country" in Alaska. If the designation of "Indian Country" is limited, as indicated in the USDOI, Memorandum, January 11, 1993, then the impact, though touching all aspects of DOT, would be limited to a small number of Tribes and, therefore, few projects/acquisitions/leases/etc... If, however, the scope of Indian Country was to include ANCSA lands, the impact would be phenomenal. In the first instance, exceptions could be made to existing administrative policies, procedures, agreements, project delivery etc. In the latter case, major procedural changes would be needed which could require organization changes as well.

Key impact areas would be:

Project Funding

Federal Highway Trust Funds
Federal Aviation Trust Funds
General Funds (royalties)

Airport Leasing & Property management

Revenue generation capabilities?
Tenant's ability to secure financing?
Enforcement of fire/safety/environmental requirements and associated insurance/liability?
Ensure non-discrimination in leasing or Indian Preference?
Repayment of FAA grant funds?

Maintenance & Operations

Procurement - advertised bid, sole source, or Indian business preference?
Equipment needs - rental vs. competitive bid?
Employment/labor - would Tribes takeover this responsibility; if not, would Indian Preference apply to DOT&PF workers ?

Right-of-Way

Eminent domain - can the State file eminent domain actions against "Indian Country"? If so, would the state file the actions in state, federal or tribal courts?

Land acquisition procedures and authorities (split estate ownership issues) - Village Corporation surface estate ownership would be conveyed to the tribe with subsurface estate ownership held or retained by the ANCSA Regional Corporations organized under State law? Surface acquisition could be fee or leasehold interest and accomplished by negotiations. Acquisitions from a tribal entity would require Secretary of the Interior approval which could delay projects. Subsurface acquisition could be fee interest or Nondevelopment Covenant and Restrictive Easement (NDC) from the Native Regional Corporation and can be accomplished by negotiations and/or condemnation in State court.

Fair market value - what judicial system would the State deposit the Fair Market Value (FMV)? With regard to the current "One Offer" mandate, it may require DOT&PF to value surface & subsurface title interests separately; i.e. FMV for surface & FMV for subsurface which will require amendments to standard federal appraisal practices.

Title clearing - ANCSA land conveyances are subject to numerous congressional mandates such as Sections 14(c)(1), (2), (3) & (4) of ANCSA and are likely to be viewed as title obligations passing with the land unless first satisfied by the ANCSA corporations prior to transfer of title to an IRA or Traditional Council. These valid existing rights are

not of record at BLM, in the State Recorders Office or in BIA records. Unless the final Map of Boundaries required by BLM prior to patent of the lands has been filed with the BLM and the required one (1) year appeals period satisfied without appeal, it will be impossible for DOT&PF to identify these interests. Obtaining disclaimers regarding future land claimants would be impossible. Unless title transferred by the Village Corporation to the IRA or Traditional Council is warranted against any Section 14(c), claims, title certification for projects would be difficult and risky.

Access - how would the public's right to use ANCSA Section 17(b) Easements, RS 2477 rights of way and navigable waters for access be affected if the State acknowledges the existence of "Indian Country"?

Relocation - what impacts would the recognition of "Indian Country" have on the State's ability to meet federal requirements for non- natives living in a native community under the Uniform Relocation Assistance Act if tribal constitutions prevent sale or lease of lands to a non-native? If there is any dissention in the community regarding a non-native person, it may be impossible to obtain the vote of members of the tribe required before lands can be sold or leased to a non-native individual.

Planning

Role by Natives vs. DOT&PF in planning/funding/legislative authority?

Design & Construction

Environmental impact, cultural/archeological impact?
Procurement - advertised bid vs. sole source vs. Indian Business Preference?
Tribal permits/taxes, etc.?
Employment/labor - Indian Employment Preference?
Applicability of State exemptions?

Administration

Contracts to be awarded or services to be provided by the Department which granted special recognition to a tribe or its dictates could be held up indefinitely while the courts tried to decide the legality of the Department's actions.

Validity or challenge to existing agreements, grants, procedures, labor contracts?
Rewrite/production of internal Ps&Ps, operating methods, policies, forms, etc.?

cc: Keith Morberg, Acting Director, D&C, Central Region
George Church, Acting Director, M&O, Central Region
John Tolley, Chief, Planning & Administrative Services, Central Region

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(2/95)

ROW Comments sent to M. Holland.

IDENTIFY ALL CONTEXTS IN WHICH DOT&PF IS CURRENTLY WORKING WITH TRIBAL AND OTHER NATIVE ENTITIES.

Acquisition of land and other title interests necessary for the construction, maintenance and operation of highways, airports and other public facilities.

Native Allotments/BIA/BIA Contractors/BLM - land acquisition of fee estate (airports and public facilities) and right of way easements (highways) for DOT&PF projects. These lands are conveyed to the allottee pursuant to the Native Allotment Act of 1906. They have a restricted status and the BIA acts as a Trustee for the allottee.

ANCSA Village Corporations - acquisition of fee interest to surface estate for DOT&PF projects. In some cases, the Village Corporation owns both surface and subsurface estates of the lands required for DOT&PF projects.

ANCSA Regional Corporations - acquisition of either the fee interest to the subsurface estate or a Nondevelopment Covenant and Restrictive Easement (NDC) for DOT&PF airport projects. In some instances the Regional Corporation will own both estates required for DOT&PF projects.

If construction materials (sand, rock, and gravel) required for DOT&PF projects is not contractor furnished, DOT&PF must also negotiate a royalty agreement for use of material sites for both highway and airport projects.

IRA and Traditional Councils - We are currently discussing proposed projects and land issues with the IRA and Traditional Councils at Kongiganak, Kwigillingok and Goodnews Bay in the Central Region. Although title has not transferred at this time, DOT&PF is being told that the ANCSA Village Corporations of these communities will transfer title in the future. If title to the surface estate of ANCSA lands is conveyed to either an IRA or Traditional Council in the future, DOT&PF will have to acquire a sufficient title interest to satisfy FAA regulations, give DOT&PF the jurisdiction and control over the maintenance and operations of the airport, and ensure uninterrupted public use of the airport by both native and non-native entities.

INDICATE THE LEGAL BASIS (STATUTORY OR OTHERWISE) UPON WHICH THESE RELATIONSHIPS ARE BASED.

AS 02 - Aeronautics
AS 19 - Highways
AS 34.60 - Relocation Assistance and Real Property Acquisition Practices
AS 35 - Public Facilities
AAC 17 - Transportation
14 CFR
49 USC Sec. 47101 - 47153
FAA Order 5100.38A
49 CFR, Part 24
23 CFR
ANCSA
ANILCA
BIA Regulations & CFR's
BLM Regulations & CFR's

IDENTIFY ALL POTENTIAL IMPACTS TO DOT&PF IF THE STATE DECIDES TO ACKNOWLEDGE THE EXISTENCE OF FEDERALLY RECOGNIZED TRIBES.

Impacts on right of way acquisition for airports, highways and public facilities:

Village Corporation surface estate ownership would be conveyed to the tribe with subsurface estate ownership held or retained by the ANCSA Regional Corporations organized under State law. Surface acquisition could be fee or leasehold interest and accomplished by negotiation, requiring Secretary of Interior approval, and/or condemnation filed in federal or tribal court. Subsurface acquisition could be fee interest or a Nondevelopment Covenant and Restrictive Easment (NDC) from the Native regional corporation and can be accomplished by negotiation and/or condemnation in state court. The legal and authority issues involved in settling split ownership acquisition disputes are set forth under Eminent Domain below.

IDENTIFY ALL POTENTIAL LEGAL EFFECTS UPON DOT&PF PROGRAMS IF THE STATE ACKNOWLEDGES THE EXISTENCE OF "INDIAN COUNTRY" IN ALASKA.

Eminent Domain:

Can the State file eminent domain actions against "Indian Country"? If so, would the state file the actions in state,

federal or tribal courts?

What judicial system would the State deposit the Fair Market Value (FMV)? With regard to the current "One Offer" mandate, it may require DOT&PF to value surface & subsurface title interests separately; ie FMV for surface & FMV for subsurface which will require amendments to standard federal appraisal practices. Further the surface/subsurface rights will become even more difficult to define in order to resolve inevitable conflicts. Would the State be required to file two separate court actions; one action for the surface estate in federal court and a separate action in state court for the subsurface estate? Projects could be delayed indefinitely if adequate interest in both estates cannot be obtained simultaneously.

Title clearing:

ANCSA land conveyances are subject to numerous congressional mandates such as Sections 14(c)(1), (2), (3) & (4) of ANCSA and are likely to be viewed as title obligations passing with the land unless first satisfied by the ANCSA corporations prior to transfer of title to an IRA or Traditional Council. These valid existing rights are not of record at BLM, in the State Recorders Office or in BIA records. Unless the final Map of Boundaries required by BLM prior to patent of the lands has been filed with the BLM and the required one (1) year appeals period satisfied without appeal, it will be impossible for DOT&PF to identify these interests. Obtaining disclaimers regarding future land claimants would be impossible. Unless title transferred by the Village Corporation to the IRA or Traditional Council is warranted against any Section 14(c), claims, title certification for projects would be difficult and risky.

Access:

How would the public's right to use ANCSA Section 17(b) Easements, RS 2477 rights of way and navigable waters for access be affected if the State acknowledges the existence of "Indian Country"?

Material Sales Agreements:

Currently the Department negotiates subsurface material

royalty payments with the Regional Corporations. These agreements include surface entry permission obtained from the Village Corporation by the Regional Corporation and usually involves payment of a portion of the total royalty payment to the Village Corporation for those rights. Surface entry permission could be difficult to obtain if disputes arise between the surface and subsurface owners if settlement involves separate judicial systems as discussed under eminent domain above.

Relocation:

What impacts would the recognition of "Indian Country" have on the State's ability to meet federal requirements for non-natives living in a native community under the Uniform Relocation Assistance Act if tribal constitutions prevent sale or lease of lands to a non-native? If there is any dissention in the community regarding a non-native person, it may be impossible to obtain the vote of members of the tribe required before lands can be sold or leased to a non-native individual. Although we try to locate projects so they have minimal impact on developed properties in the "bush" communities, and as a result have had little need to relocate families or businesses due to our projects in the past, community development and lack of good ground to build on may prohibit us from impacting owners of improved properties in the future.

Right of Way

Eminent Domain - can the State file eminent domain actions against "Indian Country"? If so, would the State file the actions in state, federal or tribal courts?

Land Acquisition Procedures and Authorities (split estate ownership issues). -Village Corporation surface estate ownership would be conveyed to the tribe with subsurface ownership held or retained by the ANCSA Regional Corporations organized under State law. Surface acquisition could be fee or leasehold interest and accomplished by negotiations. Acquisitions from a tribal entity would require approval by the Secretary of Interior which could delay the projects. Subsurface acquisition could be fee interest or Nondevelopment Covenant and Restrictive Easement (NDC) from the Native Regional Corporation and can be accomplished by negotiations and/or condemnation in State court.

Fair market value - in what judicial system would the State deposit the Fair Market Value (FMV)? With regard to the current "One Offer" mandate, it may require DOT&PF to value surface and subsurface title interests separately; ie FMV for surface and FMV for subsurface which will require amendments to standard federal appraisal practices. Further, are public funds best invested if FMV is paid for a 20 or 30 year leasehold interest, which will require periodic renewal or extension for each project, instead of purchasing a fee interest or a perpetual leasehold estate in the property which requires a one time payment equal to the FMV?

1) Identify all contexts in which DOT&PF is currently working with tribal and other native entities.

The Northern Region DOT&PF is currently working with a number of village councils and native village groups. First an assumption must be made that the above "entities" does not include ANCSA Native Corporations. DOT&PF works with all the village and regional corporations on a regular basis and it is presumed that relationship is not the point of discussion here. The type of group requires some definition as it plays a role in the questions following. They are as follows:

Tatitlek Village Council (IRA) An airport improvement project is scheduled in Tatitlek for this year. The Department of Community and Regional Affairs (DCRA) has received in trust the ANCSA 14(c)(3) lands for the future municipality of Tatitlek. The Native Village Council is recognized by DCRA as the appropriate village entity (AVE) only for the purpose of receipt of the lands. The DOT&PF is in the process of entering into a lease with DCRA for a portion of the lands needed for the airport improvement project. The lease is administered by DCRA. The Tatitlek Native Council has given their verbal support and is expected to pass a resolution authorizing DCRA to initiate the lease.

Minto Village Council (IRA) An Airport Master Plan is underway addressing the aviation needs of Minto. When the Plan is complete some land, location still unknown, will be needed for the airport. The land status is similar to Tatitlek. It is held or will be held in trust by DCRA for the recognized AVE, presently the Minto Village Council. The ANCSA 14(c)(3) plans for Minto are not yet final. It is assumed that DOT&PF will be dealing with the Council and DCRA to lease land when the airport development plans are complete.

Native Village of Birch Creek (Traditional) Chief Randall Baalam assumed negotiations for the Native Village of Birch Creek when land was needed for a runway extension. The Council received their lands without exception from the ANCSA Village Corporation Tihteet'Aii, Incorporated. A Warranty Deed and an express waiver of any sovereign immunity was granted as part of the conveyance.

Native Village of Noatak (IRA) DOT&PF is working on an ISTEA Project for a new landfill road at Noatak. The Native Village of Noatak has not sought the recognition of the State of Alaska (DCRA) as an AVE as have the above groups. ANCSA 14(c)(3) conveyances and planning have not been completed in Noatak. The village corporation for Noatak is NANA Regional Corporation acting as successor in interest to the village corporation (Noatak Napaaktukmeut Corporation). ANCSA law requires/obligates the village corporation to convey up to 1280 acres to the State recognized governmental entity of each village. DOT&PF is receiving an easement directly from NANA in lieu of no State recognized governmental entity. The easement received will be adequate to complete the ISTEA project and will be transferred to a local governmental entity should one be recognized in the future.

Stevens Village (IRA) An airport relocation project was scheduled five years ago for Stevens Village. The IRA Council is the owner of the lands needed for the project. The project has not come to grant and no agreement is in place to date.

Native Village of Fort Yukon (IRA) The Native Village of Fort Yukon has received some type of title interest from the village corporation for lands surrounding the airport. The interest conveyed is convoluted and unclear. Title interest for the lands lies now with three parties-the Native Village, GwitchyaaZhee and Doyon. The lands around the airport are not being acquired at the present time. The lands were selected by the City of Fort Yukon as part of their ANCSA 14(c)(3) entitlement.

Other villages There are a number of other villages who have received the AVE status from the State of Alaska. There are many communities where DOT&PF is planning ISTEA projects in the near future. Some of these communities have the AVE status, some do not. We feel certain this list of projects will continue to grow over coming years and DOT&PF is dealing with them case by case as each community has unique land status situations.

2) Indicate the legal basis (Statutory or otherwise) upon which these relationships are based.

Tatitlek, Minto and Birch Creek all are recognized as the AVE under the authorities and regulations of the DCRA. The authorities for that process are as follows:

Alaska Native Claims Settlement Act Section 14(c)(3)
Alaska Statutes 44.47 150 A & B
19 Alaska Administrative Code 90

Birch Creek Birch Creek land was acquired in fee under the authority of Alaska Statute, Title 2. The warranty deed contained an express sovereign immunity waiver as outlined in the memorandum from then Attorney General Charles Cole dated March 18, 1992.

Noatak, Stevens Village and Fort Yukon There is no formal policy or legal basis in place dealing with the lease guidelines for IRA Councils. There have been no formal agreements or documents signed with these entities by this Department. Negotiations with Stevens Village are still underway and hope to end positively. FAA has recently announced their approval of leases with recognized tribal entities.

Other Authorities

United States Constitution
State of Alaska Constitution
Alaska Statutes, Title 2, Chapter 15
Title 19, Chapter 5
Alaska Administrative Code, Title 17

Code of Federal Regulations, Chapter 14, Subchapter I, Parts 151,152
Federal Aviation Administration Advisory Circular 150/5300-13

3) Identify all potential impacts to DOT&PF if the State decides to acknowledge the existence of federally recognized tribes.

"All potential" is a large task. Many facets of tribal rights are still unknown. The impacts may not be known for many years to come.

Depending on the extent of recognition or acknowledgement granted, the lands where jurisdiction is to be exercised and the level of "sovereignty" assumed, the potential impacts could be great or minimal.

Title to the land needed for these projects will be increasingly difficult to obtain. Without the express authority to condemn the lands and the ability to enforce and enter into a binding contract the State of Alaska will not be able to assure quality title is held for the expenditure project funds. More importantly, the State must be able to continue to maintain and operate these facilities unimpeded. The control this Department must have to complete its responsibilities may be at risk.

In the Lower 48 States where transportation projects cross tribal lands, Right of Way Easements are obtained from the BIA who represents the Tribal Authority. The process sounds lengthy and quite expensive. Fair market value will be a thing of the past. Title 25 of the Code of Federal Regulations may become the new land acquisition procedures for DOT&PF on tribal lands.

Again depending on the group involved and the extent of sovereignty asserted, there is a potential for unregulated Taxation on projects. The State of Alaska has already had a experienced this issue in Venetie.

Our funding structure and contract provisions are not designed for the type of tribal local hiring practices and training programs that may be invoked with tribal authority.

If every Native Village or IRA Council in Alaska purports the rights of self government and self sufficiency, these "separate nations" within the State of Alaska may have the right to restrict access to and from public facilities and infrastructures where millions of dollars have been invested by the State. Jurisdiction and levels of responsibility would need to be clearly defined by the laws of both the State of Alaska and the Tribe in question.

4) Identify all potential legal effects upon DOT&PF Programs if the State acknowledges the existence of "Indian Country" in Alaska.

Taxation on projects could be imposed. Taxation on gross receipts or other aspects of our operation are subject to a new authority (tribal) approval.

Any breaches, disagreements or violations DOT&PF may have with a tribal entity may have to be resolved by the tribal courts and not in the courts governing this State without express and specific waiver of that jurisdiction. Even with a waiver, the rights of the tribe may not be extinguished as determined by a federal court. It appears State's rights may require as much redefinition as tribal rights. The State may find itself as a "nonexistent power" as in Ollestead -v- Tyonek.

Grant assurances for Federal Aviation Projects have been made in many villages that require adherence to the assurances for as long as the facility is operational. The tribal entities may have to consider becoming sponsors or co-sponsors of these facilities to accommodate future transportation systems.

State must have the ability to control the land and all the access to our facilities. DOT&PF is liable for the safety of the users. If a public facility is located within tribal boundaries DOT&PF must be guaranteed the authority to manage, in its entirety, the facility. The right to issue third party uses, as granted to DOT&PF by statute must continue if these facilities are to in fact remain "public".

Construction, maintenance and operations of a public facility will be a challenge within tribal boundaries. The public, not necessarily only tribal members, must have the right to lease land, conduct business and use our facilities that may be located within tribal boundaries. This seems a case for built in discrimination which we have already experienced in our dealings with tribal councils. Both federal and state laws are explicit on discrimination. Tribal law may approach the subject a bit differently.

The existing transportation system may suddenly be "under tribal jurisdiction". Careful planning and well thought out policies are paramount if the DOT&PF is to continue having projects and managing the transportation system within these proposed "tribal boundaries".

The power of eminent domain by the State of Alaska should remain a viable option for the safety of the public. The ability to protect public interest is the bottom line.

Example

Eureka to Rampart
Information Sheet

Description of Project:
Environmental studies and location activities for a road between the old mining town of Eureka, on the Elliott Highway, to the village of Rampart on the Yukon River.

Contact Person:
Mr. Stephen C. Sisk, P.E., Northern Region Director Phone:907-451-2210

Other Agencies:
None

Constituency:
Village of Rampart and other visitors to the lands between Eureka and Rampart. This is an active mining district.

Policy and decision opportunities:
This project would recommend whether or not a road should be built and, if so, where it should be located. This would be a year around road to the village from the contiguous highway system. Currently there is an old mining trail that is passable with tracked vehicles in the summer season. The trail has been plowed open at Christmas by the village. This would be a two lane resource development road. This project has been done in-house thus far but a consultant is being sought to complete this phase of the work. The Department studies show that the road can follow the existing trail pretty closely.

Facts:
The consultant selection process has been put on "hold" until direction is received from the Commissioner. This project is funded as a federal/state match in the amount of $669.558. The match ratio is 90.97%/9.03%.

Statement of Controversy:
The project appears to have the support of the village of Rampart, the appropriate Native Corporations and the miners in the area. Some people in Stevens Village, upriver from Rampart, have responded negatively to the project.

Other:
None

Alternative/Alternative Strategies:
No-Action, alternative alignments and alternative modes will be considered in the environmental studies.

Recommendations:
Select the consultant. Continue the project through compeletion of the enviromental document to a decision. If the decision is to build a road, program subsequent phases of work for design and construction.

