

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

5223 SCRA SB 424 - SB 426

795

Wednesday, March 2, 1988, The Anchorage Times B-3

# Builders mad over Kotzebue bid

By Robert Laurie  
Times Juneau Bureau

JUNEAU — Last fall, the state Department of Transportation awarded a \$1.8 million contract for work at the Kotzebue airport to a joint venture made up of the Kotzebue village corporation, a local contractor, and the city of Kotzebue.

The involvement of the city of Kotzebue has Alaskan contractors upset. They say it's a threat to their livelihood and the free enterprise system.

Representatives of the Alaska General Contractors testified Tuesday afternoon before a Senate committee in favor of a bill that would prohibit such contracts in the future.

"The bill simply says that we won't allow our municipalities or government entities to compete with private business in bidding state contracts," said bill sponsor Sen. Lloyd Jones, R-Ketchikan. "Municipalities have marginal or non-existent debt service on equipment, where your con-

tractors have to use depreciation schedules. And they don't have government funds on their equipment."

AGC executive director Bill Schneider says it's the first time a local government has bid on a state project.

"Quite frankly we think there are some inequities in that," he said. "We don't think that government should be competing with private enterprise in the building of projects."

State Transportation commissioner Mark Hickey says the department had no choice but to award the bid to the joint venture after an attorney general's review found nothing prohibiting Kotzebue's participation in the contract, but he agrees it raises some questions of fairness.

"A municipality can bring things to the table a private contractor can't," he said.

Kotzebue Rep. Al Adams doesn't think much of AGC's protest.

"I think it's sour grapes by an

organization I used to support," he said.

Adams, who also sits on the board of the village corporation, says he has no problems with local communities bidding.

"Where you have the resources and permits, you should participate," he said. "There's no unfair competition. Everybody has a chance to bid."

Sen. Willie Hensley, D-Kotzebue, said the Kotzebue contract is just a little different version of other contracting done by the state.

Many capital construction projects funded by the state in rural Alaska are administered by local communities. The municipal governments use "force accounting," or "transfer of responsibility" agreements to manage the contracts.

"I can understand why the AGC would be a little agitated by such an idea," said Hensley.

Still, he said it was made to order for Kotzebue, "and more power to them."

The project expands the aircraft parking apron at Kotzebue's Ralph Wien Memorial airport using about 75,000 cubic yards of gravel dredged from the Kotzebue lagoon.

