

H B

450

HOUSE COMMITTEE REPORT

(9)

Date Referred: January 26, 1990

FURTHER REFERRALS:

Date of Committee Action: 4-4-90

The RESOURCES Committee considered:

HB 450

HOUSE BILL NO. 450

EASEMENTS & RIGHTS-OF-WAY IN STATE PARKS

"An Act relating to easements or rights-of-way within a state park or recreational facility."

RECOMMENDATIONS:

- be replaced with CS HB 450 (RES) the same title
 have attached amendment(s) a new title
 do pass
 do not pass
 no recommendation
 individual recommendations
 additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):
(Dept)

APPROVES PREVIOUS: (Date/Dept)

- fiscal impact _____
 zero fiscal note DNR
 zero with analysis _____

- fiscal note(s) _____
 zero fiscal note(s) _____
 zero fn/analysis _____

SIGNING DO PASS:

Carl Mendenhall
Mike Davison
Mike Gavan
George [unclear]
Bill [unclear]
Bob [unclear]
Mike [unclear]

SIGNING:

(Check approp. column)

	Do Not Pass	No Rec	Amend
<u>Carl Mendenhall</u>		<input checked="" type="checkbox"/>	
<u>Mike Davison</u>			

Carl Mendenhall
Chairman's Signature

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : HB 450
PUBLISH DATE : _____

FISCAL NOTE

REQUEST:

Revision Date: 19-Mar-90
Title: An Act relating to easements or rights of way within a state park or recreational facility.
Sponsor: Cotten
Requestor: House Resources

Agency Affected: Natural Resources
BRU: Park & Outdoor Recreation
Components: Parks Mgmt

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Larry Ostrovsky Phone: 465-2400
Division: Commissioner's Office Date: 19-Mar-90
Approved by Commissioner: Lennie Gorsuch Date: 19-Mar-90
Agency: Department of Natural Resources

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1798
PHONE: (907) 485-2400

March 16, 1990

The Honorable Curt Menard
Alaska State Representative
P.O. Box V
Juneau, AK 99811

Dear Representative Menard:

Subject

House Bill No. 450, An Act relating to easements or rights-of-way within a state park or recreational facility.

Background

Access to private lands within state park units has been granted through the vehicle of a revocable park use permit. The grant of an irrevocable right-of-way or easement constitutes a disposal of an interest in land. Under Title 41, the Division of Parks and Outdoor Recreation lacks the legal authority to dispose of land and the provisions of Title 38 authorizing the Department to grant access does not apply to park land administered under Article VIII, Section 7 of the Alaska Constitution.

The Division of Parks and Outdoor Recreation does have the authority to establish public roads within park areas for park purposes. Through reciprocal agreements with private inholders, a park road could access private land if it also served a public purpose, i.e. provided access through private land to adjacent park land thereby improving the public's access; resolved a resource management problem; or provided greater control over public access. In this manner, access across park land would be regulated and a landowner would be guaranteed access although a disposal of interest in park land would not occur.

Effect of HB 450

As written, HB 450 would constitute a disposal of an interest in park land which is not contemplated under Article VIII, Section 7 of the Alaska Constitution. HB 450 also implies an exclusive

grant of land without any statutory authority for a public interest finding or compensation (although the constitutional provision would apply under Article VIII, Section 2 which refers to maximum benefit (compensation) to the people, and Article VIII, Section 10 which requires public notice).

Need for HB 450

HB 450 attempts to provide to a private landowner a dedicated public or private right-of-way to their property through park land rather than utilize a park road under reasonable regulation. This need is in part motivated by financing and title concerns. Communication between the lending institution and the division has in all past cases resolved concerns about the revocability of a park permit and continued use of a park road.

The Division of Parks and Outdoor Recreation has the existing authority to establish public roads for park purposes. If road access to private land does not meet the standard of park purposes then access may be denied or accomplished by a revocable permit in order to regulate the access in the public interest.

Department Position

Although there may persist a question of the constitutionality of disposing of an interest in park land through an easement or right-of-way, the legislature may define by statute the limit of what title rights in park land it grants. In order to better define the public interest, the following amendments to HB 450 are suggested.