Post-it™ Fax Note 7671	Date 2/15	# of pages ▶ 1
To John Bennett	From M. Tucker	
Co./Dept. R/W	Co.	
Phone #	Phone #	
Fax #	Fax #	

CENTRAL REGION
DEPARTMENT OF TRANSPORTATION and PUBLIC FACILITES

MEMORANDUM

State of Alaska

TO: Mark S. Hickey
Commissioner

DATE: January 6, 1989

FILE NO:

TELEPHONE NO:

FROM: William R. Snell
Regional Director
Central Region

SUBJECT: Bethel Airport
Project No.
RS-0208(7)/57119

Title problems resulting from the Bureau of Land Management's (BLM) failure to reserve highway right of way grants from native allotment certificates and patents impact right of way certification for the Bethel Airport Road project scheduled for 1989 construction. Eight parcels are involved; four are native allotments. The alternative courses of action proposed by this paper allow for construction in FY89 or may delay construction until summer of FY90.

In order to make every effort to construct this summer your expedited consideration is requested.

BACKGROUND:

In the late 1960's the Department of Highways (DOH) acquired by quitclaim deed the land required for a 100 foot wide right of way from each individual applicant for native allotments and other entries on federal land. Concurrently DOH applied for and received a 100 foot wide grant of right of way pursuant to the Act of August 27, 1958 (72 Stat. 885; 23 U.S.C. Sec. 317) from BLM on May 16, 1969. During this acquisition period the Bureau of Indian Affairs' (BIA) position was DOH could directly contact the allottee applicants to acquire the necessary interests without any action on BIA's part; only many years later was that procedure deemed inappropriate and full authorization by BIA in compliance with title 25 of the CFR's required.

Subsequent certificates and patents failed to (1) reserve or except the May 1969 Sec. 317 grant, or (2) reserve a right of way pursuant to Sec. 317 but did not specify whether the grant was a prior Sec. 317 grant for a 60 foot wide right of way issued to Department of the Airforce in 1955 or the May 1969 grant. A question arises under number (2) because the dates of entry or occupancy preceded the May 1969 grant, therefore, ostensibly the entry was subject to the 1955 grant but not the 1969 grant.

Unfortunately the circumstances are further complicated by the fact that some of the quitclaim deeds acquired by DOH were recorded prior to patent (a wild deed and not in the chain of title) and not recorded upon issuance of the certificate or patent. As a result there is a notice issue as to subsequent purchasers for value.

Three courses of action are available:

(1) Certify the project based on the DOH's acquisition and grant for the Bethel Airport to Brown's Slough project, number RS-0208(1) which would require anyone asserting an interest in the 100 foot right of way strip to file an inverse condemnation and prove their interest,

(2) Initiate condemnation actions for title curative purposes to resolve any clouds on the title to the right of way, and

(3) Undertake a full an administrative settlement program based on a nominal or reasonable payment to eliminate clouds on DOT's right of way.

Each of these alternatives has drawbacks.

ALTERNATIVE ONE:

Certify the current project based on the previous project right of way.

PROS:

- Construction of the project can commence in FY89.
- DOH acquired the necessary interests in the late 1960's.
- DOT is only asserting the rights previously acquired and will not be paying twice for the same rights.
- The burden of proof will be on any landowner asserting an interest contrary to DOT.
- Funding of an acquisition program will not be required.
- The individual owners may not dispute the existence of a 100 foot wide right of way.
- Recent DOT and city projects within the right of way have not been contested.

CONS:

- FHWA may not concur in this approach and may require DOT to acquire any clouded title interests through an administrative settlement or acquisition procedures.
- DOH's purchases from the native allotment applicants may be invalid due to lack of capacity of the applicant to sign without the express concurrence of BIA.

- Depending upon whether construction of the road is notice to subsequent purchasers, DOH's pre-patent and allotment certificate recordings may be invalid under the recording statutes.

- BIA, on behalf of the allottees may assert the pre-certificate conveyances by the allottees are invalid.

- Individual owners may seek injunctive relief once construction starts, possibly delaying the construction phase of the project during TRO and preliminary injunction proceedings.

- This approach may have a negative impact on relations between DOT and the various native and other local interests (BIA, local legislative delegation, AVCP and members of the community).

ALTERNATIVE TWO:

Initiate condemnation actions to remove clouds from DOT's right of way grant and acquisitions.

PROS:

- Construction can commence in FY89 if FHWA concurs with this approach.

- Early initiation of condemnation actions will secure possession and eliminate injunctive relief actions during construction by any adverse claimants.

- This approach will resolve any potential claims against the right of way through formal court proceedings.

- Condemnation is superior to a declaratory judgment action due to the right to possession under a declaration of taking.

- DOT will not be required to compensate any adverse title claimants except to the extent determined by the court.

- Except for litigation expenses and any possible court awards, right of way phase funding will not be required.

- The cases will have similar issues of fact and law limiting the additional work required for each individual case.

- DOT may be able to resolve many of the legal issues through partial summary judgment motions in the condemnation proceedings.

- Partial summary judgment actions on the issues of law will allow DOT an opportunity to appraise any adverse property interest determined by the court prior to a master's hearing or trial.

- All parties will have an opportunity to protect their interests through the court process.

CONS:

- This approach conflicts with DOT's practice to condemn native land interests only after exhaustive negotiations.

- Litigation may be more costly than an acquisition program based on payment of fee simple values.

- FHWA may not concur with the condemnation of possible adverse title interests without initiating an administrative settlement or acquisition program.

- If DOT does not first attempt to negotiate the settlement of potential adverse title interests there may be a good faith negotiations issue which the courts may refuse to allow the declaration of taking and the FHWA may not participate.

- This approach will have a negative impact on relations between DOT and the various native and other local interests.

- Any award to an adverse claimant will likely result in DOT having to pay the opposing party's costs.

ALTERNATIVE THREE

Undertake an administrative settlement program to clear any interest that is a cloud on DOT's right of way interest.

PROS:

- Any adverse claims will be resolved through a negotiation process with condemnation used only if negotiations are unsuccessful.

- Except for possible project delay, this approach will have a more positive impact on relations between DOT and the various native and other local interests than the other two alternatives.

- BIA's concurrence with the right of way will be requested.

CONS:

- The right of way may not be certified in time for Summer 1989 construction but will be certified in FY89 for Summer 1990 construction.

- The delay in the project will not be consistent with the construction schedule announced to the local legislative delegation and the AGC.

- DOT will be paying additional compensation for right of way it acquired in the late 1960's.

- FHWA may not participate in the administrative settlements or court awards.

- BIA may not concur with the title clearing effort.

- The right of way phase will have to be funded, an obligation not included in the 1989 spending plan.

- Due to conflicting project requirements, staff availability is limited and will impact scheduling of other projects.

RECOMMENDATIONS

Our primary recommendation is to review the state policy implications of each approach and establish a preferred hierarchy of action subject to FHWA's concurrence and agreement to participate.

Of the three courses of action Central Region recommends alternative one. This approach will allow DOT to proceed to construction this summer. DOH acquired the necessary right of way and will continue to assert that interest unless a court of law rules otherwise. Previous DOT and city projects within the 100 foot wide right of way have not been contested.

The major liability is an adverse party may seek injunctive relief during construction, which, if successful, may result in delay claims by the contractor. Our perspective is an adverse claimant will have adequate remedies at law and will be unable to show irreparable harm necessary to obtain a TRO in an ex parte action and especially in a hearing for preliminary injunction. To mitigate the possibility of a TRO or preliminary injunction Central Region would notify all adjacent property owners of the impending construction and the 100 foot right of way limits. Further prior to construction the A.G.'s office would be provided all pertinent information to defend an injunction.

Central Region's second choice is alternative three. If this approach is used we anticipate a 30 to 60 day negotiation period to make administrative settlements of a nominal or reasonable amount to clear title only. Those parcels not administratively settled will be condemned for title. This approach eliminates the major weakness with alternative two, lack of negotiation efforts, but will require more time to complete and may delay construction until 1990. Alternative two is our least favored alternative.

As indicated above your immediate consideration is requested so that every effort can be made to construct the project this summer.

DWB/rsk

Author: Sam Kito III at JNUHQ1
Date: 8/7/95 4:19 PM
Priority: Normal
Receipt Requested
TO: Marty Johnston at DOTPFWAN
TO: John Miller at FAIBWR-CCMAIL
TO: John Jensen at ANCAV1
CC: Jonathan Scribner at DOTPFWAN
CC: Tony Johansen at FAIPM1
CC: John Horn at ANCAV1
CC: Boyd Brownfield
CC: marilyn_heiman%gov@state.ak.us at DOTPFWAN
Subject: RS&G

---------- Message Contents ----------

The Commissioner has a meeting with the AFN land managers on August 18th and will be discussing the Rock, Sand and Gravel issue. The Land Managers would like to talk about the statewide position on RS&G payment for materials within ROW. I think the issue there has to do with ANCSA 7(i) payments that the Corporations believe they are responsible for regardless of use. Would there be a way of recognizing the value of the RS&G as a portion of match on federal projects?

Could I get some comments back on the RS&G position of your region by Tuesday August 15th so I have time to brief the Commissioner.

If there are other issues relating to RS&G other that the one mentioned above which may be important, please include those in the discussion.

Commissioner Shively of DNR will also be attending the meeting and will be responding to questions on RS 2477. In case this issue is brought up, we should provide the Commissioner with information on RS 2477 and DOT/PF. Please provide backup on RS 2477 issuses as they relate to DOT.

thanks.

ROSE

Author: John Miller at FAIBWR-CCMAIL
Date: 8/11/95 9:15 AM
Priority: Normal
TO: Sam Kito III at JNUHQ1
CC: John Miller
CC: Rod Platzke at FAIPM1
CC: Tony Johansen at FAIPM1
CC: Martin Ott at FAIPM1
CC: Mike Gavin at FAIPM1
Subject: Re: RS&G
---------- Message Contents ----------

Our decision to compromise and accept less than fee interest in airport lands was made in an effort to accommodate Native policy not to sell ANCSA lands. Because of the compromise, DOT&PF should strongly defend the interest received in these subsurface easements. Keep in mind we are paying, at a minimum, full fee value for these properties. The fair market value based on the fee value of the property, is divided between the surface and subsurface owner without DOT involvement on the fairness of that division.

In those situations where Regional Corporations have agreed to accept a portion of fee value in exchange for an easement, DOT&PF has purchased the exclusive right to use materials in any manner as long as the use is for airport purposes. DOT&PF cannot be expected to pay royalties for materials on lands where just compensation equal to or greater than the value of the fee estate has already been paid. We pay for the full bundle of rights, we should receive the full bundle of rights. We are charged with responsible use of public money. There is no room for us to accept less than what we have previously negotiated. Our only alternative is to acquire the fee estate if we cannot reach agreement on this issue.

There are no cost "restrictive covenants" that have been granted by Regional Corporations. These easements grant DOT the assurance that no development will endanger our surface investment. These interests do not grant us adequate interest when the subsurface is needed nor when fair market value is offered.

Over the years as ANCSA 7(i) has become more complex. As the case law builds, Corporations have requested we include in our easements a court sanctified definition of what ANCSA 7(i) resources are. DOT cannot accommodate that request. We either own the resource or we don't. There cannot be scrutinized use of (and payment for) each and every yard of material during the life of a public airport, highway or public facility.

DOT&PF will not, as a matter of policy, appraise the surface and subsurface estates separately. Lands acquired for public purposes by this Department should continue to be appraised in fee. There is not a market across Alaska to draw from to derive comparable sales of subsurface estate values. By law, DOT is obligated to offer fair market value; we would be unable to meet that requirement without a real market to draw from. The complexities this suggestion could create within the appraisal process are great. Drilling, assaying and soil testing are only the beginning. The property owner always has the opportunity and right to submit their own appraisal for the property. DOT would review the information submitted by any property

owner.

7(i) ANCSA Revenue Sharing is certainly a complex issue. Undoubtedly, the Settlement Agreement is considered in all facets of a Regional Corporation's operation and development. 7(i) is an internal concern of all ANCSA Regional Corporations. Interpretations of and compliance with the Settlement Agreement are ANCSA Corporation concerns and cannot be those of the State of Alaska. We must insist there be no language regarding ANCSA 7(i) definitions nor payment for materials on lands we have already paid for.

If 7(i) is a true liability to the Regional Corporations, sale of the property should be the preferred alternative, negating any concern or future liability. State match or federal grant money, either being used for 7(i) payments is objectionable.

RS2477: Planning, specifically Norm Piispanen has been the Northern Region liasson with DNR during their RS 2477 assertion project and is better equipped to respond. I forwarded a copy of this request for information to Mike Gavin, Norm's direct supervisor for handling.

_____ Reply Separator

Subject: RS&G
Author: Sam Kito III at JNUHQ1
Date: 8/7/95 4:19 PM

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August 14, 1995

Bo/Sam:

In response to Sam's 8/7/95 E-mail on RS&G issues, it sounds as though the AFN Land Managers wish to re-open or continue the dialog regarding compensation (royalty) for "cut and fill" within a highway right of way or airport boundary when the subsurface estate is not owned by the Department.

Our position, in the past, has been fairly simple:

1. Compensation (royalty) should not be paid for "cut and fill" (simply re-shaping the earth) within the limits of any particular project.

2. Compensation (royalty) should be paid for material imported from an off-site pit.

Of course, there are many entanglements that arise during the discussion of this issue, as there are with most any controversial issues.

1. Dually owned estates: It has been the Department's policy to appraise and acquire fee simple title to land required for our projects. We have not appraised the surface and subsurface estates separately. Fee simple purchase should entitle the Grantee to all rights, including ownership and use of subsurface materials, however the fee value is inevitably less than the sum total demanded by the surface and subsurface owners. (See attached copy of our unanswered letter to Julie Kitka dated Sept. 30, 1990)

Parenthetically, a surface estate is similar to an easement; a PLO easement, for example, wherein the subsurface estate or underlying fee is owned by others. Although we have taken issue with Regional Corporations over royalty payment, we have not yet, but conceivably could, encounter the issue with a fee owner, over whose land we have a PLO or any other transportation or related easement.

2. A recent 9th Circuit Court decision addresses the "cut and fill" issue for the circumstances of that particular case, however we feel that the decision does not apply to construction of public facilities. John Steiner, Assistant AG, can help fill in the details on this issue.

With respect to Sam's question on whether value for RS&G could be recognized as part of a match on federal projects, the answer is "yes" for imported material and "no" for "cut and fill" within project limits.

RS2477 was a highly discussed issue during the last administration with Mr. Coghill taking the lead. I consider Clyde Stoltzfus to be our most knowledgeable person on that issue and couldn't begin to discuss the matter as Clyde could. As a practical

matter, RS2477 rights of way, including section line rights of way, are not of much use in our work. They rarely follow the topography, therefore they rarely fall within the design limits of our projects which must take advantage of topography. An example of this issue was the construction of Warehouse Mountain Road near Dillingham some years ago which followed the topography rather than section line easements. Although the issue had the potential to become controversial, it didn't because it was not practical to construct roads along straight lines in Alaska as it might in South Dakota, Iowa or Nebraska. Commissioner Shively should feel free to discuss this example with Tom Hawkins, BBNC, who knows and has been on both sides of this particular issue.

September 30, 1990

Re: Separate allocation of value to surface and subsurface estates

Ms. Julie Kitka
President
Alaska Federation of Natives, Inc.
411 West 4th Avenue, Suite 1A
Anchorage, Alaska 99501

Dear Ms. Kitka:

As you are probably aware, recent developments at St. George and Crooked Creek have once again brought to light differing views regarding the appraisal and acquisition of Native lands. The fact that separate estates in land originally selected under ANCSA Section 12(a) or (b) are conveyed to regional and village corporations poses unique challenges to the corporations, and to us when acquisition becomes necessary.

My firm belief is that if we adopt inflexible positions, we have been of disservice to our organizations. Not only do surface/subsurface issues languish for want of solution, but we become less able to discuss and resolve other issues that confront the corporations and this department. I therefore request that, through the auspices of AFN, we establish a forum for discussion of our concerns. The purpose of this letter is to briefly explain the thinking of the department and to propose a basis upon which we may reach agreement regarding allocation of value.

The corporations desire that we separately value the surface and subsurface estates when we acquire lands for projects. We are aware and appreciate the difficulty of reaching agreement as to division of proceeds between village and regional corporations. We understand the obligation Section 7(i) of ANCSA imposes upon the regions.

It has been our policy to appraise the fee simple absolute in accordance with the Unit Rule without separate allocation to the surface and subsurface estates. The primary reason we follow this practice is because we are not confident that **any** allocation we may make would satisfy the property owners. Are we, for instance, to unilaterally instruct our appraisers as to the effect the ANCSA Section 14(f) proviso regarding village consent to subsurface development may have on the value of the fee simple? Any allocation the state may make on the basis of such instruction is bound to place the

state (disinterested in the split) squarely between two property owners, both of whom have substantial vested interests.

The extent of ownership interests which accompany the surface and subsurface estates has been the subject of extensive litigation, and still there are no definitive answers. In short, we believe that such interests are complex and not readily recognizable. Where this is the case, we believe allocation is best left to the parties having the most direct interest in the split of compensation and establishment of legal precedent determining the extent and value of the estates held.

I propose that an intermediate approach be adopted. If we can develop, either on a case by case or statewide basis, instructions to be used by fee appraisers in valuing dually owned lands, this department will undertake separate allocation of the appraised value to the surface and subsurface estates. As a prerequisite to formulating such instructions, the definition of what makes up each estate should be provided by the corporations themselves.

I propose to do this contingent upon two conditions. First, that the values of the estates together do not exceed the value of the fee simple absolute; and second, that the state be held harmless from any costs associated with litigating the **allocation** should disagreement arise after appraisal is completed.

This approach would result in a fair market valuation for various interests that it seems could be used for purposes of Section 7(i) distribution. In addition, the allocation would be based upon the parameters agreed to by the owners themselves. At the same time, it would protect the state from costs associated with litigating the split of proceeds.

I realize that this proposal is broad. I ask for your help in ascertaining whether there is any interest among the village and regional corporations in pursuing a more definitive agreement. Either myself or knowledgeable members of my staff are available to further discuss the concept with interested parties at any time. It is my hope that common ground established on this front will serve as an example of successful conflict resolution between the department and Alaska's major private landowners.

Sincerely,

Mark S. Hickey
Commissioner

Doyon, Limited

Doyon Building
201 First Avenue
Fairbanks, Alaska 99701
Tel: (907) 452-4755 Telex 090-35340

March 21, 1982

Mr. Andy Zahare
Interior Regional Engineer
State of Alaska DOTPF
2301 Peger Road
Fairbanks, Alaska 99701

RE: Project F-062-1 (18), materials Survey Program, Letter of March 12

Dear Mr. Zahare:

The above cited letter, received by Doyon on 16, March, advises us that work may be conducted on Doyon lands adjacent to the Alaska Highway, mile 1270-1285.

We must advise you that Doyon Limited's Policy, with regard to exploration of, and/or entry on corporate lands requires a formal agreement between the Corporation and the Entryman. Your letter of March 12 makes no mention of such an agreement, and does not provide enough information for us to determine that one has been executed. Accordingly, you are hereby advised that entry on any Doyon lands, or any lands selected by Doyon Limited, is denied unless and until an agreement has been formally executed dealing specifically with the lands and entry proposed. A number of these agreements have been executed between DOTPF and Doyon, Limited during the past year. Review of them will reveal that Doyon requires all information obtained in such surveys be made available to us.

In the case of selected lands, final approval must come from the managing Federal Agency after consent by Doyon, Limited.

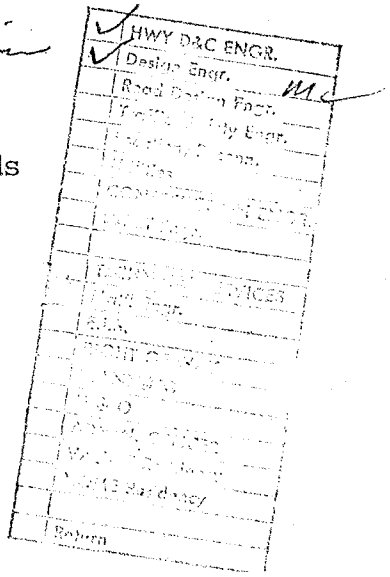
Your attention to this matter will be greatly appreciated.