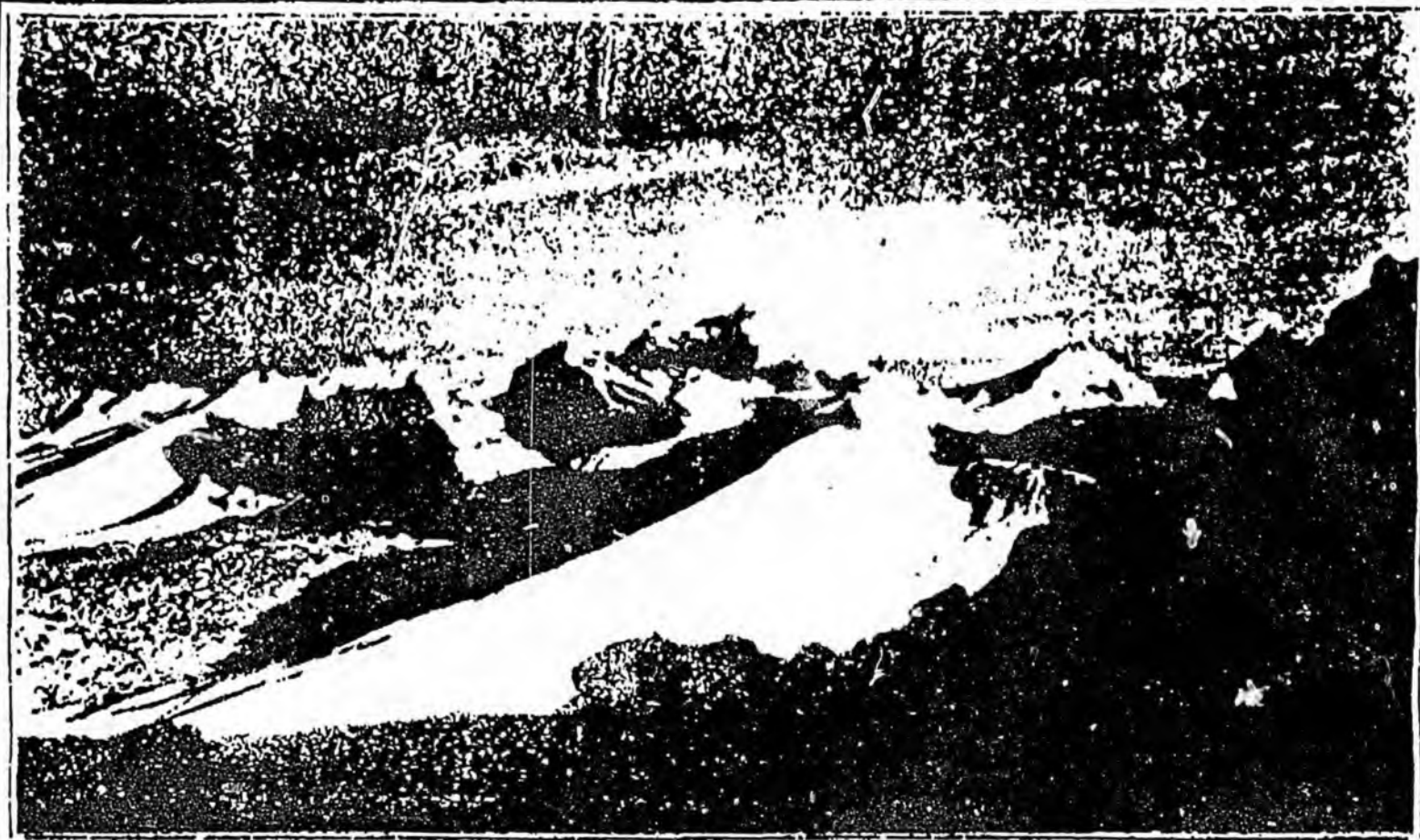
Up to 16 pieces of heavy equipment; dozers, loaders, and dump trucks, are involved in the project. Eight of the units are owned by the city. The dredge is owned by the Kikiktagruk Inupiat Corporation, the Kotzebue village corporation.

The next lowest bid, from Brown Construction of Kenai, was nearly \$500,000 higher.

In a protest to the department of transportation, Brown said the city's inclusion in the joint venture gave an "unfair competitive advantage" to the other two members of the joint venture and may have represented a misuse of public funds for private gain.

The department, and later a superior court, rejected the claims.

**SURPRI**



One of Kotzebue's more prominent "mountain ranges" located near the airport.

# Sparks fly at council meeting

by Den Neuschwan  
Staff Reporter

Angry words and accusations of misconduct punctuated the Kotzebue City Council regular meeting Feb. 18, when Jeff Smith questioned council members about the city's financial arrangement with R.S. Store Inc., one of the airport improvement's joint venture partners.

Smith, who spoke during the citizen's comments of the council meeting, said rumors had been circulating that the council had loaned \$300,000 to a private individual.

"I find it just incredible that the city loaned \$300,000 to Bish," Smith said. "We talk about closing the library, talk about needing money for the Rec

Center. How many employees are forced to take pay cuts? Service after service is threatened, there are debts that the city owes, yet the city loans \$300,000 to a private enterprise it's just incredible."

Smith was referring to Bish Callahorn, president of R.S. Store Inc.

Smith said he didn't realize the city was a financial institution and added: "It's financial dealings like this that got our city in trouble."

City Manager Mike Scott, visibly taken back by Smith's comments, said the loan had been discussed during public hearings and if the city had not loaned the money the joint venture would have lost the bid.

"If you had attended the public hearings, you would have known

what was going on," Scott told Smith. "The city went into a joint venture agreement with KIC and R.S. Store Inc. We bid on the project, and when it came time to place the bond, R.S. Store Inc. couldn't come up with the cash. The project was on the line."