Section 1. AS 41.21.020 is amended by adding a new subsection to read:

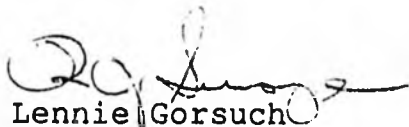
(c) The department may issue a public easement or public right-of-way within a state park [or recreation facility] unit for access to private property when such an action is determined to not unduly impact park resources and serves the public interest. The commissioner may regulate the access and require compensation for the access.

Representative Curt Menard

-3-

March 16, 1990

Sincerely,


Lennie Gorsuch
Commissioner

cc: Representative Cotten
House Resources Committee
Bob Evans, Legislative Liaison
Office of the Governor

2 1
Confidential

Neil Johannsen, Director
Division of Parks and Outdoor
Recreation

March 8, 1990

DRAFT

276-3550

Eagle River Visitor
Center Access Road

Kenneth C. Powers
Assistant Attorney General

This memorandum responds to the Division of Parks' request for legal assistance to determine what options are available to the division to respond to the Gateway Homeowners' Association's request for a permanent right-of-way or easement for vehicular access across a portion of Chugach State Park land at the Eagle River visitor center.

In our opinion, the Division of Parks does not have the authority to grant a private easement or right-of-way for recurring or permanent motorized access across state park land. Moreover, even if a private right to use state land for access existed¹ or were created, it would still be subject to reasonable regulation by the state, including a permit requirement under the existing park regulations.

FACTUAL BACKGROUND

The Gateway Homeowners' Association represents a group of private landowners living in a subdivision in the Eagle River valley beyond the Eagle River visitor center. Both the visitor center and the private homes are located on land that was homesteaded by John Barclay in the 1960's. Barclay received a federal patent to the property in the 1960's. In 1980, the state purchased the visitor center property from Barclay's successor in interest, Alaska's Paradise Haven Lodge, Inc. Under AS 41.21.121, the visitor center property automatically became part of Chugach State Park when it was acquired by the state.

¹ We have not sought to determine whether the homeowners have an existing right of access across the visitor center parking lot. According to a June 3, 1988 letter in the file from Veronica Gilbert to the Bureau of Land Management, the road was built across federal public lands without authorization. If that is the case, then the homeowners probably do not have an existing right of access. Prescriptive easements (grandfather rights) cannot be created against either the state or the federal government. Thus, the historic use of the road for access would not have created any legally enforceable right to continue to do so.

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Our understanding of the situation is that the members of the Gateway Homeowners' Association have been driving through the parking lot at the visitor center for access to their homes. Under 11 AAC 18.019(a)(9), the Division of Parks has issued the homeowners a permit authorizing the use of park land for recurring motorized access to private land. The homeowners want to receive a permanent, irrevocable right-of-way or easement rather than continuing to operate under the park use permit system.

LEGAL ANALYSIS

Our analysis is based upon the special status of the Eagle River Visitor Center land as part of Chugach State Park and provisions in the Alaska Constitution and statutes governing the creation and administration of state parks. Art. VIII, sec. 7 of the Alaska Constitution authorizes the Alaska legislature to reserve special areas of the state from the public domain and "provide for their administration and preservation for the use, enjoyment, and welfare of the people." Pursuant to that authority, Chugach State Park was established by the legislature in 1970. AS 41.21.121.

The grant of an irrevocable right-of-way or easement constitutes a disposal of an interest in land. 1980 Inf. Op. Atty Gen. ____ (Dec. 22, 1980). As part of an art. VIII state park, the Eagle River visitor center property is not subject to the general state laws concerning management and disposal of state land in Title 38 of the Alaska statutes. 1985 Inf. Op. Att'y Gen. 177, 185-86. (Feb. 21, 1985).² Thus, the provisions of Title 38 authorizing the Department of Natural Resources to grant access easements and rights-of-way do not apply. Id.

Even if the grant of an access easement could be construed as something other than a disposal of land (which it cannot), the Division of Parks would still lack the legal authority

² Although state statutes generally applicable to state land do not apply to park land, there are a number of constitutional provisions applicable to the use and disposal of state land or interests which apply regardless of the status of the area as park land. For example, art. VIII, sec. 2 of the Alaska Constitution requires that the natural resources of the state be utilized, developed and conserved for the maximum benefit of its people. Unless the public was adequately compensated, a grant of an interest in state land for the exclusive use of a group of private homeowners could run afoul of that provision. Furthermore, any disposals or leases of interests in state land would need to comply with the public notice requirements of art. VIII, sec. 10 of the Constitution.