Sincerely,

Thomas D. Williams

Thomas D. Williams
Vice President of Lands

TDW/PB/cn



MEMORANDUM State of Alaska

TO: Dave McCaleb, Design Engineer
Dept. Trans. & Pub. Fac.
2301 Peger Road
Fairbanks, AK 99701

DATE: April 14, 1982

FILE NO: F-66-143-81A

TELEPHONE NO:

FROM: Gary Foster
Assistant Attorney General
Transportation Section
604 Barnette, Room 216
Fairbanks, AK 99701

SUBJECT: Entry on Doyon Property for Materials Survey, Proj. F-062-1(18)

After having looked over AS 09.55.280 Entry upon land, a copy of which is attached, and Doyon's March 21 letter to Andy Zahare, I have a succinct opinion for you. The statute clearly allows the entry you contemplate. It just as clearly does not require any pre-entry agreement, formal or otherwise, between the landowner and the State. Thus, Doyon's denial of entry without such an agreement is legally meaningless and can be ignored. I caution in closing, however, that you make sure your entry and material surveys are performed in a reasonable manner. Otherwise the statutory protection may be lost under section 280's last sentence. Although by no means intending to put words in anyone's mouth, I have drafted a suggested response to Doyon's letter. The rough draft is attached. If you have any questions or comments, please give me a call.

GF:rir
Enc.

APR 14 3 08 PM 1982
HIGHWAY D&C
INTERIOR REGION
DOT&PF

APR 16 2 21 PH '82
DIRECTOR D&C
D.O.T.P.F.

- HWY D&C ENGR.
- Design Engr.
- Road Design Engr.
- Traffic/Safety Engr.
- Location/Reconn.
- Utilities
- CONSTRUCTION ENGR.
- LSt&t Engr.
- TECHNICAL SERVICES
- Mat'l Engr.
- E.I.S.
- RIGHT OF WAY
- PLANNING
- M & O
- ADMIN. OFFICER
- VALDEZ Residency
- NOME Residency
- Return

02-001A(Rev.10/79)

Aguilar Stipulations

Stipulated Procedures for Implementation of Order

Docket No. A76-271 Civil U.S. District Court, Alaska Ordered February 9, 1983

The parties by and through their attorneys stipulate, subject to the Order of the Court, to the following procedures to implement the Order of the Court dated July 31, 1979, that the Department of the Interior adjudicate the substantive claims of the plaintiffs to land patented to the State.

1. The Bureau of Land Management (BLM) will review each allotment application file to determine whether there are any legal defects in the application. Legally defective applications which are incapable of being corrected will be rejected, and rejection by the authorized BLM official shall be final for the Department.

2. Where an applicant whose application is not rejected pursuant to paragraph 1 of this stipulation is deceased, the Office of Hearings and Appeals will determine the applicant's heirs before BLM proceeds.

3. Where the merits of the application turn on whether the applicant's use and occupancy predate the commencement of the rights of the State, the BLM will examine the file. The examination, and all further proceedings until a federal court action to cancel the State's patent is initiated, shall be for investigatory purposes only and shall not constitute an administrative agency adjudication of the rights of third parties. If the application and contents of the file indicate that the applicant's use and occupancy began after the rights of the State arose, the BLM will inform the applicant by letter of the date of commencement of the State's rights and that the application will be rejected unless the applicant files an affidavit within ninety days alleging, with particularity, specific use prior to the date on which the rights of the State arose.

4. If the application and contents in the file indicate that use and occupancy began before the State's rights arose, or if an affidavit to that effect is received pursuant to section 3 of this stipulation, the BLM will send a letter to the applicant informing the applicant that based upon the file, it appears that the application may be found valid. The letter will invite any additional evidence such as witness statements and photographs, which the applicant may wish to present to bolster the claim. At the same time, the BLM will send a letter to the State stating that it appears that the application may be found valid and inviting any evidence or comments the State may have to dispute the claim of the applicant. Both the State and the applicant will have ninety days to respond.

5. If, either because no comments or evidence are received questioning or disputing the claim of the applicant or, if on the basis of the case file and comments and evidence received, the BLM concludes that the application is valid, the BLM will find the application valid and refer the matter to the Solicitor's Office for settlement or referral to the Department of Justice.

6. If the BLM concludes that the applicant has failed to provide sufficient proof of entitlement, the BLM will conduct a hearing. The applicant will be notified of the hearing date and the reasons for the proposed rejection. The hearing will be informal with a designated BLM decision-maker as the presiding officer. The

presiding officer may ask questions, and the applicant and the State shall have the opportunity to present evidence and cross-examine witnesses. The hearing will be taped, but not necessarily transcribed by BLM. Based on evidence presented at the hearing or contained in the case file, the BLM presiding officer will make a decision to reject or refer the claim to the Solicitor's Office, which decision shall be final for the Department, provided that the hearing examiner may not rely on any matter not admitted in evidence at the hearing to reject an application.

7. The BLM shall have discretion to order a field report before a hearing, in order to gather evidence or to more accurately determine the location. All parties referenced in paragraph 13 of this Stipulation shall be notified of the field exam, given the opportunity to be present, and provided a copy of the report.

8. The Solicitor's Office will attempt to settle the allotment claims referred to it by BLM, by requesting a quitclaim of the land from the State.

9. If settlement is not possible the matter will be referred to the Department of Justice with a recommendation that suit to cancel patent be instituted. Nothing in this stipulation or in the procedure which it establishes in any way affects the descretion of the Attorney General of the United States with respect to any such recommendation. The parties referenced in paragraph 13 of this Stipulation shall be notified of the referral.

10. If at any time the State wishes to quitclaim all of its interest in the land and tenders a valid and appropriate deed, the United States shall accept the quitclaim and issue an allotment to the applicant, and the acreage shall be credited to the State entitlement under which the lands were originally conveyed. Provided, this paragraph shall not apply to any application which would be determined invalid for legal defects as described in paragraph 1.

11. If at any time the State is willing to convey a portion of the allotment, or the entire allotment subject to reservations, in settlement of the applicant's claim and tenders a valid and appropriate deed, the Solicitor's Office will forward the offer to the applicant and coordinate the settlement. Counseling for the applicant will be available from the BIA. Provided, this paragraph shall not apply to any application which would be determined invalid for legal defects as described in paragraph 1.

12. If after counseling, the applicant wishes to accept the settlement, a settlement agreement will be drawn up and submitted to the Court for approval. Acreage received by the applicant shall be credited to the State entitlement under which the lands were originally conveyed.

13. Copies of all notices sent to the applicant will be sent to Alaska Legal Services, applicant's private counsel, if any, the Bureau of Indian Affairs, and the State.

14. If at any point the BLM becomes aware of the identity of a third party claiming an interest in the land, whether independently or through purported conveyance by the State, it shall afford the third party the same notice and procedural rights as those afforded the State under this stipulation.

General Information

Before a Native allotment application can be found valid, the applicant must show substantial and continuous use of the land taking into account seasonality of use consistent with Native lifestyle and culture. He also must show that the resources associated with the claimed uses are (or were) present and that he used the parcel as an independent citizen at least potentially exclusive of others. The applicant's use of the land must also be such that anyone entering the land could have observed or found out about it. Substantial cessation of use by the applicant prior to the filing of his application and prior to the segregation of the land by another claimant's application is a possible reason for rejection of the allotment application.[5]

The standards which the BLM applies in determining whether an applicant's use and occupancy entitles him to an allotment are found in Title 43 of the Code of Federal Regulations, subpart 2561 and in a body of administrative decisions from the Interior Board of Land Appeals (IBLA). Copies of the IBLA decisions are available for use by the public in the Alaska Resources Library located on the first floor of the Federal Building in Anchorage and through the BLM public room in Fairbanks.

In Aguilar proceedings, the burden of proof is on the Native allotment applicant to show by a preponderance of the evidence that his use and occupancy of the land meets the requirements of the statute and regulations.

You may be able to claim you are a **bona fide purchaser** as a defense in these proceedings. The existence of a bona fide purchaser is recognized as a legal defense to a federal suit to recover title. Bona fide purchasers are individuals or entities who have acquired the land from the original patentee or a subsequent owner for valuable consideration (i.e., money or performance).

The transaction must have been made in good faith, and the buyer must have been unaware of the allotment applicant's conflicting claim, or unaware of anything which would have led him to check further (for instance, physical evidence of prior use of the land, the presence of others on the land, or information from others that there was a conflicting claim would be reasons to check further). A hearing will be held to allow the Native allotment applicant and the property owner to present evidence concerning the claimed defense. Based on the evidence and testimony provided by both parties, the BLM hearing officer will determine whether a bona fide purchaser exists thus barring recovery of the land.

If you believe that you qualify as a bona fide purchaser, you should submit evidence to support your claim. Such evidence could include a copy of your title insurance policy, copies of documents pertaining to the transaction whereby you acquired your interest in the property or affidavits from you and others familiar with the history of the land.

The process described in this guide could affect your property rights. If you have additional questions, please call (907) 271-5768 and ask for the Bureau employee who signed your letter. You may also wish to consult an attorney.

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[5] U.S. v. Flynn & Orock, 53 IBLA 208 (1981).

A GUIDE TO AGUILAR PROCEEDINGS

For Current Landowners and Interest Holders

Introduction

This information is being provided to help you understand the enclosed letter.

The property described in the letter was originally owned by the Federal government and has been claimed by an Alaskan Native under the Native Allotment Act of May 17, 1906.[1] You are receiving the enclosed letter because the Bureau of Land Management's (BLM) research indicates that you are a current owner of the property or that you currently hold an interest in the property. The letter shows that copies have been furnished to the individuals and entities listed. If you know of others with an interest in this property, please provide their names and addresses to the BLM so that they may be notified of these proceedings.

Your interest in the property is not being taken away or formally challenged by the enclosed letter and this explanatory information. Rather, this material explains why other claims to the land are being considered at this time and the procedures that apply to the current review. Even if there is a valid Native allotment claim to the land, the following information will explain procedures to protect all parties and some possible defenses that may apply to you.

Under the Native Allotment Act, Alaskan Natives received a preference right to Federal lands used and occupied by them. This preference right became perfected upon the completion of five years use and occupancy and upon the filing of an application for allotment. This legal preference right has been recently clarified through administrative and court decisions. Two of these court decisions found that in certain situations Native allotment applicants had been denied due process under the law. Allotment applications should not have been rejected by the BLM without first giving the applicant an opportunity to present oral testimony supporting his claim of use and occupancy.[2] And if a Native allotment applicant was the first to use the land but delayed in filing his application, an intervening claim by someone else could not be used by the BLM as the only reason for rejection of the allotment application.[3] In the latter case, the District Court for Alaska ruled that the BLM must determine whether Federal lands were mistakenly or wrongfully conveyed to someone other than the Native allotment applicant.[4] If it appears that the land was wrongfully conveyed, it is the BLM's responsibility to recover the land for the applicant or his heirs.

1/ As amended by the Act of August 2, 1956, 34 Stat. 197, as amended, 70 Stat. 954; 43 U.S.C. 270-1 through 270-3 (1970). Repealed but with a savings clause for applications pending on December 18, 1971, by the Alaska Native Claims Settlement Act, 85 Stat. 688, 710; 43 U.S.C. 1601, 1617. See also Sec. 905 of the Alaska National Interest Lands Conservation Act of December 2, 1980, 94 Stat. 2371, 2435; 43 U.S.C. 1634.

Aguilar Procedures

The Aguilar Stipulated Procedures for Implementation of Order dated February 9, 1983, tell the BLM how to proceed in such cases.

One of the first steps is the issuance of the enclosed letter. The information received by the BLM as a result of this letter will be used to supplement the information already contained in the Native allotment applicant's case file. **Please note that the case file is available for public inspection at the BLM public rooms located in the Federal Building at 222 West Seventh Avenue, Anchorage and at the BLM office at 1150 University Avenue, Fairbanks. If you would like to examine the case file, call (907) 271-5960 (Anchorage) or (907) 474-2250 (Fairbanks) for hours and procedures.**

When the 90-day comment period provided for by the letter has ended, the BLM will review all of the available evidence and make a preliminary finding for rejection or approval of the allotment application. If the BLM concludes that the applicant has failed to provide sufficient proof of entitlement, it is required to hold an informal hearing. Following the hearing, the hearing officer (a BLM employee) will issue a decision approving or rejecting the allotment application. If a hearing is required, you will be notified so that you may be present to testify and to cross-examine the applicant and any witnesses. You will also receive a copy of the hearing procedures at the time you receive notification of the hearing. The decision of the BLM hearing officer on the allotment claim's validity is final for the Department of the Interior and is not subject to administrative appeal. If any party is dissatisfied, he can file an action in court. However, as a current owner, title cannot be taken from you unless court action is filed; you can assert defenses and other arguments at that time.

If the BLM determines that the allotment application is valid, the case file will be referred to the BLM's attorneys who will then take all appropriate actions to recover title to the land. If recovered, title will then be conveyed to the Native allotment applicant. Title may be recovered through a negotiated settlement or by District Court order.

2/ Pence et al. v. Kleppe, 529 F.2d 135 (1976).

3/ Ethel Aguilar v. United States of America, 474 F. Supp. 840 (D. Alas. 1979).

4/ This ruling was extended to all land conveyed by the Federal government in State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alas. 1985).

IF YOU HAVE A RESTRICTED DEED YOUR NATIVE ALLOTMENT OR TOWNSITE ARE:

1. Not subject to taxation in any form.
2. Can be mortgaged with BIA approval.
3. Income from property not taxable.
4. BIA furnishes free management services involving leases, wills, rights-of-way, appraisals, sales, and other land purposes.
5. Cannot be sold or encumbered without BIA approval.
6. If individually owned and owner dies, the estate is automatically probated by the Administrative Law Judge for the Department of Interior.
7. Cannot be sold by the State to satisfy welfare liens.
8. Can be changed to unrestricted at anytime by application to and approved by the BIA if you are married to a non-native and die with no will your land automatically go out of trust.

IF YOU HAVE AN UNRESTRICTED DEED:

1. Your Native Allotment is taxable.
2. You can do as you please with it without permission from anyone.
3. Once it is unrestricted it cannot be changed to a restricted deed.
4. If you want a will, you will have to get your own attorney.
5. The Bureau will not get involved with tresspass, sales, gift deeds, etc.

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL
Anchorage Branch

360 "K" STREET, SUITE 105
ANCHORAGE 99501

October 31, 1967

Department of Aviation
4510 International Airport Road
Anchorage, Alaska 99504

ATTENTION: Miss Margery McCormick

RE: Right of State to acquire right of way across public lands not rezoned for public uses, pursuant to R.S. §2477, USCA Title 43 §932

NATIVE LAND CLAIMS

Gentlemen:

The question has been raised whether an individual native land claim will be subject to a different interpretation from other entrymen or homesteadors under Title 43, § 932.

No case law exists wherein this precise issue was raised and answered. A native land claim, by its very nature, is an entirely different kind of "entry" --in fact, a native land claim cannot really be called an "entry" since the native claim is usually asserted and said to exist even as against the Federal Government. It follows that if the native proves that his claim validly pre-dates any rights acquired by the Federal Government, then clearly the Federal Government could have no rights to give.

Mrs. Pearl Peters, of the Bureau of Land Management, assured this writer that the burden of proof is entirely upon the native when asserting his claim. If the native fails in the burden of proving his claim, then, of course, the status of the land remains unaffected. If, however, the native is successful anyone going or remaining upon the claimed land after the established date of the claim must be considered a trespasser--in "good faith," of course.

The most serious question raised must be left unanswered: that is, how much "proof" is required to establish the native's claim. The answer appears to be more political than legal. However, it would be safe to assume that "substantial" proof would be required in the administrative law sense.

-- continued.

As a practical matter, then, any agency accepting the offer by the Federal Government pursuant to Title 43 § 932 should attempt to discover if there are, in fact, any native claims upon the land to be used for the right of way. If it can be discovered that claims do exist, then it would seem that such claim would probably be valid simply because the claim is "discoverable." If none are "discoverable", then probably none exist.

Investigation into the existence of claims should be conducted with discretion so that frivolous claims or claims made in bad faith, will be avoided.

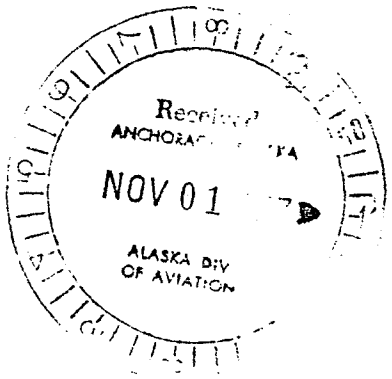
In conclusion, a native land claim is unique by its very nature and does not fit into any of the "nice legal niches" of real property law. Even after taking every precaution available it seems that the possibility of a native land claim becoming a valid reality remains one of the "perils of life" which cannot be completely guarded against.

Yours Very truly,

EDGAR PAUL BOYKO
Attorney General

By: Jim D. Rhodes
James D. Rhodes
Assistant Attorney General

JDR:kz



King Cove

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL
Anchorage Branch
360 "K" STREET, SUITE 105
ANCHORAGE 99501

September 26, 1967

Department of Aviation
4510 International Airport Road
Anchorage, Alaska 99504

ATTENTION: Miss Margery McCormick

Re: Right of State to acquire right of way across public lands not rezoned for public uses, pursuant to R.S. §2477, USCA Title 43 §932

Gentlemen:

The initial consideration as to acquisition by the State of a right of way across public lands involves a determination of the type of right of way necessary and proper under all the circumstances.

Our research has led us to the conclusion that a right of way pursuant to R.S. 2477, rather than a fee simple, is all that is necessary in order to secure to the Department of Aviation, and the public generally, a right to egress and ingress to King Cove air facilities. The State of Alaska, by accepting the offer of the Federal government, precludes a subsequent homesteader or patentee from interfering with the use of the right of way to the public for as long as the right of way is not abandoned by the State.

Before commencing with the construction of the highway, you should make sure that the proposed right of way will cross public lands not reserved for public uses. If you find that there are no patents or homesteads presently existing and the land is not set aside for some public use, then there should be no problem, and the recommendations set forth herein may be followed with confidence.

Section 932 of Title 43 is a standing offer by the Federal Government of a free right of way over public domain, and as soon as the offer is accepted in an appropriate manner by the agents of the public or by the public itself, a highway is established. Streter v. Stalnaker, 85 N.W. 47 (Neb., 1901).

To constitute acceptance of congressional grant of right of way for the highways across public lands, there must be either user sufficient to establish highways under the laws

-- continued

of the state, or some positive act of proper authorities manifesting intent to accept. Koloen v. Pilot Mound Tp., 157 N.W. 672 (N.D., 1916).

Where a highway validly exists over land covered by a land patent at time patent is issued, the patentee takes title subject to the right of way for highways. Ball v. Stephens, 158 P.2d 207 (Cal. 1945). See also Nicholas v. Grassle, 267 P. 196 (Colo., 1928), which holds that homestead entrymen take with the same reservation as the patentee.

The foregoing digest of the case law sets out the existing interpretation of Title 43, Section 932, USCA. It is clear that there are two methods by which a right of way can be established: either by use, or by some positive act. Since user is not involved, the only question is what will constitute "a positive act" within the meaning of the statute.

In Schwerdtle v. Placer County, 41 P. 448 (Cal., 1895), a declaration by the legislature of the state was held a sufficient act to constitute acceptance of the grant under the section. However, the Court found in Kirk v. Schultz, 119 P.2d 266, (Ida. 1941) that the "public authority" failed to do some positive act manifesting an intention to accept a trail as a public highway. Use was merely casual and insufficient to establish the highway.

Clearly, then, a mere declaration of the intention to accept can be sufficient in some cases, providing the declaration is followed by construction. However, casual use without more appears to be an insufficient manifestation of interest.

The solution, therefore, which presents itself is rather simple. That is the accepting authority should make an open declaration of the intent to accept, followed by construction of the road.

The following steps should constitute acceptance of the offer, pursuant to Section 932:

(1) Stake out the roadways; and
(2) Post notices of the acceptance at the beginning of the right of way and at various intervals in open and obvious places along the route of the right of way. The notice may be worded substantially as follows:

NOTICE OF ACCEPTANCE

The construction, use and maintenance of this right of way constitutes acceptance of the congressional grant of right of way across public lands, pursuant to Title 43, USC R.S. 2477; USCA 43, §932.

By the Authority of the
STATE OF ALASKA

It must be noted that a subsequent patentee or homesteader may attempt to obstruct the right of way created by the State. The State's remedy in that case would be to enjoin such acts. There is nothing which may be done to prevent the attempt, however.

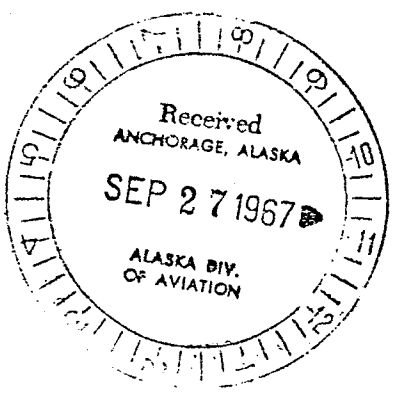
Immediate attention will be given any questions you may have concerning this, or any other matter. Feel free to contact me if explanation is needed on any point, or if supplemental research seems necessary.