Scott said the loan agreement was to the city's benefit and would amount to a net gain of \$18,000. According to Scott, R.S. Store Inc. borrowed the money at 12.5 percent interest and offered collateral worth two times that of the initial money.

"Get down to the basics," Scott told Smith. "Would you throw away the bid, lose the jobs and economic development to the city? We were in a perfect position. We had two-to-one protection, no financial institution would have given us that."

Smith said he never insinuated the city had made illegal dealings behind closed doors. He said he felt obligated to come forward and put this issue on the table.

"When rumors get started," Smith said, "you don't hear the good things. You think something nefarious is going on."

After the council meeting, Scott said he was very surprised at Smith's statements.

"I was totally surprised," Scott said. "I had just talked to him yesterday, and he said nothing about this."

Scott added Smith spoke in an accusatory tone and said he thought it wasn't right for Smith to bring the subject up in that manner.

"I'm all for citizens coming in ... continued on page 6."

# ire committee ponders own fate

and talking to the council," Scott said. "But he (Smith) came in making claims and assertions, and to do so so loosely shouldn't be tolerated. It's irresponsible. He made no legitimate attempt to contact anyone concerning this issue."

On Friday Smith, a former city council member who now does consulting work for the borough, said his action at the meeting could have been compulsive on his part, but he felt the issue needed to be out in the open.

After discussing the rumors with a council member, Smith said he was urged by the council member to come to the council meeting and air his views. Smith declined to name the council member. His wife had also encouraged him to speak his mind at the meeting, he said.

"It was nothing personal," Smith said. "It was an action I feel was wrong. They've got reasons to justify their actions, but I don't think they're adequate. I'm not one who believes the ends justifies the means."

Smith added he felt he did the

city a service.

Scott said at the time of the joint venture agreement for the \$2 million airport improvement project bid, it was assumed that all parties had enough money to cover the bond. When R.S. Store Inc. indicated it could not come up with the money, there was discussion about what the city should do.

The city did not want to lose the bid, Scott said, and the bond had to read the same as the bid, with the city, KIC and R.S. Store Inc. as backers of the bond. Scott said there wasn't much time to get the money together before the bond deadline. Under that time factor, KIC wouldn't be able to meet and approve a loan, so Scott suggested the city loan the money.

"From that point on we called a special public meeting to discuss the loan," Scott said. "It was well publicized."

The council unanimously approved the loan in its Oct. 5 special open meeting. Scott said the money was a part of the municipal investment account and was simply switched to another

Callahorn said the city should be commended for arranging the loan.

"How many millions of dollars has the city and the people of Kotzebue lost to outside contractors?" Callahorn asked. "They should use this as a matter of policy."

Among the highlights of additional city council action was the approval of a land transfer between the Indian Health Service and the city, interest in the Nome to Siberia flight, a city local hire report, the city's monthly financial statement and the first reading of a joint insurance agreement among Alaska municipalities and school districts.

The council unanimously passed a resolution transferring IHS property on 3rd Avenue to the city.

The 1.9 acre property, estimated by Scott as having a value of \$150,000, includes the city water tank, public works treatment plant, waste building and storage shed.

According to the terms of the contract, the city agrees to maintain the property for the operation and maintenance of sanitation facilities and to keep the facility in effective operating condition.

A small tract of the property will be leased back to IHS on a 10-year contract for \$1 a year, with an option to renew at the end of the period. The 2-acre lot will be used as a material staging area, regional support center and equipment repair and storage site for ongoing projects in the Manilla region.

Council members discussed the feasibility of a Siberian goodwill trip after receiving the travel offer from a letter submitted to the council by NANA Museum Director Karl Westlund.

In the Feb. 3 letter, Westlund said he had been asked to assemble a group from Kotzebue to join in on the proposed flight from Nome to Provideniya, a village in the Soviet Far East.

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Scott said a delegation to promote tourism, express friendship and goodwill and to check on economic possibilities in Siberia would be beneficial to the city. He said he'd also be interested in a sister city in Siberia.

Westlund told the council members the original sponsors of the trip would hold four to six seats for Kotzebue representatives. The Nome group has set a travel target date of March 15. She said accommodations in the village were limited and the trips were being scheduled for a day trip only.