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to grant one. The constitution requires that parks be administered and preserved for the use, enjoyment, and welfare of the people. Based upon that provision, this office has concluded in previous opinions that the Division of Parks does not have the authority to grant a private group the privilege of exclusive use of a state park or a portion of that park. See 1982 Inf. Op. Atty Gen. 55, 56 (Jan. 22 1982). As we understand the situation in Eagle River, the homeowners want the access road into their subdivision to be maintained as a private road, excluding public use. Since a grant of exclusive use of park land for private access is not permitted under art. VIII, sec. 7, the division cannot grant the homeowners' request.³

Although a private easement cannot be granted, we believe there is another avenue available to the division to provide the homeowners with the guaranteed access they seek. Under AS 41.21.122, the Division of Parks has specific authority over highway access in Chugach State Park. The division also has the authority to develop alternate and additional routes of public access into the park under its general authority for managing the park. As part of an agreement with the homeowners that would provide guaranteed public access into the park on the portions of the road that cross the homeowners' land, we believe the division could agree to guarantee motorized access to the homeowners on the portions of the road crossing the state park land. The agreement would effectively establish the road through the visitor center parking lot and the subdivision as a public road.

Both public and private use of any road or right-of-way that exists or is created across park land would remain subject to

³ We understand that a bill has been introduced in the legislature which would delegate to the Division of Parks the statutory authority to grant private easements. H.B. 450, 16th Leg., 2nd Sess. (Alaska 1990). There is some question whether such a statute, if enacted, would be valid. In art. VIII, sec. 7 of the Alaska Constitution, the people of the state granted the legislature the authority to create state parks by reserving areas of special importance from the public domain. The legislature was also granted the authority to "provide for their administration and preservation for the use, enjoyment and welfare of the people". Based upon that provision, this office has previously opined that "the constitution simply did not authorize disposal of park land or resources." 1985 Inf. Op. at 186 n.6. A statute seeking to grant authority to a state agency to dispose of an interest in constitutionally designated park land could be construed to violate the requirement in art. VIII, sec. 7 that the legislature provide for the "administration and preservation" of park lands. Of course, the legislature could choose to remove the area from the park.

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appropriate park regulation. For example, the division could close the road to motorized vehicle use by the general public while leaving it open to motorized vehicle use by the homeowners. Under the current park regulations in 11 AAC 18.010(a)(8), the homeowners would be required to obtain a permit that would regulate recurring vehicular access even if they had a right of access. Cf. United States v. Vogler, 859 f.2d 638, 642 (9th Cir. 1988) (upholding government's authority to regulate use of public highways within parks); State v. Miller, No. #3AN-88-10139 Civ. (Alaska Super. Ct. Feb. 26, 1990) (decision on summ. judg. upholding right of parks to regulate private use of RS 2477 public right-of-way for access across park lands, citing Vogler).

We hope that this memorandum has provided the guidance you requested regarding the grant of a private right-of-way across state park land. If you have any further questions or need for assistance, please feel free to contact us again.

KCP:bli

**GATEWAY
HOMEOWNERS ASSOCIATION**
2410 Eagle River Road
Eagle River, Alaska 99577

December 17, 1989

The Honorable Sam Cotton
Alaska House of Representatives
P.O. Box 770296
Eagle River, Alaska 99577

Re: Gateway Homeowners Association
Request for Right-of-Way

Dear Mr. Cotton:

Julie Kraft of your staff has kindly provided me with a copy of Department of Natural Resources Commissioner Lennie Gorsuch's letter of November 21, 1989. This letter responds to your earlier request as to which agency in Department of Natural Resources has legal authority to grant an easement or right-of-way over and across Chugach State Park property to the Gateway Homeowners Association. The easement or right-of-way would provide members of the Gateway Homeowners Association legal access to their homes and properties.

After having reviewed the letter, it is apparent to me that Commissioner Gorsuch and her staff do not fully understand the situation regarding our access problems over Chugach State Park Property and the process we have been engaged in to resolve them. Therefore, I believe that a few comments are warranted for the sake of clarity and to set the record straight as far as the facts of this matter are concerned.