Sincerely yours,

EDGAR PAUL BOYKO
ATTORNEY GENERAL

By: Dorothy Awes Haaland
Dorothy Awes Haaland
Assistant Attorney General

DAH:kz



MEMORANDUM

State of Alaska
Department of Law

TO: Anton K. Johansen
DOT&PF
Northern Regional Director

DATE: March 3, 1997

FILE NO: 665-97-0040

TEL. NO.: 451-2905

FROM: Paul R. Lyle
Assistant Attorney General

SUBJECT: Proposed Agreement with Stevens Village

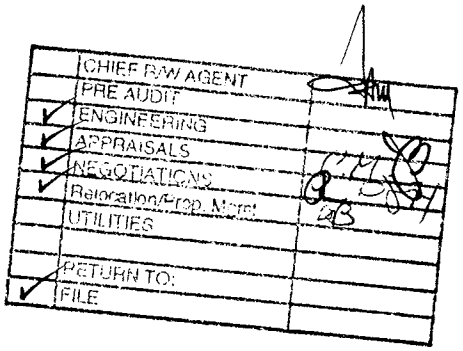
CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

Accompanying this memorandum is a draft memorandum of advice concerning DOT&PF's proposed contract to provide design and construction management services to Stevens Village. The memorandum of advice is provided in draft form so that you and your staff may ensure its factual accuracy and so that you may have the opportunity to discuss my advice before it is finalized.

If you have any questions, please do not hesitate to contact me.

PRL/

cc: John A. Miller
Chief, Right-of-Way
Northern Region



MEMORANDUM

State of Alaska
Department of Law

TO:	Anton K. Johansen DOT&PF Northern Regional Director	**DATE:**	March 3, 1997
		FILE NO:	665-97-0040
		TEL. NO.:	451-2905
FROM:	Paul R. Lyle Assistant Attorney General	**SUBJECT:**	Proposed Agreement with Stevens Village

DRAFT
CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

FACTS

The Department of Transportation & Public Facilities (the department) designed an airport for Stevens Village with state funds. The department planned to be reimbursed for the $300,000 design cost through an FAA construction grant. Subsequently, the Stevens Village Council decided to sponsor the airport construction project and to apply directly to the FAA for an AIP grant. The FAA grant will cover 93.75 percent of the project costs. The department supports the council's sponsorship of the project and its application for grant funds. Stevens Village is organized under the Indian Reorganization Act, 25 U.S.C. § 461 et seq. ("IRA").

The village council plans to construct the airport on a force account basis. The council wishes to use the state's design which is "bid-ready" and also wants the department to provide construction management services at the project site. The village will own and operate the airport after it is constructed.

The department wishes to enter into a contract with the village council for the provision of the services described above. The department is to be paid for these services out of the FAA grant funds. In this manner the department will be reimbursed for the state-funded airport design. In addition, by separate agreement, the department will grant matching funds to Stevens Village up to 6.25 percent of the estimated construction costs.

You have requested my advice with regard to this agreement and its potential effect on the state's litigation position on Indian country. You have also requested advice on methods to limit the state's liability for any claims related to the project design or the provision of construction management services for the project.

QUESTIONS PRESENTED AND SUMMARY OF ADVICE

The proposed agreement raises the following legal issues. A summary of my advice follows each question.

1. Does the department have statutory authority to enter into design and construction management contracts with Native Villages?

   Answer: Yes. The department may, in its sole discretion, provide design services, with or without charge, to Native Villages organized under the IRA. Construction management services may be provided if the department is reimbursed for the cost of personnel committed to providing those services.

2. As a Native village, does Stevens Village enjoy sovereign immunity from civil lawsuits?

   Answer: Stevens Village is recognized as a tribe by the federal government. As a tribe, Stevens Village is immune from the prosecution of civil suits to which it has not consented to be a party.

   In addition, state courts have no jurisdiction over the assets of Stevens Village. Assets owned by the village are exempt from any state court process seeking to enforce a money judgment against the village.

3. If Stevens Village enjoys immunity from civil suits, what contractual language, if any, will effectively avoid the village's immunity if the village breaches its contract and the department finds it necessary to file suit?

   Answer: The only contractual provision that could possibly overcome a tribe's immunity from suit is an express and unequivocal waiver of immunity which includes an agreement that disputes will be tried in state court and decided in accordance with state law.

   The village's 1990 constitution, which would probably be given credence by the courts, severely limits the scope of any waiver of immunity that the village council may sign. The village constitution also contains other requirements for any waiver of immunity. These requirements are discussed below in section 3.

4. Will the proposed agreement have an impact on Alaska's litigation concerning "Indian country," and, if so, is there contractual language which may lessen any potential impact?

Answer: The proposed contract treats the village like any other municipality exercising governmental jurisdiction within its political boundaries. Although it is difficult to predict how a court would view the proposed agreement, it is probable that the proposed contract would be interpreted as tacit state recognition of the right of villages to exercise tribal governmental control over transportation facilities located within their claimed territory.

The proposed contract may also require approval by the Secretary of the Interior under 25 U.S.C. § 81. If secretarial approval of the contract is required, the contract may imply the existence of Indian country in Alaska. It would be prudent for the department to avoid entering into the proposed contract with Stevens Village until the scope of Native village governmental powers is better defined.

5. Could the department be held liable for damages to third parties for alleged violations of constitutional rights by the village if the village enforces a local hiring preference during construction or excludes certain classes of aviation users from landing on or leasing airport property after construction in an attempt to limit outside influences?

Answer: Yes.

6. How may the department protect itself against potential claims from the village related to the airport's negligent design or negligent construction management?

Answer: The department cannot shield itself from liability for its sole negligence. There are some contractual provisions which may assist the department in its defense against any design defect or construction management negligence claims. Those provisions are discussed below in section 6.

7. Does the Procurement Code apply to state matching funds expended by Stevens Village in the construction of the airport?

Answer: Yes. In my opinion, the Procurement Code requires state matching funds for the construction of public works to be expended

through contracts let by competitive sealed bidding unless the department first makes a "best interests" determination to justify a sole source contract under the code.

LEGAL ANALYSIS

The Indian Reorganization Act and the Legal Status of Stevens Village

Since Stevens Village is organized under the IRA, a brief review of that statute and the status of the village is necessary to an understanding of the legal issues addressed in this memorandum.

The IRA provides for the formation of two separate and distinct legal entities. Section 16 of the IRA provides for the formation of governmental units usually referred to as "village councils" or "IRA councils." These councils are formed through the establishment of a constitution and by-laws which must be ratified by an election of the tribe's members and approved by the Secretary of the Interior.

Section 17 organizations are federally chartered corporations formed to facilitate tribal economic development. Section 17 corporate charters must also be approved by the Secretary of the Interior.

Section 16 village councils generally possess a limited sovereign immunity. Most section 17 corporate charters include a "sue and be sued" clause. Therefore, section 17 corporations generally do not possess immunity or may waive their immunity with respect to assets owned by them or dedicated to commercial purposes, although some corporate charters require any waiver to be approved by the section 16 IRA council in order to be effective. Atkinson v. Haldane, 569 P.2d 151, 170-75 (Alaska 1977); Hydaburg Co-op Ass'n. v. Hydaburg Fisheries, 826 P.2d 751, 756-57 (Alaska 1992)(Hydaburg I). Heidi L. McNeil and Mark D. Ohre, Gaming Spurs Indian Country Land Ventures, National Law Journal, Jan. 20, 1997, at B8. Therefore, before entering into any contract with a Native village organized under the IRA it is essential that the village constitution and section 17 corporate charter be reviewed.

Stevens village organized an IRA section 16 governmental unit and adopted its first constitution in 1939. This constitution was superseded in 1990 by a new "Constitution of Stevens Village." The 1990 constitution has been approved by the Secretary of the Interior.

Stevens Village does not have a section 17 corporation. However, Article X, section 3(j) of its 1990 constitution empowers the village council "[t]o engage in economic development enterprises for the benefit of the Village or its members." Article X, section 3(q) grants the council the power

"[t]o charter enterprises, corporations and associations and to join or charter housing authorities." Therefore, the Stevens Village Constitution mixes the governmental and commercial functions of IRA entities into one section 16 organization.

In Atkinson, 569 P.2d at 174-75, the court held that Congress intended section 16 and 17 entities to be separate and distinct. The Atkinson decision reviewed cases from other jurisdictions holding that section 16 IRA governmental units were subject to civil suits. Atkinson distinguished those decisions on the basis that the IRA constitutions at issue in those cases "mixed the governmental and corporate entities" in a single organization that contained a "sue and be sued" clause. While noting the legal distinction between IRA section 16 and section 17 entities, Atkinson did not hold that it was illegal for one IRA entity to exercise both governmental and commercial functions.[1] This memorandum assumes that Stevens Village may lawfully mix the governmental and commercial aspects of tribal functions in a section 16 constitution.

1. Statutory Authority to Assist Stevens Village

The department has the statutory authority to assist Stevens Village in the design and construction of a public airport. AS 02.15.120 provides in part:

> The department **may assist persons** in the construction, enlargement and improvement of airports and air navigation facilities. The airports and facilities, until they are abandoned as such, shall be at all times available for the use of and accessible to the general public, and maintained as public airports and facilities.

(Emphasis added).

In the statutes of Alaska the term "'person' includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person." AS 01.10.060(8). Since Stevens Village is organized under the IRA and has a valid IRA constitution,

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[1] In 1992, the Alaska Supreme Court appeared to hold that a single IRA organization may simultaneously exercise both governmental and commercial functions. Hydaburg I, 826 P.2d at 756-57. However, after remand of Hydaburg I, the court held that the status of an IRA entity as a section 16 governmental unit or a section 17 commercial unit must be established in order to determine whether its assets are immune from execution on a judgment. . Hydaburg Co-op A'ssn. v. Hydaburg Fisheries, 925 P.2d 246, 247 & n. 3 (Alaska 1996)(Hydaburg III).

it is an "organization" under AS 01.10.060(8) and thus a "person" to whom the department may render assistance under AS 02.15.120.[2]

The department may provide a broad array of services to individuals seeking to establish airports. It is expressly authorized to grant or lend funds to any person for airport "planning, acquisition, construction, improvement, maintenance, or operation". AS 02.15.140. The "project costs" that may be covered by the grant or loan specifically include "the costs of all necessary studies, surveys, plans and specifications, architectural, engineering or other services . . . ." AS 02.15.155.

Therefore, the department is authorized to expend funds to design an airport for Stevens Village and may turn that design over to the village council for its use in constructing the airport. The department, in its sole discretion, may either require reimbursement for the design or treat the design costs as a grant and provide the plans and specifications to the village at no charge.

The department is also authorized to provide construction management services to the village council because AS 02.15.120 authorizes the department to "assist persons in the construction" of airports. However, any contract for construction management services would probably be construed as a technical assistance contract under the Procurement Code. AS 36.30.730 requires the department to be reimbursed for the costs of personnel committed to technical assistance contracts.

If the department renders **any** design or construction assistance to Stevens Village, the airport **must** be open to use by the general public and **must** be maintained as a public airport until abandoned. See AS 02.15.120 and AS 02.15.140. This statutory requirement may have an impact on the department's potential liability for damages to third parties if Stevens Village fails to provide equal access to the airport or grants exclusive-use rights on the airport following construction. See section 5, below.

2. Tribal Status and Sovereign Immunity

The Bureau of Indian Affairs (BIA) is required to publish an annual list of Native groups eligible to receive assistance from the agency. The 1993 Interior list purported to clarify the legal effect of including Alaska Native groups in the annual list. According to the supplementary

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[2] The department of Law has expressed doubt as to whether traditional village councils, i.e. councils which have not been organized under the IRA, are "persons" under AS 01.10.060(8). 1984 Inf. Op. Att'y Gen. (Oct. 24; 166-134-84) at pp. 2-5. This memorandum expresses no opinion on that issue since Stevens Village is formally organized under section 16 of the IRA.

information accompanying the publication of the 1993 list, inclusion of an Alaska Native group constituted an express and unequivocal recognition of that group as a tribe. Alaska tribes so recognized were declared to be equal in status to tribes in the contiguous 48 states and entitled to the same protections and immunities as other federally acknowledged tribes. 58 Fed. Reg. 54364 at 54365-66 (1993). Stevens Village is included on the list and is therefore a tribe.

The 1995 Interior list stated that inclusion on the list "does not resolve the scope of powers of any particular tribe over land or non-members." 60 Fed. Reg. 9250 at 9251 (1995). The state does not concede that Native groups included on the Interior list possess governmental powers over specific territory or non-members. The extent of tribal governmental powers and the issue of whether there is "Indian country" in Alaska continues to be litigated in the courts.

Generally, Indian tribes enjoy an inherent, limited sovereignty. United States v. Wheeler, 98 S.Ct. 1079, 1086 (1978). By "inherent," the law means that tribal sovereignty derives from the Indian tribes' original exercise of power over their own affairs prior to the arrival of Europeans on this continent. Id. Sovereignty attaches to tribes because they were independent nations prior to the establishment of the United States. Id. The word "limited," refers to the fact that Indian sovereignty is now subject to the plenary power of Congress to alter or extinguish it. Thus, Indian tribes retain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status" in relation to the federal government. Id.

One of the most important aspects of tribal sovereignty is immunity from civil lawsuits in the absence of an express consent to suit by Congress or the tribe. Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670, 1677 (1978)("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers . . . subject to the superior and plenary control of Congress."); Ollestead v. Native Village of Tyonek, 560 P.2d 31, 33 (Alaska 1977)("Indian tribes are sovereign, self-governing entities subject only to the plenary power of Congress.")

In 1988, the Alaska Supreme Court ruled that Stevens Village did not possess immunity from suit because it was not a federally recognized tribe and because, in the court's view, mere federal approval of IRA constitutions was insufficient to constitute tribal recognition. Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32, 34-35 (Alaska 1988). Stevens Village's subsequent tribal recognition by the federal government undermines the supreme court's conclusion in that case.

In my opinion, the Alaska Supreme Court is now likely to rule that Stevens Village is a tribe which possesses common-law immunity from civil suit. The same ruling is likely to be made with respect to all Native villages on the 1993 Interior list, at least insofar as they are organized under

section 16 of the IRA and are acting in their governmental capacity. This conclusion is based upon the supreme court's 1977 decision in Atkinson, 569 P.2d 151.

In Atkinson, the plaintiffs brought suit against the Metlakatla Indian Community alleging that the community negligently trained police officers whose actions resulted in the wrongful death of two individuals. The court ruled that the community was a tribe.[3] As a tribe, the court held that the community possessed sovereign immunity.

> Once the executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a nonjusticiable political question, the Community is entitled to all of the benefits of tribal status. The Supreme Court of the United States declared in [United States v. United States Fidelity & Guaranty Co., 309 U.S. 509 (1940)] that one of those benefits is tribal sovereign immunity in the absence of congressional waiver.

569 P.2d at 163.

The Metlakatla Community had both a governmental unit organized under section 16 of the IRA and a corporation chartered under section 17. The court found that the actions complained of were undertaken by Metlakatla in its governmental capacity. Id. at 174-75. Because the actions complained of were governmental in character, the court held that the IRA Council was immune from suit in the absence of a congressional or tribal waiver of immunity. The court dismissed the action because there was no such waiver.

There is no general congressional waiver of immunity for section 16 IRA organizations. Therefore, the court's holding in Atkinson will likely be applied to declare Stevens Village immune from any civil suit to which it has not expressly and unequivocally consented.

Moreover, while the Alaska Supreme Court has rejected the tribal status of IRA councils in the past, it has consistently ruled that the **assets** of those groups are immune from execution to enforce money judgments because section 16 of the IRA empowers a council to prevent the disposition or encumbrance of its assets without the council's consent. Hydaburg I, 826 P.2d at 756; In re City of Nome, 780 P.2d 363, 367 (Alaska 1989).

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[3] This ruling was based upon the community's unique history in this state and not on its status as a Native group organized under the IRA. 569 P.2d at 156.

In fact, the court has held that state courts lack jurisdiction to adjudicate **any** issue related to "ownership or other interests in property which is subject to a restriction against alienation imposed by the United States . . . ." Heffle v. State, 633 P.2d 264, 267 (Alaska 1981)(No jurisdiction over Native allotment); Calista Corp. v. Mann, 564 P.2d 53, 58 (Alaska 1977)(No jurisdiction to determine rights to regional corporation stock except to determine intestate heirs); Ollestead, 560 P.2d at 36 (no jurisdiction to determine rights to oil lease proceeds held in trust by U.S. for Tyonek Natives). The provision of IRA section 16 which gives IRA councils the power to prevents encumbrance of IRA assets is a type of restriction against alienation. Thus, the courts have no jurisdiction over IRA governmental unit assets unless immunity is waived with regard to them.

Therefore, in my opinion, the Alaska Supreme Court is now likely to hold that Native groups included in the 1993 Interior list are tribes and that, as such, they possess common-law immunity from the prosecution of civil suits to which they have not given their express consent. In addition, the court will continue to exempt the assets of section 16 IRA organizations from execution to satisfy money judgments.

3. Contractual Provisions to Avoid Immunity

Against the backdrop of Stevens Village's inherent, limited tribal sovereignty and the likely recognition of that sovereignty by the Alaska Supreme Court, there is only one contractual provision that may protect the department's interests should a civil suit against the village for breach of contract become necessary. The contract must contain a clear and unequivocal waiver of sovereign immunity. This conclusion is supported by case law and the provisions of Steven Village's constitution, which would likely be given effect by the Alaska Supreme Court.

a. Case Law

Ramey Construction Co., Inc. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982) is factually similar to the type of action the department would have to file if Stevens Village breached its contract with the state by failing to pay for design or construction management services. Ramey was awarded a ten million dollar contract with the Apache Tribe to construct a resort hotel complex on reservation lands. After construction was complete, Ramey filed a lawsuit to recover a $427,000 retainage that it alleged the tribe had wrongfully withheld. Ramey also sought interest on the retainage. Id. at 317. The tribe consented to an entry of judgment for $427,000 but refused to pay interest on that amount. Id. at 320. The trial court found that the tribe was immune from suit for the interest. Ramey appealed.

Ramey argued that the tribe had waived its immunity by implication by agreeing to certain provisions both in its contract with Ramey and its loan documents for the financing of the resort

complex. The Tenth Circuit rejected these arguments because "[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." (Citations and inner quotes omitted). Id. at 319.

Ramey next argued that the tribe had waived its immunity from suit for interest on the retainage because it consented to an entry of judgment for the principal amount of the retainage. The court rejected this argument under the rule that the scope of a waiver of sovereign immunity is to be strictly construed in favor of the sovereign party. Because the tribe consented only to entry of judgment for the principal amount of the retainage and not interest on that amount, interest could not be awarded. Id. at 320.

Ramey next argued that the "sue and be sued" clause in the tribe's section 17 corporate charter constituted a waiver of immunity. Id. The court disagreed. The tribe had both a section 16 and a section 17 IRA entity. The Tenth Circuit held that, because section 16 and section 17 IRA entities are separate and distinct, the "sue and be sued" clause in the section 17 corporate charter could not affect the immunity of the section 16 governmental unit.[4] Although the hotel complex was clearly a commercial venture, the court upheld the trial court's finding that the hotel was a "sub-entity" of the section 16 organization and not a separate corporate venture. Therefore, the hotel venture was "clothed with the sovereign immunity of the Tribe" and the suit against the tribe was dismissed. Id.

In Hydaburg III, 925 P.2d at 250, a building was constructed, as part of a joint commercial venture, on one-third of a lot of land owned by an IRA council. The Alaska Supreme Court held that the portion of the land on which the building was constructed was dedicated to the commercial venture and thus subject to execution to satisfy a money judgment in state courts. However, the case was remanded to the superior court to determine whether the remaining two-thirds of the same lot were dedicated to the same business function or whether that portion of the lot was owned by the IRA council in its governmental capacity. If the remaining two-thirds of the lot is ultimately determined to be in the ownership of a section 16 IRA entity, the land will be exempt from state process to execute against a money judgment.[5]

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[4] The court cited the Alaska Supreme Court's decision in Atkinson and similar rulings from other courts in support of this conclusion.

[5] The Hydaburg case demonstrates the complexity of precisely identifying asset ownership in the context of section 16 and 17 IRA organizations. The Hydaburg case has been to the supreme court three times and is likely to return, regardless of the decision rendered by the superior court on remand.

A waiver of immunity is also important even if the department never has to file suit against the tribe. If the village sues the state for breach of contract, tribal immunity may preclude the state from raising counterclaims insufficiently related to the village's cause of action.[6] The Ninth Circuit's decision in McClendon v. United States, 885 F.2d 627 (9th Cir. 1988) is instructive on this issue.

In McClendon, the Ninth Circuit held that a tribe's lawsuit to establish its ownership of disputed land constituted a waiver of the tribe's sovereign immunity only with regard to ownership issues. The tribe's waiver of its immunity was not broad enough to apply to an alleged breach of a lease entered into as part of a settlement of the tribe's lawsuit. The court held that the tribe's waiver of immunity to litigate one issue was "not necessarily broad enough to encompass related matters, **even if those matters arise from the same set of underlying facts.**" Id. at 630 (Emphasis added). The court held that the tribe was immune from an action by the lessee alleging breach of contract.

The Ninth Circuit was unimpressed with the argument that it was unfair to allow the tribe to sue without exposing itself to suit on related matters. Id. at 631. The court stated that individuals who have business dealings with a tribe are on notice that the tribe may be immune from suit. The court held that considerations of equity were not in McClendon's favor because he failed to negotiate a waiver of immunity in his contract with the tribe. Id. at 630.

The lesson of Ramey, Hydaburg, and McClendon is that a waiver of immunity should be included in all contracts with tribal entities, even if the entity is an IRA section 17 corporation.[7] In the event of a contract dispute with Stevens Village, the department could find itself unable to enforce its contractual rights in court unless the contract includes a clear and unequivocal waiver of sovereign immunity.

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[6] If problems arise in the construction of the airport or cost overruns occur that exceed the amount of FAA grant funds, Stevens Village may assert a claim against the department for negligent design or negligent construction management.

[7] A recent article discussing commercial real estate transactions with section 17 corporations advises that "waivers [of sovereign immunity] . . . should be obtained not only from the tribe, but also from a Sec. 17 corporation and a tribal enterprise." McNeil and Ohre, National Law Journal, Jan. 20, 1997, at B8. However, as stated above, this issue is moot with respect to Stevens Village because the village has no section 17 organization.

b. Constitution of Stevens Village

The village's 1990 constitution was drafted and approved by the Dep't of the Interior under section 16 of the IRA. The village constitution strictly regulates any waiver of immunity the IRA council may execute. Article X, section 5 of the constitution provides:

> Nothing in this Constitution shall be deemed or construed to be a waiver of the sovereign immunity of Stevens Village, which may be only waived by express resolution of the Village Council, after receiving an affirmative vote of the majority of the entire adult membership, and only to the extent specified in such resolution and permitted by this Constitution and federal law. Waivers of sovereign immunity shall not be general but must be specific and limited as to duration, grantee, transaction, property or funds, if any, of the Tribe subject to the waiver, as well as specific to the court having jurisdiction and applicable law.
>
> Waiver of the sovereign immunity of the Village shall not be deemed a general consent to the levy of any judgment, lien or attachment upon property of the Village other than property specifically pledged, assigned or otherwise explicitly subject to levy in the waiver resolution.

This article takes precedence over the powers granted the council elsewhere in the constitution to enter into commercial transactions or to engage in economic development activities. Therefore, unless the contract with Stevens Village contains a clear and unequivocal waiver of sovereign immunity, the village would likely be immune from suit, even if the council were to act through a separate tribal enterprise or tribe-chartered corporation.

The Alaska Supreme Court has not hesitated to give effect to the provisions of section 16 of the IRA or constitutions drafted pursuant to that section where the assets of an IRA section 16 entity are at issue. City of Nome, 780 P.2d at 367; Hydaburg III, 925 P.2d at 247. Since Stevens Village is a tribe, the court will give effect to the village constitution when evaluating any waiver of immunity executed by the village council. Therefore, the court will probably require any waiver of immunity to conform to the above-quoted article of the village constitution.

Under Article X, section 5 of the village constitution, the court would likely invalidate a general waiver of immunity. A limited waiver for this project and contract should be preceded by a council resolution which is approved by a vote of the village membership. In addition, I recommend that the waiver include language to: (1) specify that Alaska law governs the contract's interpretation, (2) specify that Alaska state courts would have jurisdiction over any civil action

brought to enforce the contract, (3) be specific to matters arising out of the design and construction management services provided for the airport, (4) list assets subject to execution that are equal in value to the estimated value of the contractual services, and (5) include a six-year statute of limitations for filing suit on the contract measured from the date of project completion or beneficial occupancy.[8] Any contractual waiver of immunity providing less protection will only introduce uncertainty both in contract administration and judicial enforcement.

c. Alternatives to a Waiver of Immunity

A recent Alaska Law Review article suggested identifying which IRA organization owns specific assets and pledging particular assets as security for business transactions as a way to avoid confusion in the IRA commercial context and to avoid the need to waive immunity. Kenton Keller Pettit, Note: The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court?, 10 Alaska Law Review 363, 397-98 (1993). I have considered this alternative and have determined that it would not suffice in this situation.

As stated above, Stevens Village does not have an IRA section 17 corporation. Therefore, simply pledging assets to this contract will not avoid the tribe's sovereign immunity. The mere pledging of assets would be insufficient even if Stevens Village were to charter a separate enterprise under Article X, section 3(q) of its constitution. As a "sub-entity" of the section 16 governmental unit, the enterprise would be clothed with the tribe's immunity. Ramey, 673 F.2d at 320. Any tribal enterprise formed pursuant to the constitution would be subject to the strict waiver requirements of the constitution, which, as stated above, expressly takes precedence over any other clause. For the same reason, an agreement that merely provided that Stevens Village is pursuing this project in its "business purpose" capacity would provide insufficient protection for the state against a village sovereign immunity defense.

I have also considered whether utilizing an arbitration clause would be sufficient to waive the tribe's immunity. In Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983) the Alaska Supreme Court held that a contractual arbitration clause waived tribal immunity. However, the Ninth Circuit held that a similar clause did not constitute a waiver. Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989). Since any litigation concerning the proposed contract has the potential of ending up in federal court, either through direct filing or a removal action, an arbitration clause would be a risk for the state unless it explicitly waived immunity. Furthermore, the restrictive waiver provisions of the village constitution may be applied to interpret

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[8] Six years is the statute of limitations for bringing a civil action for breach of contract. AS 09.10.050(1).

the arbitration clause as not constituting a waiver since the clause would not comply with the specific requirements of the village constitution and would not have received the prior approval of the village's adult membership.

To summarize, any contract with Stevens Village must contain a clear and unequivocal waiver of sovereign immunity that complies with Article X, section 5 of the village constitution. In my opinion, any waiver that does not comply with the village constitution may be ineffective and render the proposed contract unenforceable against the tribe in any court. There is no contractual provision other than an unequivocal waiver of sovereign immunity that will adequately protect the state's interests.

4. The impact of the proposed agreement on "Indian country" litigation.

Generally speaking, the issue in Indian country litigation is whether Alaska tribes may exercise governmental power over specific territory in the state and, if so, the scope of power they may exercise. That being the case, the department should avoid any action that appears to accede to any tribe's claim that it exercises governmental control over specific territory.[9]

The primary problem with the proposed contract in regard to the Indian country controversy is that it requires the state to assist a village in its efforts to exercise ownership and operational control over a public facility located on land within its claimed territory. The contract treats Stevens Village as the department would treat any municipality seeking airport assistance, including a grant of state matching funds for project design and construction.

Municipalities are governments that exercise defined governmental powers over lands located within their political boundaries. The more the department treats a Native Village like any other municipality, the more it looks like the state is recognizing the right of the village council to

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[9] A detailed explanation of "Indian country" is beyond the scope of this memorandum. However, the Stevens Village constitution helps to demonstrate the scope of the controversy. Article II of the Stevens Village constitution lays claim to village council governmental jurisdiction over all of the lands customarily and traditionally used or owned by the Koyukon people of Stevens Village "from time immemorial" including lands withdrawn under ANCSA for selection by Dinyee Corporation or Doyon, Ltd, all lands actually patented to those corporations, the federal townsite of Stevens Village and all fee lands and Native allotments within the traditional lands of the village without regard to the issuance of any patent or unrestricted fee title to any such lands. Therefore, as things now stand, the state faces uncertainty over the scope of tribal governmental power and the territorial boundaries within which that power may be exercised, if any.

exercise governmental authority within its claimed political boundaries. A court may conclude that where the state treats a village as it would any local government organized under the laws of Alaska then it has implicitly recognized the existence of Indian country.

Since the contract relates to the construction of a public facility on land owned by a tribe, the contract may have to be approved by the Secretary of the Interior under 25 U.S.C. § 81 (hereinafter "section 81").[10] Section 81 provides, in relevant part, that the Secretary must approve contracts with tribes that require the payment of tribal funds to any person in return for "services . . . **relative to** [tribal] lands . . . ." (Emphasis added). Any contract not so approved is "null and void" and all money paid by the tribe "may be recovered by suit in the name of the United States . . . ."[11] If this contract must be approved by the Secretary because it is one for services relative to tribal lands, then a court may interpret the contract as giving tacit recognition to the exercise of tribal governmental powers over specific territory, i.e. recognizing Indian country.

It is difficult to predict whether a court would require approval of the proposed contract by the secretary under section 81. The courts disagree over which contracts will trigger the application of section 81. For example, the Tenth Circuit held that section 81 does not apply to construction of facilities on Indian reservation lands where the construction is paid for entirely out of grant funds from another federal agency. The reasoning is that where tribal funds are not at risk, section 81 should not apply. Sac & Fox Tribe of Indians, 757 F.2d at 222. Under this analysis the state would be able to avoid section 81 entirely because the department's services under the proposed contract will be paid for from federal grant funds, not tribal funds. However, Pueblo of Santa Ana v. Hodel, 663 F.Supp. 1300, 1307-08 (D.D.C. 1987) distinguished Sac & Fox on the basis that, although tribal funds are not obligated to an enterprise, section 81 still applies if tribal lands are obligated to the enterprise or may be encumbered under the contract.

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[10] The land on which the new airport will be constructed has various ownerships. Tract Ib is part of the present airport which is constructed within an ANS withdrawal. Tract Ib is presently owned by the United States. BLM plans to convey this tract to Dinyee which, in turn, is required to deed it to the state under ANCSA § 14(c)(4). Tracts II and III of the airport were deeded to the IRA Council by the BLM townsite trustee. Stevens Villages owns Tracts II and III in fee. The IRA Council owns the surface estate in Tract IV by deed from Dinyee. The subsurface in Tract IV is owned by Doyon, Ltd. Section 81 applies to any land owned by a tribe whether it was acquired by purchase or otherwise. Narragansett Indian Tribe v. Ribo, 686 F.Supp. 48, 51 (D.R.I. 1988).

[11] Section 81 was enacted in 1871 to protect Indian people from dissipating their lands through fraudulent contracts. The Sac and Fox Tribe of Indians of Oklahoma v. Apex Construction Co., 757 F.2d 221, 222 (10th Cir. 1985), cert. denied, 106 S.Ct. 146 (1985).

In U.S. ex rel. Harlan v. Bacon, 21 F.3d 209 (8th Cir. 1994) the court held that a lease of Indian land which gave a tribe a share of crops grown on the land by the lessee was not covered by section 81 "[b]ecause the tribe received crops and not services" under the contract. In Penobscot Indian Nation v. Key Bank of Maine, 906 F.Supp 13, 20 (D.Me. 1995) the court held that a settlement agreement affecting land owned by a tribe was not relative to Indian land because it disposed of "pending legal claims, not the transfer of Indian lands, nor the management, control, or particular status of those lands."

In Narragansett Indian Tribe v. RIBO, Inc., 686 F.Supp. 48, 51 (D.R.I. 1988), the court held that promissory notes secured by mortgages on two parcels of land owned by a tribe required secretarial approval under section 81 because they were relative to Indian land and affected tribal funds. However, in United States ex rel. Yellowtail v. Little Horn State Bank, 828 F.Supp. 780 (D.Mont. 1992), affirmed, 15 F.3d 1095, 1994 WL 8715 (9th Cir. 1994)(mem.), the court held that loans to a tribe secured by security agreements involving tribal funds were not covered by section 81 because the loans were not "service contracts" nor "relative to Indian lands." The court was unconcerned that the security agreements affected tribal funds in apparent violation of section 81 because the bank did not enforce its rights under the security agreements and because the court found that "tribal funds" means only funds actually on deposit with the United States' Treasury. Id. at 787 n. 14.

On appeal of the Yellowtail decision, in an unpublished decision, the Ninth Circuit held that the security agreements "merely created the possibility" that the bank would gain control over tribal funds in the event of nonpayment of the loans.[12] The court found that such a possibility did not "rise to the level contemplated by the statute" regardless of whether section 81 is interpreted to apply to contracts that are relative to Indian land or relative to tribal funds. 1994 WL 8715 at 2.

In A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986), the Ninth Circuit found unenforceable an unapproved contract for the construction and management of a gambling facility on tribal lands. The court held that the contract was "relative to" Indian lands. The Ninth Circuit recognized its duty to give Indian statutes "'a sweep as broad as [their] language' and interpret them in light of the intent of the Congress that enacted them.'" 789 F.2d at 787, quoting Central Machinery Co. v. Arizona State Tax Comm'n., 100 S.Ct. 2592, 2596 (1980). Thus, the court stated that "[t]he broad language of section 81 expresses congressional intent to cover almost all Indian land transactions." 789 F.2d at 787. In Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc., 840 F.2d 1394, 1404 (9th

[12] Under Ninth Circuit Rule 36-3, unpublished decisions may not be cited as legal authority in any court of the circuit.

Cir. 1987), cert. dismissed, 109 S.Ct. 7 (1988), the court refused to identify a single factor or set of factors that could be used to make a definitive determination as to whether a contract requires section 81 approval.

A reading of A.K. Management and Barona indicates that the Ninth Circuit focusses on the degree of post-construction control that non-Indians exercise over any facility built on Indian land in determining whether section 81 approval of a contract is required. Relying on A.K. Management, Barona, and other cases, the Seventh Circuit has developed a four-factor analysis to determine whether a particular contract comes within section 81. Those factors are:

> 1) Does the contract relate to the management of a facility to be located on Indian lands? 2) If so, does the non-Indian party have the exclusive right to operate that facility? 3) Are the Indians forbidden from encumbering the property? 4) Does the operation of the facility depend on the legal status of an Indian tribe being a separate sovereign?

Altheimer & Gray v. Sioux Manufacturing Corp., 983 F.2d 803, 811 (7th Cir. 1993), cert. denied, 114 S.Ct. 621 (1993). However, like the Ninth Circuit, the court in Altheimer stressed that no one factor is controlling on the issue of whether a contract requires secretarial approval under section 81. Given this state of the law, it is difficult to predict how the courts would view the proposed contract under the Altheimer factors. Attempting to apply the Altheimer considerations to the proposed contract leads to mixed results, as will be demonstrated below.

a. Management of the Facility.

The proposed contract does not relate to non-Indian management of a facility after construction. The state will direct the course of construction and control the use of materials on the airport for two to four years, but this fact probably would not constitute the type non-Indian post-construction management with which the courts are concerned.

b. Do Non-Indians enjoy exclusive rights to operate the facility?

The airport will be owned and managed by the tribe after construction, not the department. However, in order to protect itself from third-party suits, the department will have to require in its contract with the village that the village keep the airport open to the public at all times and avoid the granting of exclusive rights on the airport. See section 5, below. Although the department will not operate the facility, the department will have the authority to dictate how the tribe operates the facility with respect to leasing and user policies. If the tribe violates state law in the operation of the

airport, the department is required to take corrective action, probably in the from of a civil action for an injunction against the tribe.

c. May the tribe encumber the property after construction?

The proposed contract does not prohibit Stevens Village from encumbering village-owned land. However, both FAA regulations and AS 02.15.120 require the village to maintain the project as a public airport until the airport is abandoned. This restriction on the use of the village's property constitutes an "encumbrance" under state law and may be read into any contract by operation of law. Domer v. Sleeper, 533 P.2d 9, 11 at n. 5 (Alaska 1975)(An "encumbrance" includes any "restriction on use" or right in a third party that "limits the use of the land . . . .").

In order to secure the village's performance under this contract and to comply with the Constitution of Stevens Village, I have recommended that specific assets of the village be pledged to this undertaking. The primary asset of the village council is its land or structures located on land. The pledging of real property to secure payment under the proposed contract may trigger the requirement for section 81 approval. This problem could be avoided by not requiring the village to pledge real property. Of course, if no other assets are pledged, the state will not be able to collect the money owed to it under the contract if Stevens Village fails to pay and the state is forced to file a collection action. The absence of a means of collecting on any money judgment would render the waiver of the village's immunity meaningless.

d. Does the legality of the contract depend on the tribe's sovereignty?

The subject of the proposed contract does not directly depend upon the sovereignty of the tribe for its validity. The department is authorized to provide these services to "persons" under AS 02.15.120. Design and construction management contracts can be performed anywhere.

However, in State of Alaska v. Native Village of Venetie Tribal Government, 101 F.3d 1286, 1294 (9th Cir. 1996), one of the six factors that the Ninth Circuit applied to determine whether Venetie was a "dependent Indian community" inhabiting Indian country was "the established practice of government agencies toward that [geographic] area . . . ." The courts may find it significant that public airport construction is usually undertaken by government agencies and that the department is treating Stevens Village's sponsorship of this project as it would treat any municipal government's airport application.

Although the language of AS 02.15.120 permits the department to provide design and construction management services to all "persons," the court may find significant the fact that, in practice, this type of agreement is always entered into with municipalities or other political

subdivisions of the state, or with tribes exercising or claiming governmental powers. While the legality of the contract may not depend on the tribe's status as a **sovereign**, a court may find that the contract was entered into only because of the tribe's status as a **government** exercising authority over lands within its political boundaries.

The confusion and uncertainty generated by the court decisions on this topic can be attributed to the fact that section 81 is not a model of clarity and the fact that its paternalistic nature conflicts with the modern federal Indian policy of self-determination. Nevertheless, the statute is still in effect and these cases demonstrate the difficulty of trying to predict how a particular contract will be analyzed under section 81. That is why a recent article suggested that any commercial contract with an Indian-owned enterprise that will be carried out on Indian-owned land be submitted to the secretary for section 81 approval. McNeil and Ohre, National Law Journal, Jan. 20, 1997 at B11.

In the case of Stevens Village, village lands are encumbered by a use restriction for as long as the land is used for an airport and must remain subject to the power of the state to enforce its statutory duties with regard to public access and nondiscrimination. In addition, as stated above, the Constitution of Stevens Village requires that specific village assets be pledged to this contract in order for any money judgment to be enforceable against the assets of the village. Since the primary asset of the village is land, the pledging of this asset under the contract may trigger section 81's secretarial approval requirement. Given the Ninth Circuit's holding in A.K. Management, 789 F.2d at 787, that section 81 applies to "almost all Indian land transactions", it is prudent to assume that the Ninth Circuit would find section 81 applicable to an agreement which pledged real property as security for payment of a contract for design and construction management services.

Indian statutes are interpreted liberally in favor of providing protection to tribes. Any ambiguity in their application is interpreted in favor of the tribes. Venetie, 101 F.3d at 1294. In my opinion, the state's involvement in the design, construction and funding of this project weighs in favor of a finding that the state impliedly recognizes Stevens Village's governmental power to construct, operate and maintain a transportation facility located on land **owned by the tribe** within its claimed political boundaries. As such, the contract may be found to be "relative to Indian lands" and subject to secretarial approval.

Section 81 raises an additional problem for the department with regard to enforcing the tribe's contractual waiver of sovereign immunity. In A.K. Management, the court held that, because an unapproved contract is "inoperable" without secretarial approval, any waiver of immunity contained in that contract is equally inoperable. 789 F.2d at 789. Moreover, in Barona, the court applied section 81 to void a gaming management contract that was not approved by the Secretary, even though the Bureau of Indian Affairs had determined in writing that the contract did not require secretarial approval. 840 F.2d at 1404-05. The court also affirmed the district court's denial of a

stay to allow the plaintiff to obtain BIA approval, finding that the contract would not have been approved under BIA guidelines that were not promulgated until after the contract was signed. Id. at 1408.

Because it is not clear whether the proposed contract must be approved under section 81, it would be prudent to request approval of the contract. The act of requesting secretarial approval may not necessarily imply that the state believes there is Indian country in Alaska. However, if the secretary determines that his approval is required and takes action to approve or disapprove the contract, then that administrative decision may be used along with the facts set out above as further evidence of tribal governmental jurisdiction over claimed territory within the state.

On the other hand, if the department does not seek secretarial approval of the contract, and a court subsequently finds that the contract required such approval, then the contract will be declared void. As a result, the contractual waiver of sovereign immunity will be ineffective and the contract will be unenforceable against the village.

In my opinion, there is no contractual language that can avoid the risks associated with the failure to seek or obtain section 81 approvals. No portion of an unapproved contract subject to section 81 "can be relied upon to give rise to any obligation by the [tribe], including an obligation of good faith and fair dealing." A.K. Management, 789 F.2d at 789 (Emphasis in original).

Finally, the draft memorandum of understanding originally reviewed by this office contained a statement of support for Stevens Village's sponsorship of this project. The federal government recognizes Native villages as public agencies under 14 CFR §§ 152.103(a)(1) and 152.3. State law permits any "person" to apply for an FAA grant. AS 02.15.020(b). The FAA issued a written determination in 1995 that Alaska Native villages included in the 1993 Interior list qualify as public agencies for the purpose of receiving airport improvement funds. Letter from Ronnie V. Simpson, Manager, Airports Division, Alaska Region, Federal Aviation Administration, to Sen. Lyman Hoffman, Alaska State Legislature (Feb. 15,1995)(located in Northern Region Right-of-Way file).