My first concern is that the Commissioner did not answer your basic question regarding the agency within her Department which has the authority to grant an easement or right-of-way over Chugach State Park property to the Gateway Homeowners Association. She responded by indicating that Chugach State Park does not have this authority. She did not however, identify the agency which has this authority.

She is correct in stating that there are a land status issues involving federal, state and private lands relating to our situation. The issues are not overly complicated. She is also correct, up to a point, in saying that the Department has been working with us in an attempt to resolve our access problems. She

is not correct, in a number of her assertions regarding alternatives available to the parties to resolve our access problems.

Please keep the following information in mind during my subsequent response to issues raised in the Commissioners letter:

- The Chugach State Park Property now occupied by the Eagle River Visitor Center was part of the John Barclay Homestead. It was purchased by the Park in 1980.
- The road now used by members of the Gateway Homeowners Association to access their homes and properties was part of the John Barclay homestead and has been used by John Barclay and his successors in title for access to the homestead (and later to residential lots) since 1963. The seventeen years that the road was used as private access for Gateway property owners exceeds the statutory period under which prescriptive rights for access can accrue to the users of the road.
- While our access does indeed cross federal, state and private property, the only issue that is and should be the concern of the Department of Natural Resources and Chugach State Park is that section of the road which crosses the five acre tract of Chugach State Park property occupied by the Eagle River Visitor Center.

Over the past three years, the Gateway Homeowners Association has been working to resolve its legal access problems. To this end, we have accomplished the following:

We have entered into a reciprocal right-of-way agreement with the United States of America, through the Bureau of Land Management, for access across the federal lands involved. This agreement involves the United States granting a right-of-way to the Gateway Homeowners Association for access across the federal lands involved. Four of our private property owners have granted the United States access across the private properties involved.

The four private owners in our area have granted the Gateway Homeowners Association private right-of-way easements across their properties so that members of the Association have legal access to their homes and properties. These easements, which were recorded on October 6, 1989 are private and do not create any rights for the general public to use our access road.

We understand that under 11 AAC 18.010, Parks can only provide the Gateway Homeowners Association a revocable use permit. For this reason, we applied for an access road right-of-way to the Division of Land and Water Management earlier this summer. Our application was rejected on the grounds that since our right-of-way was located in Chugach State Park, Land and Water Management lacked jurisdiction.

The only outstanding access issue to be resolved involves acquisition of permanent access across the Chugach State Park Eagle River Visitor Center property. As an interim solution to our access problem, Chugach State Park Superintendent Pete Panarose has offered the Gateway Homeowners Association a revocable use permit. Gateway will accept this permit with the understanding that it is interim in nature for as long as it takes to permanently resolve our access problem.

- The Gateway Homeowners Association deannexed from the Eagle River Rural Road Service District effective January 1, 1989. This means that as far as the Municipality of Anchorage is concerned, our access road is essentially a private road.

Commissioner Gorsuch makes several statements in her letter which leads me to believe that she does not fully understand or appreciate the access issue.

First, she indicates that in order to establish permanent access, "the existing access route needs to be realigned and platted as a public right-of-way through the Municipality of Anchorage...". This is not correct.

Gateway Homeowners Association needs either a dedicated easement or a right-of-way grant from the State of Alaska. The Municipality of Anchorage is not involved in our area any longer by virtue of Gateway's previously mentioned deannexation from the Eagle River Rural Road Service District. Furthermore, Chugach State Park does not desire that our access road become public access. They have signed our access road as it departs from the Visitor Center parking lot as a private road for authorized vehicles only.

The Municipal cost reimbursement program for developers to construct subdivision roads and establish road service districts is not applicable in this situation since, as previously stated, our area is not in a road service district and the Municipality will not allow a district to be formed because the road is private.

Second, legislative funding for a public road and the creation of a public right-of-way is not appropriate to our situation since the portion of our access road crossing the Visitor Center parking lot is already public and a public right-of-way across the remainder of the Visitor Center property would serve no public purpose. In fact, current Park management involves limiting public vehicular access south of the Visitor Center.