Stevens Village is eligible to apply for and receive funding under both state and federal law without the written consent or support of the department. Only municipalities need the department's approval of their grant applications. AS 02.15.150. I recommend that this statement be deleted from the proposed contract, not only because it is unnecessary, but because it may be construed as further evidence of the state's implied recognition of Stevens Village's right to act in a governmental capacity within the ill-defined boundaries of its traditional lands.

The right-of-way files for the Stevens Village project contain references to the village's desire to enforce a local hire preference for the construction of this airport. The village has also expressed its desire to control leases on the airport so as to "[m]inimize the potential impact of outside influences on the subsequent utilization of the airport." (Letter from Randy Mayo, First Chief, Native Village of Stevens to Sam Kito, Jr. Special Asst. to the Commissioner, ADOT&PF dated May 20, 1995). Mr. Mayo's letter describes these issues as the "most important issues concerning the Tribe". Id. at 1.[13] Apparently, the outside influences that Stevens Village wishes to ban are big game guides and outfitting operations. Letter from Floyd H. Pattison, Federal Aviation Administration, Manager, Planning and Programming Branch, Airports Division to Rose Martell-[Greenblatt], ADOT&PF, Right-of-Way Agent (Jun. 17, 1991). If Stevens Village were to attempt to enforce a local hire preference or deny airport access to certain aviation uses, that action may have adverse legal ramifications for the state.

a. Local Hire Preferences.

The Alaska Supreme Court declared Alaska's local hire statute unconstitutional under the privilege and immunities clause of the United States' Constitution in Robison v. Francis, 713 P.2d 259 (Alaska 1986). In Lynden Transport, Inc. v. State, 352 P.2d 700, 710 (Alaska 1975), the supreme court held that a statute that sought to economically assist state residents over non-state residents violated the equal protection clause of both the federal and state constitutions.

The principle announced in Lynden was applied to strike down another local hire preference statute in State v. Enserch Alaska Construction, Inc., 787 P.2d 624, 634 (Alaska 1989). In Enserch, the state legislature granted a hiring preference for Alaska residents in economically depressed geographic zones over Alaska residents living outside the zones. The court held that the statute violated the equal protection clause of the state constitution.

The state's financial involvement in the project, together with the provision of the state-financed design and the utilization of state employees for construction management services could result in a law suit against the state or state officials under 43 U.S.C. § 1983 for violation of the civil rights of prospective workers not hired to work on this project because of the local hire preferences. A section 1983 suit may be filed in either state or federal court. Such a lawsuit could be filed by individuals or union and public contractor groups on behalf of their members.

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[13] Other letters in the file discuss enforcement of a Tribal Rights Employment Ordinance (TERO). It is not clear whether Stevens Village has enacted a TERO or whether the village seeks to enforce a TERO-type policy.

Section 1983 suits may be filed against "persons" who, under color of state law, deprive a citizen of his or her rights, privileges or immunities secured by the Constitution and laws of the United States. The state cannot be sued under section 1983 because the state is not a "person" within the meaning of section 1983. Will v. Michigan Dep't of State Police, 109 S.Ct. 2304, 2312 (1989). Likewise, state officials sued in their **official** capacities are not subject to suits for damages under section 1983 because such suits seek the payment of damages out of the state treasury thus making the state the real party in interest. Will, id. However, state officials sued in their official capacities are "persons" subject to suit under section 1983 if the suit seeks **only** prospective injunctive relief against the officers' actions. Will, id. at 2312, n. 10.

State officials may also be sued in their **personal** capacities and can be held personally liable for damages stemming from the deprivation of a citizen's constitutional rights even though their actions were taken within the scope of their official duties. Hafer v. Melo, 112 S.Ct. 358 (1991). State officials sued in personal-capacity suits may assert a qualified good faith immunity from suit. This immunity attaches **only** if the official can demonstrate that he or she did not violate a "clearly established" federal right of which a reasonable person should have been aware. Mitchell v. Forsyth, 105 S.Ct. 2806, 2814 (1985).

State officials would not be directly involved in enforcing the village's local hire preference under the proposed contract. However, state officials may be accused of authorizing the expenditure of state money and the provision of state services and employees to the construction of a public airport knowing that the sponsor of the project intends to enforce an unconstitutional hiring preference. This involvement may be enough to subject state officials to a civil suit for an injunction under section 1983 to stop the state from applying state funds to the project.

In addition, state officials may also be sued in their personal capacities for damages caused to those who were denied employment on the basis of the hiring preference. Those officials may not be able to assert a qualified immunity to the suit because the illegality of local hire preferences under both the state and federal constitutions has been clearly established by the Alaska Supreme Court.

I recommend that any agreement with Stevens Village contain an express commitment by the village to forego enforcement of any local hire preference. The provision should tie a breach of that commitment by the tribe to the withholding of state matching funds, immediate cancellation of project management services, and the reimbursement of state funds that have been furnished to Stevens Village for the project.

b. Exclusive Rights on Airports

The Federal Aviation Act. 49 U.S.C. App. § 1349(a), prohibits the granting of exclusive rights on public airports constructed with federal funds. AS 02.15.210 also prohibits the grant of exclusive rights on airports. The prohibition against granting exclusive rights means that all aviation users must have equal access to the common areas of the airport. In addition, people within any class of aviation use must be given equal opportunity to lease lots on the airport set aside for that user class.

The statute under which the department is authorized to provide airport design and construction assistance. AS 02.15.120. requires that airports constructed with state assistance "shall be at all times available for the use of and accessible to the general public. and maintained as public airports and facilities." A violation of any provision of AS 02.15 is a misdemeanor.

The state cannot provide airport design and construction assistance to any person if it has reason to believe that person will exclude certain classes of the flying public from the airport or otherwise fail to maintain the airport as a public airport. If the state does so, it may be subject to suit for violating its statutory duties to aviation users. In Plancich v. State, 693 P.2d 855, 859 n. 9 (Alaska 1985) the supreme court held that AS 02.15.120 created a private right of action against the state for damages where the state failed to ensure aviation access to a city-operated seaplane facility. The state owned the seaplane facility and leased it to the city.

The holding in Plancich may be distinguishable from the facts in Stevens Village because the state does not own the airport and will not exercise operational oversight for the airport after it is constructed. Nevertheless. Plancich does stand for the proposition that the state has a duty to ensure that the public access requirements of AS 02.15.120 are enforced. AS 02.15.220 also requires the department to enforce all aviation statutes. which include the prohibition against granting exclusive rights. The holding in Plancich and the provisions of AS 02.15.120 and .220 discussed above may be sufficient to render the state liable for damages if suit is brought against it by guides or outfitters complaining that the state failed to fulfill its statutory duties to maintain public access to an airport built with state assistance and state matching funds.

Therefore. any agreement with Stevens Village should require the village to maintain the airport as a public airport at all times and to provide equal access to lease lots. The village's waiver of immunity from suit should include a waiver for the filing of an action in state court to enforce the public accessibility requirements of AS 02.15.120 and .210.

6. Protection of the State against potential negligence claims.

The department is concerned that it may be sued for either negligent design or negligent construction management if the village encounters unanticipated difficulties and increased costs in constructing the airport. Such a suit would be especially likely if the construction costs exceed the amount of the FAA grant and result in an incomplete project.

AS 45.45.900 renders void and unenforceable a provision in a contract that purports to indemnify a party from that party's **sole negligence** where the contract is "collateral to, or affect[s]" a construction contract. The statute specifically prohibits sole-negligence indemnity provisions related to design defects. The Alaska Supreme Court has interpreted this statute as applicable to limitation of liability clauses.[14] City of Dillingham v. CH2M Hill Northwest, Inc., 873 P.2d 1271, 1277-78 (Alaska 1994). Thus, there is no contractual provision that can shield the state from liability for design defects or negligent construction management as a matter of law.

The design section advised me that the design of this airport poses more than an ordinary risk that construction problems will be encountered. The design requires wet material to be placed in a rough runway prism and drained before final shaping. This process requires a two to four year construction period. The soils actually encountered may have a higher shrinkage factor than originally anticipated or may be wetter than anticipated requiring either additional material or a longer draining period than called for in the plans. If the soils are shaped and compacted before being adequately drained, the runway will fail prematurely and will require expensive repairs. While this design is not unique, its construction could be very difficult if the work is performed by an inexperienced contractor or inadequately trained personnel.

Although the state can not shield itself from liability for its sole design or construction management negligence, it can include warnings in the contract setting out the specific risks associated with the design and requiring the village to affirmatively acknowledge that it understands and is willing to undertake the financial risks inherent in the design. This language will not shift the risk for the state's sole negligence to the village, but it may assist the state in demonstrating that the design was not negligent and in arguing that the inherent risks in the non-negligent design were known by and allocated to the village at the time the contract was signed.

There is no contractual language that can shield the state from a claim of negligent construction management. That type of claim is fact-specific. However, careful record keeping by

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[14] A limitation of liability clause does not shift liability to another party. Rather, if liability is established, it limits the payment of damages to a pre-determined sum of money.

the department's on-site employees and a contractual requirement rigidly adhered to by the department that all directives, changes or advice be written in order to be binding on the state will help to prevent problems and will provide the state with the documentary evidence it needs to defend against any claim the village may file.

7. Does the Procurement Code Apply?

As stated above, Stevens Village plans to build the airport on force account and does not plan to put the project out for competitive sealed bidding.[15] There are several sections of the Procurement Code (AS 36.30) which are relevant to the department's proposed contract with Stevens Village and which may have a bearing on whether the state may grant state matching funds to this project without requiring compliance with the code.

a. The department's contract with Stevens Village.

The department is authorized to enter into a contract with a "public procurement unit" for the purpose of providing personnel for technical assistance and other services to that unit so long as the unit receiving assistance pays for the expenses of the services so provided. AS 36.30.730(a) and (b). The Procurement Code defines the term "public procurement unit" to include both state and local units. A "local public procurement unit" is defined, in relevant part, as:

> a municipality or other subdivision of the state **or other entity** that expends public funds for the procurement of supplies, services, professional services, and construction . . .

AS 36.30.790(3)(Emphasis added). The Stevens Village IRA council technically qualifies as a "local public procurement unit." The council is as an entity that expends public funds (FAA grant money and state matching funds) to procure the construction management services (i.e. professional services) of the department. Therefore, the department is authorized to enter into the proposed contract so long as it is reimbursed for the costs of providing personnel committed to the construction management tasks. AS 02.15.140 grants the department discretion to provide the design at no cost, as stated above in section 1.

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[15] I am using the term "force account" as it is used in federal regulations, i.e., the performance of work through the use of a party's own labor force, equipment and materials rather than by letting the contract out for competitive sealed bid. See 14 CFR §§ 151.51 and 152.3 (airport construction); 23 CFR §§ 635.201 and 635.203(c)(highway construction).

b. Can state matching funds be spent by Stevens Village without regard to the Procurement Code?

The more difficult question is whether state matching funds for the construction of the airport can be expended by the village without regard to the requirements of the Procurement Code. I have concluded that state funds may not be given to the village for force account expenditure unless the department complies with the Procurement Code.

Two sections of the code lead to this conclusion. AS 36.30.850(b) provides that the code "applies to **every** expenditure of state money by the state, acting through an agency, under a contract" unless the contract concerns one of 36 listed exceptions. There is no exception listed for the construction of airports or contracts.[16] AS 36.30.100 requires all agency contracts to be awarded by competitive sealed bidding unless there is an exception in the code. Sole source contracting is permitted under 36.30.300, but only if a written and documented "best interests" determination is first prepared. The right-of-way file for Stevens Village contains documents indicating that the state has already determined that constructing the Stevens Village airport by force account may not be in the state's best interests.

Therefore, unless the department prepares a sole source justification, the state matching funds cannot be given to Stevens Village to expend under a sole source contract. I doubt that the courts will allow the department to circumvent the Procurement Code by granting state funds to other parties and allowing them to spend those funds in a manner prohibited to the department.[17]

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[16] AS 36.30.850(b)(8) exempts from the code "acquisitions or disposals of property and other contracts relating to airports under AS 02.15.070, 02.15.090, 02.15.091, and AS 44.88. The listed sections of Title 2 refer to the purchase or condemnation of real property for airport purposes, the leasing of airport lease lots, and the sale and delivery of in-bond merchandise at international airports. These sections do not address the construction of airports. Construction of airports is controlled by AS 02.15.060. AS 44.88 concerns contracts entered into by AIDEA and is not applicable here.

[17] AS 36.30 850(c) states that the Procurement Code does not apply to contracts between the "state and other governments." The department may argue that neither the proposed contract nor the contract under which state matching funds are provided to Stevens Village are covered by the Procurement Code because Stevens Village is a government. However, this argument would constitute further evidence of the state's implied recognition of the power of Native Villages to exercise governmental power within their claimed territorial boundaries.

Conclusions and Recommendations

I recommend that the department decline to enter into the proposed contract with Stevens Village for the following reasons:

1. If a contract dispute arises the contract will be unenforceable against Stevens Village unless there is a clear and unequivocal waiver of sovereign immunity. Even with a waiver of immunity, the department runs the risk that the courts will find the waiver ineffective in regard to a particular issue or will find that the restrictive village constitution was not properly followed.

2. The contract treats Stevens Village as any other municipality would be treated under state law regarding airport assistance. Because local governments exercise governmental power over the land within their political boundaries, the contract could be construed as an implied recognition of Indian country by the state. The contract is therefore likely to have an adverse impact on the state's continuing litigation over the existence of Indian country in Alaska.

3. The state or its officials may be held liable for the actions of Stevens Village if the village enforces a local hire preference or unlawfully excludes certain aviation users from the airport.

4. The department may also wish to seek legislation clarifying the Procurement Code and Title 2. At the time these statutes were enacted Native villages were not recognized as tribes. The legislature may wish to clarify whether the portions of the Procurement Code and Title 2 discussed herein should be applied to agreements with Native villages. In addition, it is not easy to harmonize Title 2's airport assistance provisions with the Procurement Code's technical assistance contract provisions. The departmental services covered in Title 2 overlap with those described in Title 36. Title 2 gives the department the authority to provide these services at no charge while the Procurement Code requires that the department be reimbursed when these services are performed for other "public procurement units."

If you have questions concerning this advice, please do not hesitate to contact me.

cc: D. Rebecca Snow, Chief Assistant Attorney General, Fairbanks
Barbara Ritchie, Deputy Attorney General, Civil Div.
Daniel D. Urbach, Design & Construction, Northern Region
John A. Miller, Chief, Right-of-Way, Northern Region

PRL/

TONY KNOWLES, GOVERNOR

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

NORTHERN REGION, RIGHT OF WAY

2301 PEGER ROAD, MAIL STOP 2553
FAIRBANKS, ALASKA 99709-5399
PHONE: (907) 451-5400
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June 27, 1997

Re: Native Allotment AA-6000, Parcel B;
Material Site A-063173

Charles F. Bunch
Realty Officer
Bureau of Indian Affairs
1675 C Street
Anchorage, Alaska 99501-5198

Dear Mr. Bunch:

Please be advised that the State of Alaska is the owner of the material site on the referenced allotment. The state has been in possession of this material source since 1966, and has used it ever since. The state plans to continue using the material source, and it is being considerered as a source available to the state's contractor on the upcoming Edgerton Highway rehabilitation project. In addition, the state will continue using the material source for normal maintenance purposes, as the state has done for the past 20 plus years.

The state's rights derive from the material site grant it was issued by the BLM in 1966. Occupancy claims were specifically made subject to the grant, and the law did not change in this regard until 1987--long after the state's rights had vested and the source developed. Although the grant has been terminated by the BLM, and this termination affirmed by the IBLA, the termination is void and illegal. The state remains the owner through a Congressional appropriation pursuant to 23 U.S.C. § 317, and the Secretary is prohibited under the terms of the Alaska Native Allotment Act from issuing an allotment on appropriated land. The state timely sought judicial review of the administrative action terminating the grant. However, the federal court held that there could be no review of the administrative action because the federal government would not waive its sovereign immunity.

We do not purport to understand the rationale of this ruling, or the federal government's purpose in pursuing the ruling. However, the import of the court's decision is that until the United States sues the state to confirm and enforce its title, the administrative action cannot be reviewed. The state did everything it could to have the title issue resolved by the court. It is curious that after the federal government expended such efforts and resources to block the court from deciding the merits of the title issue when raised by the state, the federal government now demands payment and rehabilitation of the site. This raises a question as to the good faith of the federal government in pursuing its sovereign immunity claim. Nevertheless, the state's interest is to

have the title issue resolved. Therefore, the state would welcome a suit initiated by the federal government to enforce its perceived rights.

Until the title issue is resolved by the federal court, the state will remain in possession its material source, and will continue to use it for public purposes in accordandance with the terms of the BLM grant. There will be no payment from the state for the materials used, also in accordance with the grant terms.

Sincerely,

JAMILLER

John A. Miller, P.E.
Chief, Right of Way

36
for comments

STATE OF ALASKA

Department of Transportation & Public Facilities
STATEWIDE AVIATION
P.O. BOX196900
Anchorage, AK 99519-6900
Fax No. (907)269-0489

TO: Rose Martell-Greenblatt

FAX #: (907) 451-5411

DATE: 9-17-97

Number of pages transmitted, including cover sheet 9.

If transmittal is not properly received, please contact Ornie at (907)269-0731 or 269-0730

From: **Phone No.**

___ Paul Bowers (907)269-0724

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___ Ornie Clifford (907)269-0731

___ Denise Perry (907)269-0729

_X_ Roger Maggard (907)269-0727

___ Granville Couey (907)269-0732

Message/Regarding: AVCP Planning Grant

As we discussed yesterday, attached is FAA's initial draft of the scope of work for the proposed Planning Grant with AVCP. There is a number of items in the draft scope with which I disagree.

If you have comments on the scope, please send them to me.

Author: J Lomen <J.Lomen@faa.dot.gov> at DOTPFWAN
Date: 9/16/97 6:29 PM
Priority: Normal
TO: Roger Maggard at ANCAV1, Paul Bowers at ANCAV1,
Kay_Rollison@dot.state.ak.us (Return requested) at DOTPFWAN,
Starkey@win.bright.net (Return requested) at DOTPFWAN
CC: Ron V Simpson <Ron.V.Simpson@faa.dot.gov> (Return requested) at DOTPFWAN,
Sharon DaBoin <Sharon.Daboin@faa.dot.gov> (Return requested) at DOTPFWAN,
Matthew Freeman <Matthew.Freeman@faa.dot.gov> (Return requested) at DOTPFWAN
Subject: Review of DRAFT Scope of Work for System Planning

Attached is a DRAFT copy of a proposed Scope of Work to address a number of issues that were raised at the Joint Tribe/State/FAA meeting on May 1, 1997 and issues that have come up since. I would greatly welcome your comments on the Scope.

Sky,
I have incorporated your recommendations into this scope. Please let me know if I have missed any of your thoughts.

Kay,
I welcome your comments on the whole scope, but am most interested on your thoughts/recommendations for Element 3: Employment and Job Training Options and Issues.

Group,
If all of you could provide your comments by September 22, 1997 I would greatly appreciate it. If you have any questions please give me a call, (907)271-5816.

Jim

RURAL AIRPORT DEVELOPMENT SYSTEM PLAN
SCOPE OF WORK

DETAILED SCOPE OF WORK:

This Scope of Work will study various options and find a means for villages within the State of Alaska, the Federal Aviation Administration Airports Division (FAA) and the State of Alaska Department of Transportation & Public Facilities (DOT&PF) to work as partners to plan, construct, operate and maintain safe public airports in the Native Villages of Akiachak, Quinhagak, Kwigillingok, Kwethluk, Stevens Village, Goodnews Bay, Kongiganak and Kipnuk (here after identified as the "Native Villages"). The following is a detailed scope of work for the Final Report required upon completion of the elements listed below. The State of Alaska reserves the right to change this Scope of Work at any time prior to contract signing.

ELEMENT 1: Land Ownership (Adequate Title) Options and Issues

The purpose of this element is to clearly identify and define for airport sponsors the requirement for showing adequate title to be eligible to receive grant funds under the FAA Airport Improvement Program (AIP). Information will be gathered from FAA Airports Division, State of Alaska Statewide Aviation, and the Native Villages.

Task 1.1: Identify the land ownership requirements of AIP.

Upon request by the consultant, the FAA will provide the requirement to show adequate title for airport sponsors performing airport development under an AIP grant.

Task 1.2: Identify the land ownership options available to the State of Alaska.

Upon request by the consultant, Statewide Aviation will explain the various land interest options the State will consider for demonstrating adequate title on their airports. At a minimum the following will be discussed:

1.2.1: Long term lease requirements (a discussion on the need for eminent domain shall be included)

1.2.2: Fee simple

1.2.3: Title with or without a reverter clause

Task 1.3: Identify the land ownership concerns of the Native Villages.

The consultant shall contact each of the Native Villages to document their concerns with regard to the States requirements for demonstrating adequate title (i.e. waving sovereign immunity within long term leases).

ELEMENT 2: Airport Sponsorship Options and Issues

The purpose of this element is to clearly identify and define what is required of an airport sponsor to apply for and receive federal assistance through the AIP. The consultant shall discuss options for tribes to become sponsors for either planning, or development work.

Task 2.1: Identify the requirements for an airport sponsor to receive an AIP grant.

Upon request by the consultant, the FAA will provide information on the minimum requirements that must be met for an airport sponsor to receive an AIP planning or development grant. At a minimum the following will be discussed:

2.1.1: Adequate financial tracking system

2.1.2: Certification by the sponsor's legal representative

2.1.3: AIP Grant Assurances (assure the requirement of keeping the airport open for public use, and what that means is discussed)

Task 2.2: Identify the funding options available for a non-primary commercial service or general aviation airport project.

Upon request by the consultant, the FAA will provide information on possible funding sources within the Airport Improvement Program. At a minimum the following will be discussed:

2.2.1: State Apportionment

2.2.2: Alaska Supplemental

2.2.3: Commercial Service Discretionary

2.2.4: Non-commercial Service Discretionary

2.2.5: Sponsors 6.75% match

Task 2.3: Identify the sponsorship options available to the Native Villages.

Upon request by the consultant, both Statewide Aviation and FAA will provide information on possible sponsorship options available to the Native Villages. At a minimum the following will be discussed:

2.3.1: Tribes act as sponsor for a planning grant, after which they make a decision as to whether to become the airport sponsor for airport development, operations, and maintenance.

2.3.2: Tribes act as full sponsor for airport planning, design and development, and assume responsibility for operation, maintenance and insurance of the airport.

2.3.3: Tribes act as full sponsor for airport planning, design and development, but works with DOT&PF as a partner for operation and maintenance purposes.

2.3.4: Tribes act as co-sponsors with the State on airport planning, design, construction, operation and maintenance.

2.3.5: Tribes continue to have DOT&PF, with community involvement, plan, design, construct, operate and maintain the airport.

2.3.6: After DOT&PF completes actual airport development the Tribes takeover sponsorship of the airport.

ELEMENT 3: Employment and Job Training Options and Issues

The purpose of this element is to clearly identify and define options available to communities to increase the potential of local hire and job training on airport development projects funded through an AIP grant.

Task 3.1: Identify employment and job training options available within the frame work of a DOT&PF managed development project.

Upon request by the consultant, Statewide Aviation will provide information on possible options within the State's contracting procedures. For each option that is possible the consultant shall provide an explanation of the option and provide documentation on the step-by-step process a community would take for it's implementation. For options that are not possible the consultant shall provide documentation as to why the option is not possible from both the federal and state perspective. Additional organizations may need to be contacted to fully document some of the options listed below. At a minimum the following will be addressed:

3.1.1: Project labor agreements with unions

3.1.2: The USDOT school to work program and Training Apprenticeship program

3.1.3: The Tribal Employment Rights Ordinance (TERO)

3.1.4: Force Account

3.1.5: Non-profit Corporation coordinates directly with contractors to provide resources that are available.

Task 3.2: Identify employment and job training options available when airport sponsorship is held by a Native Village.

Upon request by the consultant, Statewide Aviation and FAA will provide information to assist the consultant in addressing the same employment options identified under Task 3.1, but considering Tribal sponsorship instead of State sponsorship. Discussions with the Native Villages will also be required.

Task 3.3: Identify available resources for each of the Native Villages.

The consultant will contact each Native Village and develop an inventory of available resources (labor & equipment) that could be utilized during an airport construction project. The inventory shall include as a minimum a listing of available personnel and their experience level for operation of all equipment. For available equipment the consultant shall provide the equipment type, age, hours of use, and condition.

ELEMENT 4: Airport Operations and Maintenance (O&M) Options and Issues

The purpose of this element is to clearly identify and define the annual costs associated with the ownership of an airport. For the purposes of this discussion the range of costs to be provided should be for a 3,200' lighted runway with a 60,000 square foot apron.

Task 4.1: Identify the responsibilities for an airport owner/sponsor on an airport similar to the one described under Element 4.

Upon request by the consultant, Statewide Aviation will provide a brief discussion and a range of costs, where appropriate, for the items listed below.

4.1.1: Liabilities for an airport owner

4.1.2: Insurance requirements

4.1.3: Snow removal / grading

4.1.4: Grant compliance (20 years)

4.1.5: Airport management (NOTAMS, accident prevention & response)

4.1.6: Management of leasing on an airport

4.1.7: Accounting requirements to meet Grant Assurances

4.1.8: Cost of having airport lighting

Task 4.2: Identify fund sources available for Native Villages to cover O&M costs.

The consultant will contact each of the Native Villages and develop an inventory of possible revenue sources available that can be utilized to fund airport O&M costs.

Task 4.3: Identify and document how shared operating costs have been utilized by the State.

Upon request by the consultant, Statewide Aviation will provide information on where the use of shared operating costs have been utilized and the results of those agreements. With the assistance of Statewide Aviation the consultant will explore and document the opportunities that exist that would allow the Tribes and State to share operating costs.

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ELEMENT 5: The Steps Leading to an Airport Development Project

The purpose of this element is to clearly identify and define the steps that must take place prior to an airport development project going to grant. For this discussion it will be assumed that the project being developed is a documented need that is high within the State's priority system for funding.

Task 5.1: Document the two primary steps leading to an AIP grant for airport construction.

Upon request by the consultant, both the FAA and Statewide Aviation will provide information on the requirements for airport planning and design prior to an AIP grant for construction. For both planning and design the consultant will document clearly each step and the common problems that occur.

Task 5.2: Document the potential cost, and time required for planning and design when the work is directed by DOT&PF and when the work is directed by a new airport sponsor.

The consultant will utilize the information developed for Task 5.1 and develop, with the assistance of Statewide Aviation, an estimate as to the cost and time required for DOT&PF to do both the planning and the design for the standard airport described under Element 4. The consultant will also develop the same estimate for cost and time, with the assistance of Statewide Aviation and FAA, for the work being performed by a new airport sponsor.

ELEMENT 6: Questions Pertaining to future development projects for the Native Villages

The purpose of this element is to clearly define basic questions that exist for the Native Villages, DOT&PF and FAA regarding future airport development. To accomplish this element the consultant will be required to discuss each task with each of the three parties.

Task 6.1: Can Native Villages be held legally liable for events that occur on their airports when they are the owner and sponsor?

The consultant will research and document whether a native village can be held liable, sued in State or Federal court, for activities that occur on an airport under their control.

Task 6.2: What is the status of existing development efforts being performed by DOT&PF at each of the Native Villages?

Upon request by the consultant, Statewide Aviation will provide the current status of planned development efforts for each of the Native Villages. The consultant shall develop for each village a list of information, and the associated costs, that can be turned over to them from DOT&PF if they were to choose to become their own airport sponsor.

Task 6.3: How can the Native Villages form a Regional Airport Authority or Corporation to manage their airports?

For this task the consultant will develop a concept for managing village airports through the use of a Regional Authority or Corporation. The concept should also consider the possible use of an existing corporation. Upon request by the consultant, both Statewide Aviation and FAA will assist in the development of the concept describing the new authority or corporation. The concept shall consider the airports sponsorship remaining with the State and also being held by each individual tribe. The consultant will need to coordinate the concept development with the Native Villages.

ELEMENT 7: Progress Reports / Draft Report / Final Report

Progress Reports, the Draft Report and the Final Report will be prepared and provided to DOT&PF for distribution.

Task 7.1: Progress Reports

The consultant will, as the project progresses, make available to DOT&PF, periodic progress reports of completed tasks, noting the status of each element and percent of work completed. The progress report may also serve as an interim report, requesting review and comments of completed tasks from appropriate groups. As a minimum the consultant shall provide an interim report at 45 days from the date of Notice to Proceed.

Task 7.2: Draft Report

A draft report will be submitted to DOT&PF 90 days from the date of Notice to Proceed. Comments will be returned from DOT&PF within 30 days to be incorporated into the Final Report.

Task 7.3: Final Report

The Final Report will be provided to DOT&PF 14 days after receipt of DOT&PF's comments, but no later than 135 days from the date of Notice to Proceed. The Final Report text will also be submitted to DOT&PF on disk in "Word" format

GENERAL CONDITIONS:

(Boiler plate material from State.)

MEMORANDUM State of Alaska

Department of Law

TO:	**Anton Johanson, P.E.** **Regional Director** **DOT/PF, Northern Region**	**DATE:**	**June 22, 1999**
		FILE NO:	**225-96-0030**
		TEL. NO.:	**451-2811**
FROM:	**E. John Athens, Jr.** **Assistant Attorney General** **AGO, Fairbanks**	**SUBJECT:**	**Alaska v. Babbitt, Bryant,** **9th Cir. No. 95-36122**

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

This memo is to let you know that the State had a big win in the Ninth Circuit Court of Appeals. Attached is a copy of the decision. This is one of the Native allotment / highway right-of-way conflict cases. The conflict in this particular case involves the Parks Highway. Essentially the 9th Circuit reversed the U.S. District Court, and held that the allottee (William T. Bryant) had no colorable claim to an allotment where it conflicts with the highway right-of-way.

This decision will not solve all of the problems with conflicts between Native allotments and highway rights-of-way. However, it is a very big step in the right direction. We are slowly getting the BLM, the IBLA, and the courts turned around on this question. All of the money that DOT has put into this litigation is starting to bear fruit.

Please give me a call if you have questions about this decision.

cc: John Bennett, PLS
John Miller, PE

I:\ATHENSJ\CASES\BRYANT\JOHANSON.MEM

1999 WL 402707 (9th Cir.)
(Publication page references are not available for this document.)

STATE OF ALASKA, Plaintiff-Appellant,
v.
BRUCE E. BABBITT, Secretary of the Interior; UNITED STATES OF AMERICA, WILLIAM T. BRYANT, Defendants-Appellees.

No. 95-36122

United States Court of Appeals, Ninth Circuit.

D.C. No. CV-94-00301-HRH

Argued and Submitted December 13, 1996-Seattle, Washington Submission Vacated November 16, 1998 Reargued and Resubmitted January 25, 1999
Filed June 18, 1999

Appeal from the United States District Court for the District of Alaska H. Russel Holland, Chief District Judge Presiding

E. John Athens, Jr., Assistant Attorney General, Fairbanks, Alaska, for the plaintiff-appellant.

Paul R. Lyle (briefed), Assistant Attorney General, Fairbanks, Alaska, for the plaintiff-appellant.

Jeffrey P. Kehne (briefed), United States Department of Justice, Washington, D.C., for the defendants-appellees.

Andrew C. Mergan (argued), United States Department of Justice, Washington, D.C., for the defendants-appellees.

Before: John T. Noonan, David R. Thompson, and Andrew J. Kleinfeld, Circuit Judges.

KLEINFELD, Circuit Judge:

The United States issued a 500 acre grant to the State of Alaska in 1961. The grant was of a right of way for a material site to mine gravel. It was part of a comprehensive scheme of right of way grants for what has become the Parks Highway, the primary highway between Anchorage and Fairbanks. The highway was constructed, in parts quite slowly over extraordinarily rugged terrain, during 1969-71. The land at issue in this case is about 30 miles south of Cantwell.

In 1970, appellee William T. Bryant filed an application for an Alaska Native allotment, [FN1] the relevant portion of which is within the 1961 grant to the state. Bryant filed his application nine years after the United States had granted the right of way for that location to the State of Alaska, during the period when the Parks Highway was being built. Bryant's application sought 120 acres, and stated that although he lived in Anchorage, he had used the land every year since 1964, from August to March, for hunting, picking berries, and trapping. Bryant's allotment is a long, narrow rectangle straddling the highway.

FN1. 43 U.S.C. §§ 270-1 to 270-3, repealed with saving clause for allotment applications pending on December 18, 1971, at 43 U.S.C. § 1617.

In 1969, after Bryant stated that he began his hunting, trapping and berry picking on the land, but before Bryant filed his application for a Native allotment, the United States granted to the State of Alaska an amended right of way for the land at issue. This 1969 grant refines the earlier grant. It lies substantially within the 1961 grant but is for much less of the parcel, and shows exactly where the highway goes. In the blank on the government form for "date of grant," the 1969 grant says "original grant October 3, 1961." Years after the highway was built, in 1988, the state relinquished the unused part of its 1961 grant.

The substantive question in this case is whether Bryant's use and occupancy entitled him to take priority over the state's earlier grant. The main procedural issue is whether the district court had jurisdiction to decide that substantive question.

The Bureau of Land Management initially questioned whether Bryant's evidence of use and occupancy was sufficient, but eventually

approved Bryant's allotment in 1988. The state initiated private contest proceedings. [FN2] It presented witnesses who lived, hunted and trapped, in the area, and who had worked on the highway project in the area of the allotment, none of whom ever saw Bryant or any sign of his use. But the administrative law judge dismissed the state's contest and the Interior Board of Land Appeals affirmed. [FN3] Two points in the IBLA decision are important to the case in its present posture. The first is that, although five years of use and occupancy is needed to entitle an applicant to an allotment, [FN4] the application "relates back" to the commencement of the use and occupancy, so the land need only be vacant and unappropriated at that earlier time, not the later time when the application for native allotment is filed. Second, although land must be "unappropriated" to be open for native allotments, the 1961 right of way did not make the land unavailable, because it granted only a right of way and not the fee, and the state had relinquished all but four acres of the material site after the road was built.

FN2. 43 C.F.R. § 4.450.

FN3. IBLA No. 91-341, 129 IBLA 35 (1994).

FN4. 43 U.S.C. § 270-3, repealed (see footnote 1).

The state then filed an action in the United States District Court to obtain judicial review of the IBLA decision pursuant to the Administrative Procedure Act. [FN5] The district court dismissed the action for lack of jurisdiction, ruling that our authorities and earlier decisions against the state in other cases barred the exercise of jurisdiction. But the district judge made an express plea for reversal in his written order: "the facts of this case cry out to the court for review and a different result." [FN6] The district judge said that it made no sense for the state to lose its first in time priority, based on its 1961 grant, because it successfully obtained a more precise and permanent grant in 1969. Also, in his plea for reversal, the district judge said "it is inequitable that Bryant's use and occupancy ... relates back in time to his original entry ... but the State's admittedly prior rights to use the land in question for a public highway do not relate back to its original public filing.... " [FN7]

FN5. 5 U.S.C. §§ 701 et seq.

FN6. Order, page 11, n. 18 (September 18, 1995).

FN7. Id.

ANALYSIS

The Department of the Interior, for appellees Babbitt and Bryant, argues that the district court lacked jurisdiction under the Quiet Title Act. [FN8] That statute allows the United States to be named as a defendant in a civil action to adjudicate a disputed title to real property, but expressly "does not apply to trust or other restricted Indian lands." [FN9]

FN8. 28 U.S.C. § 2409a.

FN9. 28 U.S.C. § 2409a(a).

The Quiet Title Act is "the exclusive means" by which adverse claimants can challenge the United States' title to real property. [FN10] We have interpreted that exclusivity to mean that a plaintiff cannot avoid the Indian lands exception by obtaining jurisdiction under the Administrative Procedure Act. [FN11] The State of Alaska's form of complaint, therefore, seeking review under the Administrative Procedure Act, cannot avoid the limitations of the Quiet Title Act.

FN10. Block v. North Dakota, 461 U.S. 273, 286 (1983).

FN11. State of Alaska v. Babbitt (Albert), 38 F.3d 1068 (9th Cir.1994).

The State argues that the officers and agents of the United States acted ultra vires. The argument is in substance that the legal decision they made was so plainly incorrect that the officers acted completely outside their

governmental authority. We have twice rejected, in cases similar to this one, the argument that such decisions are ultra vires. [FN12] The officers' suit means of challenging federal government title to land was rejected by the Quiet Title Act. [FN13] The ultra vires argument has to be rejected in this case because it would be no more than the old officers' suit in new words.

FN12. Id. at 1076; State of Alaska v. Babbitt (Foster), 67 F.3d 864, 867 (9th Cir.1995).

FN13. Block, 461 U.S. at 284-286.

Of course the Indian lands exception applies only if the lands at issue are Indian lands, or at least colorably so. The Quiet Title Act waives sovereign immunity subject to the exception that it "does not apply to trust or other restricted Indian lands." [FN14] We have repeatedly, in all of our analogous cases speaking to the Indian lands exception, carefully carved out an exception to the exception for cases where the claim of Indian lands is not "colorable." In Wildman v. United States, [FN15] we said that the United States cannot be put to its proof "when it has a colorable claim" that it holds the land in trust for Indians. Judge Hug, concurring separately, pointed out that the court "did not need to determine whether a bare assertion of a claim would be sufficient to invoke the Indian land exception because it is clear that the claim of the United States that the land is Indian land is substantial." [FN16] In Albert, [FN17] we noted that the Indian lands sovereign immunity applies whether the government is right or wrong, and gave further contour to the "colorable claim" requirement. We said that judicial inquiry extends no further than "a determination that the government had some rationale," and that its position "was not undertaken in either an arbitrary or frivolous manner." [FN18] Foster again conditioned applicability of the Indian lands exception, saying "[a]s long as the United States has a colorable claim." [FN19]

FN14. 28 U.S.C. § 2409a(a).

FN15. Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir.1987).

FN16. Id. at 1310.

FN17. State of Alaska v. Babbitt (Albert), 38 F.3d 1068 (9th Cir.1994).

FN18. Id. at 1076.

FN19. State of Alaska v. Babbitt (Foster), 67 F.3d 864, 867 (9th Cir.1995), amended at 75 F.3d 449, 451 (9th Cir.1996).

The State of Alaska has urged that the position of the United States in this particular case was so far outside what the law permitted as to be arbitrary and frivolous, leaving not even a colorable basis for characterizing the land at issue as Indian lands. The district court, though deeming itself constrained to rule otherwise by our precedents, deemed this view to have considerable merit. As we note above, the district judge made an express request that we overrule him, because of the arbitrariness of the result. At oral argument, the judge carefully parsed the IBLA decision and expressed his view "that the decision was either cynical or that it was intellectually dishonest." [FN20] Of the IBLA decision's "focal point" of the decision, that the state had relinquished its grant of the original material site because it no longer needed it, the judge said "What a bunch of garbage":

FN20. Transcript page 23.

As I indicated when I came in this morning, I really have a big bone to pick with the decision that was made in this case, not so much because of the result, but because of the--you know, I've struggled to try and find a word to characterize my reaction to this and the closest I could get was a feeling that the decision was either cynical or that it was intellectually dishonest because the focal point of the decision, sort of the culmination of it, it appears on-- I think it's page 9 of the decision and I lost my mark. Hang on just a second. Well, I guess it's page 10.
Page 10 in the incomplete paragraph that's at the top of the page, the decision says:

"The state's relinquishment of all but 4.006 acres of the original 500-acre site demonstrated that the remainder of the site was no longer needed by the state and abrogated the state's interest in the land." What a bunch of garbage. Everybody knows the state built a road across the material site. They built it on the strength of an easement that was granted under the same serial number before the BLM that the--that granted the original material site of 500 acres.

Subsequent to argument in this case, the administrative agency completely changed its own interpretation of the law, and eliminated much or all of the foundation for its opinion in the case at bar. We withdrew the case from submission and ordered reargument. The law of allotments as construed by the agency responsible for applying it appears no longer to give Bryant a colorable claim to an allotment, so the government's position is now even more tenuous than it was when the district judge made his strong remarks. The change in the law as construed by IBLA compels the conclusion that there is now no colorable basis for application of the Indian lands exception, so the agency position now falls within the "undertaken in an arbitrary or frivolous manner" category for which there is jurisdiction.

In its 1997 decision, Goodlataw, [FN21] IBLA itself has now held that such occupancy as Bryant had in the case at bar when he commenced his hunting, trapping, and berry picking, was not "under color of law." [FN22] Goodlataw holds that allotments are granted subject to valid existing rights, and a state right of way is such a valid and existing right. It holds further that if the Native use and occupancy commences subsequent to a right of way grant to the state, then relation back cannot save it regardless of the state of affairs at the time of the native allotment application, because "the qualifying Native use and occupancy must be under color of law." [FN23] Goodlataw expressly analogizes the case to "a material site right of way," such as the state had in the case at bar, and says that the rights the state acquires under a material site right of way bars allowance of an allotment. [FN24] "[S]ince the allotment applicant had no legal basis for barring the issuance of the material site right of way at the time it occurred because the allotment applicant's attempted appropriation of the land was then contrary to the law, the subsequent removal of the statutory prohibition against granting lands valuable for gravel under the Native Allotment Act could not result in a retroactive invalidation of a right of way which was in conformity with the law when it was issued." [FN25]

FN21. State of Alaska (Goodlataw), 140 IBLA 205 (1997).