Third, the Commissioner apparently is not aware that the Visitor Center parking lot was redesigned and paved during the summer of 1989. Previously, our access road went through the Visitor Center parking lot which admittedly, was not only unsafe for Park visitors, but also created a hazardous situation for our homeowners as well. The redesign and paving of the parking lot last summer has resulted in a two lane access way along the east edge of the parking lot along which public parking is prohibited. This new alignment, while not perfect, greatly minimizes conflicts with visitor activity. Park Superintendent Pete Panarese and his staff also are now able to be proactive in managing parking during peak use periods and have been very cooperative and effective in keeping the access way available for our use. A road realignment at this point would probably not be cost effective and is really not necessary.

The foregoing discussion should put our situation into the proper perspective. It is our belief that our remaining access problems could be resolved rather easily and conveniently by the Department of Natural Resources, through the Division of Land and Water Management, granting an easement or right-of-way to the Gateway Homeowners Association along the existing alignment which follows the east edge of the Visitor Center parking lot.

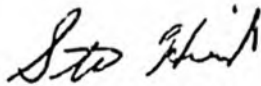
From the foregoing, it seems that the Gateway Homeowners Association is in somewhat of a Catch 22 situation. On one hand, Chugach State Park lacks the statutory authority to grant easements and right-of-way. On the other hand, the Division of Land and Water Management indicates that it lacks authority to act because the lands are located within Chugach State Park. Yet both agencies are under the Department of Natural Resources umbrella and this is the department which manages State land. We are in a quandary as to how to resolve our access problem.

Given the foregoing, we feel we have no other alternative than to respectfully request that you continue to intercede with the Commissioner on our behalf. We very much appreciate your continuing assistance and

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stand ready to provide any additional information or to provide a representative or spokesman to meet with you and/or Department of Natural Resource staff to resolve this issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "Stu Hirsh".

Stu Hirsh, President

GATEWAY
HOMEOWNERS ASSOCIATION
2410 EAGLE RIVER ROAD
EAGLE RIVER, AK 99577
907-694-6946

Resources
FYH

2/6/90

Representatives Curt Menard and Cliff Davidson, Co-Chairmen
House Resources Committee
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Representative Menard and Davidson:

I am writing on behalf of the Gateway Homeowners Association, to request your support of House Bill 450. This bill would authorize the Department of Natural Resources to issue easements or rights-of-way across state parks or recreation facilities for access to private property. At the present time, the Department has no such authority.

Members of the Gateway Homeowners Association own homes and property on an old homestead at the end of Eagle River Road within Chugach State Park. The homestead and many of the homes in our area predate the establishment of the park.

In 1930, the State of Alaska purchased a 5 acre tract of land which was part of the original homestead. The old Paradise Haven Lodge (now the Eagle River Visitor Center) was located on this land as well as the original homestead access road which members of our Association have used for access to their property for over 20 years. Unfortunately, the deed by which Chugach State Park acquired this property did not reserve an easement protecting the legal rights of access that members of our Association previously enjoyed.

We now are faced with a situation where it is nearly impossible to refinance and/or sell our properties because we do not have legal access. In fact, the Alaska Housing Finance Corporation recently refused to finance a home in our area.

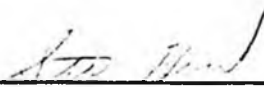
In an attempt to cure our legal access problems, we applied for a right-of-way with the Division of Land and Water Management. Our application was rejected on the grounds that the DNR did not have

authority to convey property rights on park property. Chugach State Park, also lacking this authority, can only issue us a non-compatible use permit. Such a permit is a poor solution to our problem.

The only alternative we (and others similarly so situated) have to gain legal access to our homes and property is for the legislature to authorize the Department of Natural Resources to grant easements and rights-of-way across state parks or recreational facilities. This can be accomplished by the passage of House Bill 450.