FN22. Id. at 214.

FN23. Id.

FN24. Id. at 215 (emphasis in original).

FN25. Id. at 215.

This new administrative position eviscerates the basis for the earlier IBLA decision in the case at bar. Now that IBLA, in Goodlataw, has held expressly that commencement of the use and occupancy period for a Native allotment is without "color of law" if the state already has a right of way at the time, that a materials site right of way suffices to bar effective use and occupancy by the would-be allottee, and that subsequent elimination of the right of way does not retroactively give "color of law" to the Native use and occupancy, the claim by the would-be allottee in the case at bar apparently would be treated by IBLA as not made under "color of law." This necessarily means that the claim that the land at issue is Indian land is not "colorable," so the exception to the Indian lands exception demarcated in Foster, Albert, and Wildman applies, and there is jurisdiction under the Quiet Title Act.

When we decided whether the Indian lands exception vitiated jurisdiction in Albert, [FN26] our decision was grounded upon the then-prevailing administrative interpretation by IBLA that a native allotment related back

to initiation of native occupancy, despite application for and grant of a right of way to the state prior to filing and grant of the native allotment. [FN27] Because there was "some rationale" for the agency position, and it "was not undertaken in an arbitrary or frivolous manner," [FN28] we held that the claim of Indian lands was sufficiently colorable to be unchallengeable on the merits. The then-prevailing administrative interpretation gave a "colorable" basis to the claim that the land at issue was Indian land. But the change in the agency's position renders this case distinguishable from Albert. The agency now takes the position, in Goodlataw, that if the "occupancy and use was initiated after the land had been withdrawn from appropriation," then "Native settlement on land which was closed to entry afforded no cognizable rights." [FN29] Because "one of the essential premises" of the former IBLA rule that a native allotment relates back to the initiation of use and occupancy is that "the qualifying Native use and occupancy must be under color of law," [FN30] Native occupancy commenced when the land was not subject to appropriation "traditionally afforded an applicant no rights thereto." [FN31] Now that the administrative interpretation has been reversed, the colorable basis we found for treating the land at issue as Indian land in Albert and Foster no longer exists. This change in administrative law, by eliminating the legal basis for our determination that there was a colorable basis, renders Albert and Foster distinguishable.

FN26. State of Alaska v. Babbitt (Albert), 38 F.3d 1068 (9th Cir.1994),

FN27. Id. at 1075-76.

FN28. Id. at 1076.

FN29. State of Alaska (Goodlataw), 140 IBLA 205, 214 (1997).

FN30. Id.

FN31. Id.

IBLA's decision in Goodlataw appears to be on all fours with the case at bar. The state's 1961 right of way was in effect when Bryant began hunting, trapping and berry picking on the land. It does not matter that the state later obtained an amended right of way and relinquished what it did not need, because the right of way had been "appropriated" [FN32] when Bryant commenced his use. Therefore if the agency applied to Bryant its own decision in Goodlataw, apparently Bryant's allotment would not relate back to his commencement of use and would not take priority over the state's right of way. In this case, as in Goodlataw, the allotment was approved by adjudication, and not by Congress under 43 U.S.C. § 1617(a), which further distinguishes Albert, [FN33] though because the change in IBLA's position sufficiently distinguishes the cases, we need not reach the question whether the distinction between allotments approved by adjudication and those approved by legislation matters to the outcome.

FN32. 23 U.S.C. § 317(b).

FN33. State of Alaska v. Babbitt (Albert), 38 F.3d 1068, 1075 (9th Cir.1994).

Because IBLA would now apparently hold that Bryant's commencement of use and occupancy was not made under color of law, application of the Indian lands exception lacks a rational basis. We therefore REVERSE the judgment of the district court dismissing this case for lack of jurisdiction, and remand for such proceedings as may be appropriate.

END OF DOCUMENT

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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May 20, 1992

Thomas L. Sansonetti
Solicitor
Office of the Solicitor
United States Department of the Interior
Washington, D.C. 20240

Governmental Powers of Alaska Natives
Our File: 663-92-0625
Opinion No. 3

Dear Solicitor Sansonetti:

We appreciate the opportunity to provide you with the State of Alaska's views on the nature and extent of governmental powers possessed by Alaska Native villages. Those issues have been much debated and are the subject of increasing litigation. Some litigants have gone so far as to claim that each of the more than 200 Alaska Native villages is an Indian tribe possessing governmental authority. The emergence of over 200 Indian tribes exercising governmental powers over nonreservation and otherwise undefined territory within the State of Alaska would seriously disrupt the administration of government in Alaska and divide its people. Therefore, we urge your thoughtful consideration of our views on the issues under consideration.

Our understanding is that your forthcoming opinion is intended to address concerns raised by the Secretary about the approval of constitutions authorized under the Alaska Native

Reorganization Act (25 U.S.C.S. § 473(a)). Since there is no Indian country in Alaska, with the exception of the Annette Island Reserve, no proposed I.R.A. constitution should be approved if it purports to empower Alaska Native villages to exercise governmental authority. This result is dictated by established principles of federal Indian law, and we urge you not to depart from that position.

I. INTRODUCTION

The historical interaction between Alaskan Native groups and the federal government, as well as existing legal authority, shows that Congress has consistently treated Alaska Natives differently from those Indian groups in the lower 48 states that have been accorded sovereign tribal status. The United States has not entered into any treaties with groups of Alaska Natives. Only one reservation has been established by Congress in Alaska, the Annette Island Reserve.[1] The few reservations established by executive order were revoked by the Alaska Native Claims Settlement

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[1] The history of the Metlakatla Indian community is unique. It was established when approximately 800 Tsimshian Indians migrated from British Columbia to the Territory of Alaska in 1887. While a general reservation system was never established in Alaska and there never were any treaties, the Metlakatlans were an exception. Congress specifically created a reservation for them. This "reservation status sets them apart from other Alaska Natives, making them much more like the tribes of the other states." Atkinson v. Haldane, 569 P.2d 151, 154-55 (1977). In addition, the Metlakatlans had "a strong central tribal organization unlike most Alaska Native groups." Id. at 155.

Act (ANCSA), in which Congress clearly intended to resolve Native land claims

> without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservation system or lengthy wardship or trusteeship . . . .

43 U.S.C.S. § 1601(b) (1980).

The United States Supreme Court recognized the distinct nature of historical federal relations with Alaska Natives in Metlakatla Indian Community, Annette Islands Reserve v. Egan, 369 U.S. 45, 51-53 (1962) (citations omitted):

> As early as 1886 a federal judge . . . denied that the principle of Indian national sovereignty enunciated in Worcester v. Georgia, 6 Pet. 515, applied to [Alaska Natives]. . . . There were no Indian wars in Alaska. . . . There was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of those, in contrast to many in other States, was not to confine the Indians for the protection of white settlers but to safeguard the Indians against exploitation. . . .

Since that decision, the Alaska Supreme Court has further examined the federal-Native relationship in detail. In Native Village of Stevens v. Alaska Management and Planning, 757 P.2d 32 (Alaska 1988), the Alaska Supreme Court reviewed Congressional acts affecting Alaska Natives groups and relied on several specific acts to support its conclusion that Congress intended the Alaska Native

groups to be subject to federal and territorial laws generally applicable to all Alaska residents.[2]

The Department of Interior clearly has never extended general tribal recognition to Alaska Native villages. The Bureau of Indian Affairs, for example, does not list Alaska Native villages as recognized tribes, but rather as "Native entities within the State of Alaska recognized and eligible to receive services from the United States Bureau of Indian Affairs." 53 Fed. Reg. 52,832 (Dec. 29, 1988).[3]

In short, the history of federal relations with Alaska Natives, as well as the judicial decisions which have examined that history, can only lead to the conclusion that Alaska Native villages have not been accorded sovereign tribal status. This conclusion is further supported by the authority discussed below.

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[2] The Stevens Village court recalled its earlier conclusion in Metlakatla Indian Community v. Egan, 362 P.2d 901, 920 (Alaska 1961), that "[n]o Indian tribe, independent nation or power has been recognized in Alaska." Native Village of Stevens, 757 P.2d at 36. Acknowledging the U.S. Supreme Court's decision in Metlakatla, the Alaska Supreme Court noted:

> [T]he statement in Metlakatla [362 P.2d at 920,] that no tribes have been recognized in Alaska was inaccurate because the Metlakatlans have received Congressional recognition. In all other respects, however, the legal conclusions in Metlakatla are accurate.

Id.

[3] Indeed, the preamble to the list published in 1982 indicated Native villages were not tribes. 47 Fed. Reg. 13,133-34 (1982); see also 53 Fed. Reg. 52,832 (1988).

II. THE LEGAL STATUS OF ALASKA NATIVE VILLAGES

A. Tribal status. It is axiomatic that a Native American group cannot exercise governmental powers unless it is a tribe or has been delegated tribal powers by Congress. Since Alaska Native villages have not previously been recognized as tribes, to assert that status they must comply with the recognition process set out in federal regulations (25 C.F.R. Part 83) or in case law. Native Village of Tyonek v. Puckett, 957 F.2d 631, 635 (9th Cir. 1992); Native Village of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548, 559 (9th Cir. 1991); State of Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988). Although Congress has defined "tribe" to include Alaska Native villages, and even ANCSA corporations, simply in order to extend certain federal programs to Alaska Natives, Congress has not deviated from the requirement of a factual showing by according formal recognition of a tribe to any Native village or other Native group.[4] To date, no Alaska Native village has successfully demonstrated that it meets the criteria.

B. Indian Country. The authority of an Indian tribe to exercise governmental powers within a geographic area is dependent on the existence of "Indian country." See Felix Cohen, Handbook of Federal Indian Law 1D, 4B (1982). As defined in 18 U.S.C.S. §

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[4] The Alaska Supreme Court has ruled that Alaska Native villages and groups are not Indian tribes, with the noted exception of the Annette Island Reserve and possibly one or two Native villages. Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32 (Alaska 1988).

1151, Indian country includes reservations, allotments, and dependent Indian communities. As mentioned earlier, only one reservation remains in Alaska (the Annette Island Reserve). Most Alaskan Native allotments are not located within or near any Indian reservation; all are individually owned in fee rather than held in trust by the United States; and none are subject to tribal jurisdiction.[5] Consequently, the focus of the inquiry into the existence of Indian country in Alaska (for purposes of a Native group asserting jurisdiction) must be whether off-reservation Alaska Native villages are dependent Indian communities. In our view, they are not.[6]

The Ninth Circuit has recognized that the existence of a dependent Indian community is a complex factual question. State of Alaska v. Native Village of Venetie, 856 F.2d 1384, 1391 (9th Cir. 1988). In addition, according to the most recent U.S. Supreme Court holding on this question, the test for Indian country is whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government."

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[5] Most cases construing 18 U.S.C. § 1151 deal with lands, including allotments, that are within the exterior boundaries of Indian reservations.

[6] The Alaska Supreme Court also took the position that there are no dependent Indian communities in Alaska in Metlakatla Indian Community v. Egan, 362 P.2d 901 (Alaska 1961). The U.S. Supreme Court did not disturb that ruling, although it reversed another part of the state supreme court decision. Metlakatla Indian Community, 369 U.S. 45 (1962); Organized Village of Kake, 369 U.S. 60 (1962).

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, ___ U.S. ___, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991).[7]

Alaska Native villages fail to meet these standards. With few exceptions,[8] Alaska Native villages do not occupy land "set apart" for them by the United States. Indeed, as contemplated by ANCSA, a large number of Alaska Native Villages have become state-chartered municipalities. 43 U.S.C.S. § 1613(c)(3) (Supp. 1991). In addition, the lands selected by state-chartered village corporations under ANCSA are clearly not "set apart" for the use of Indians. The structure of ANCSA and its legislative history

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[7] In an earlier related case, the Tenth Circuit Court of Appeals found that lands held in fee by the Creek Nation were Indian country, although the State of Oklahoma argued that the lands were within a disestablished reservation. Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987), cert. denied sub nom, 487 U.S. 1218, 108 S. Ct. 2870 101 L. Ed. 2d 906 (1988). However, the decision was based on the United States' longstanding recognition of the Creek tribe, and the finding that the federal government continued to treat all Creek lands as "trust lands."

[8] The only exceptions are villages that occupy an existing reservation or are the direct successors to reservation lands. The Native community of Metlakatla has historically occupied the Annette Island Reserve, which was not revoked by ANCSA. 43 U.S.C.S. § 1618(a) (1980). Also, the District Court for the District of Alaska has suggested in an unpublished opinion that the Chilkat Indian Village, I.R.A., which did not participate in ANCSA, may qualify as a dependent Indian community because it, rather than the Klukwan village corporation, received the former Chilkat Indian reservation lands. Chilkat Indian Village, I.R.A., v. Johnson, No. J84-024 Civ. (D. Alaska Mem. and Order, Oct. 9, 1990); 43 U.S.C.S. § 1615(d) (1980).

make it clear that Congress did not intend those lands to be reservation-like areas.'

Finally, Alaska Native villages must be viewed as having limited dependence on the federal government. One of the significant purposes of ANCSA was to provide Alaska Natives with corporate assets (land and money) to fund their economic independence, rather than to perpetuate "dependent Indian community" status. 43 U.S.C.S. § 1601 et seq. Accordingly, many village corporations selected lands under ANCSA that were not even near the Native villages themselves. Those lands were selected to maximize the economic benefits to particular corporations. Congress intended, and clearly stated, that future relations between Alaska Natives and the federal and state governments were to be based on the general relationship between a government and its citizens. Since the passage of the ANCSA, the federal government has acted on the Congressional intention by withdrawing

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' The relevant portion of the House Report states: "The lands granted by this Act are not 'in trust' and the Native villages are not Indian reservations." H.R. Rep. No. 746, 92nd Cong., 1st Sess. 40 (1971); see also H.R. Rep. No. 523, 92nd Cong., 1st Sess. 9 (1971).

The Senate Report stated:

> [A] major purpose of this committee and the Congress is to avoid perpetuating in Alaska the reservation system and the trustee system which has characterized the relationship of the Federal government to the Indian peoples in the contiguous 48 states.

S. Rep. No. 405, 92nd Cong., 1st Sess. 108 (1971).

significant amounts of direct federal assistance to villages; the State of Alaska has responded by continuing to provide support and aid to Alaska Natives and Native villages as it does to all its citizens.[10]

In summary, no off-reservation Alaska Native village has successfully demonstrated that it meets the established criteria to support a claim that it occupies Indian country within which it could exercise sovereign governmental powers. Nevertheless, recently submitted I.R.A. constitutions appear to avoid the required factual showings by claiming to be "dependant Indian communities" and including governmental powers that can only be exercised by reservation-based tribes. See, e.g., Constitution of the Circle Native Community, approved October 1991.

III. THE POWERS OF ALASKA NATIVE VILLAGES

We recognize that Congress has the authority to confer powers on Alaska Native villages, just as it can circumscribe those powers. The Indian Child Welfare Act (ICWA), 25 U.S.C.S. § 1901 et seq., is an example of authority that may be assumed irrespective of Indian country status, though full parameters of the authority are yet to be determined.

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[10] A prime example is educational services, where the former BIA schools have been replaced entirely by state-created, locally governed school districts funded by the State of Alaska.

In defining the relationship and powers of Indian groups, the Department of the Interior is bound by the restrictions imposed by Congress. A prime example are the restrictions imposed by Congress when it passed the Alaska Native Reorganization Act, extending certain provisions of the Indian Reorganization Act to Alaska. As originally enacted in 1934, the Indian Reorganization Act applied only to "tribes and bands" of Indians, and only in the lower 48 states. In 1936 Congress passed the Alaska Native Reorganization Act, extending certain features of the I.R.A. to Alaska. The list of groups eligible to organize under it was defined to include Indians with "a common bond of occupation, or residence within a well-defined neighborhood, community, or rural district." Thus, the Alaska groups eligible to organize under the Act included affinity groups (such as fishermen's cooperatives) and others that are clearly not tribes. The Commissioner of Indian Affairs, John Collier, explained in Senate testimony that the purpose of the Act was to extend the "land acquisition and credit benefits" of the I.R.A. to Alaskan Natives. (Hearings, S. 3645, 73rd Cong., 2d Sess., at 265 (1934).) Simultaneously with passage of the Alaska Native Reorganization Act, the Department of the Interior issued official instructions on application of the Act to Alaska (signed by Secretary Ickes on December 22, 1937):

> The power to prescribe ordinances for civil government, relating particularly to law and order, may extend only to such lands as may be held as an Indian reservation for the use of the community. . . .

> . . . If an Indian reservation has been designated and approved . . . they may include in their constitution appropriate powers for the civil government of the area reserved, including police power over their own members and, under the supervision of the Department, the power to tax, license, or exclude non-members. . . . If at the time the constitution is being drafted, the designation and approval of an Indian reservation for the community organizing is anticipated, such powers may be included in the constitution but limited to take effect only upon the designation and approval of a reservation for such community.

(Emphasis added.)

At the same time Commissioner Collier explained the difference between powers of an organized group of Natives on and off of a reservation:

> The chief legal difference [in creation of a reservation] would be that only Federal and not Territorial laws would apply to the natives and that the natives would be able to provide for their own municipal government within the reservation.[11]

Thus the Interior Department has consistently recognized the limitation in the Alaska Native Reorganization Act that powers of government are limited to those groups organized within reservations; there are no such general powers outside of reservations,[12] although Alaska I.R.A. groups may have some

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[11] U.S. Department of the Interior, Office of Indian Affairs, Explanation of the Alaska Indian Reorganization Act.

[12] In 1980 an Associate Solicitor for Indian Affairs wrote an unpublished opinion in which he opined that an Alaskan Native village was "Indian country" for purposes of federal Indian liquor laws. (Memorandum to Commissioner of Indian Affairs, Oct. 1, 1980). But the same memorandum acknowledged that the village's attempt to exercise jurisdiction over nonmembers was

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ability to prevent alienation of some of their property (see, e.g., In re Delinquent Property Taxes, 780 P.2d 363 (Alaska 1989); Hydaburg Coop. Ass'n v. Hydaburg Fisheries, 826 P.2d 751 (Alaska 1992)). Since Congress unambiguously intended to eliminate reservations in Alaska, approval of new I.R.A. constitutions should depend on an accurate description of the limitations on the I.R.A.'s governing powers and its territorial jurisdiction.

IV. OTHER CONSIDERATIONS.

A. Civil rights and constitutional protections. If off-reservation Alaska Native villages are to be accorded some measure of governmental powers, there must first be a resolution of the extent to which the civil rights protections of federal and state law apply in those areas. Application of civil rights law is a key question in the current litigation over whether the Native Village of Tyonek can bar whites from the village, but neither the U.S. Supreme Court nor the Ninth Circuit has yet reached the question of federal civil rights in its recent decisions. If Indian country were to be found, a question exists as to whether the courts would

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[12](...continued)
"questionable." And the same Associate Solicitor later limited his analysis to the special case of Indian liquor laws, explaining that for all other purposes, ANCSA lands were not Indian country. Hearings on S. 563 before the Select Comm. on Indian Affairs, 97th Cong., 1st Sess. 17 (1981).

be able to protect the civil rights of non-Natives or Natives not in agreement with the tribe.[13]

B. Lack of jurisdictional boundaries. The entities claiming Indian country status in Alaska generally do not present clear boundaries for the areas over which they claim jurisdiction. If Indian country were to be found in or around any of the more than 200-plus Alaska Native villages, there would be massive uncertainty and jurisdictional confusion. A question exists as to whether the courts could effectively define the jurisdiction of tribes in Indian country by themselves declaring precise boundaries.

V. CONCLUSION

The unique historical evolution of the federal relationship with Alaska Natives demonstrates that, without significant exception, there are no "dependent Indian communities" in Alaska capable of extending sovereign authority over Indian country. This conclusion is supported by the decisions of the United States Supreme Court, the Alaska Supreme Court, and numerous lower federal court decisions examining the standards by which tribal status may be achieved.

In addition, Congress clearly intended that the ownership of lands by Alaska Natives be regarded in terms of their status as citizens of the United States and residents of the State of Alaska, rather than as wards under a federal trust. Consistent with this

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[13] The answer appears to be that they may not. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

intent, the State of Alaska will continue to guarantee the benefits of citizenship equally to all Alaska residents.

In light of these precedents, when the Secretary reviews proposed I.R.A. constitutions, he should disapprove any proposed constitution that claims status, jurisdiction, or governmental powers for an Alaska Native village that has not previously established tribal status or Indian country.

Again, we appreciate the opportunity to express our views on these issues before you issue your opinion.

Sincerely yours,

Charles E. Cole
Attorney General

CEC:pml