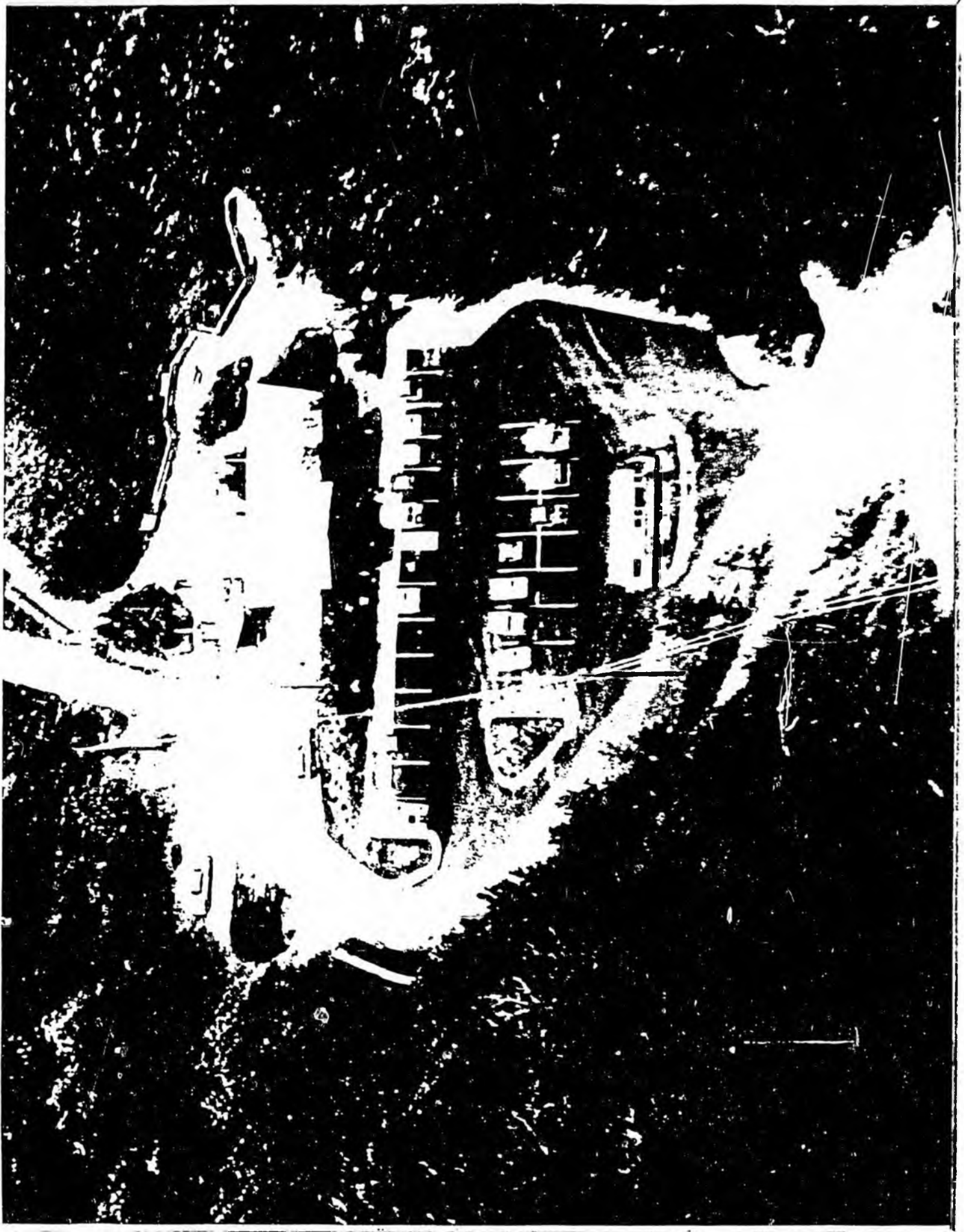
We would very much appreciate your assistance and support. Please feel free to contact me if you would like any additional information regarding this matter.

Sincerely,



Stu Hirsh, President

copies: Sam Co
George B. ... Jr.
Mike Davis
Walt Furnace
Richard Foster
Bill Hudson
Mike Navarre
Bert M. Sharp



STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400

March 16, 1990

The Honorable Curt Menard
Alaska State Representative
P.O. Box V
Juneau, AK 99811

Dear Representative Menard:

Subject

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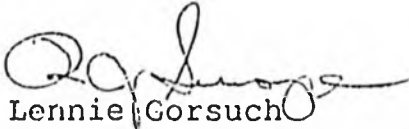
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Representative Curt Menard

-3-

March 16, 1990

Sincerely,



Lennie Gorsuch
Commissioner

cc: Representative Cotten
House Resources Committee
Bob Evans, Legislative Liaison
Office of the Governor