Jim Stimpfle, organizer of the Nome to Provideniya trip, said in a later interview the flight had been postponed until sometime in April or May. The lack of passports and an indication that Gov. Cowper will be among the passengers on the proposed trip is responsible for the delay, he said.

The council members also went over the resident employment status report from Oct. 1986 to Dec. 1987.

As a matter of contrast, two projects that were initiated before the local hire ordinance was 33 percent of the total work force were Kotzebue residents who

On the Kotzebue Elementary School Renovation Project had a local work group of 23 percent and but supplied 63.6 percent of total work hours.

In comparison, of the 109 full and part-time jobs created by five capital projects beginning Oct. 1, 1986, all were filled by local residents.

Scott said the report showed a dramatic difference in local hire since the formation of the local hire commission and enactment of the ordinance.

"This report proves that the ordinance has fulfilled its original intent and that local hire needs to remain a prominent issue of the city," Scott said. "Local hire should not be swept under the carpet or placed on the back burner."

In further council action, Scott submitted the city's financial statement and said the city was right on track. He said the city was in good shape and was six months ahead in its repayment schedules.

According to Scott, the \$2.7 million city debt has been reduced to \$1 million. He said the city debts were well on their way to recovery.

The council also had the first reading of the Alaska Municipal League Joint Insurance Arrangement.

The joint insurance agreement approved by the 1986 Alaska Legislature provides means for local governments and school districts to join together in an insurance pool to avoid some of the problems arising from conventional insurance markets. The JIA would offer insurance premium stability, according to Scott.

The arrangement would also establish a non-profit association to provide risk management services for Alaska municipalities, city and borough school districts and regional attendance areas.

In order to become a member of the JIA, the city would have to join the association, approve the agreement and pledge to appropriate sufficient funds for annual premiums and assessments for at least three years or until all payment obligations have been fulfilled.

The council members voted for a March 3 public work session to go over the insurance documents. The session will begin at 3:00 p.m. in the council chambers.

The council also approved an \$85 donation for the Students-in-Space program at Kotzebue Middle School. The donation will be used in purchasing one flight suit.

Eight students at the Middle school are involved in the after-school program organized by 3rd grade elementary teacher Urtha Lenthart. The program offers extensive study on becoming astronauts.

In later interview with Lenthart, he said with the city's donation it looked as if the cost of the flight suits for the students would be covered. The Lion's Club donated enough money for three suits and the rest of the money came from other organizations and individuals, he said.

The students are also seeking donations for a guest speaker.



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# Alaska State Legislature

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P. O. BOX V  
JUNEAU, ALASKA 99811  
(907) 465-4989

## Senate Community and Regional Affairs Committee

March 1, 1988

TO: Senate Community and Regional Affairs Committee Members

FROM: Senate C&RA Staff

RE: CSSB 424 - "An Act relating to procurement by the Department of Transportation and Public Facilities from certain entities."

This CS would prohibit DOT/PF from awarding construction contracts greater than \$150,000 to state agencies, political subdivisions, or joint ventures involving these parties. The CS limits the scope of the bill to construction contracts administered by DOT/PF. The differs from the original which dealt with all state contracts. The change in the CS is supported by the sponsor and the Associated General Contractors.

A zero fiscal note and additional backup material is included in the packet. Senator Jones and a representative of DOT/PF will be at the meeting as will the board of directors of the Associated General Contractors.

# ALASKA STATE LEGISLATURE


*Home Address*  
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*While in Juneau*  
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907-465-3743

**Senator Lloyd Jones**

MEMORANDUM

TO: Senate members,  
Community & Regional Affairs

FROM: Senator Lloyd Jones 

RE: Senate Bill 424

---

I introduced SB 424, "An Act relating to procurement by state agencies from certain entities," because of my concern that state government should help the private sector, not hinder or compete with it.

In a nutshell, it was my intent with this piece of legislation to prevent municipalities from competing with private contractors on state jobs.

There have been a couple of instances lately where municipal organizations either by themselves or in conjunction with a partner have bid or wanted to bid on state projects. It is unfair to private businesses to compete with publicly funded, not-for-profit organizations.

This bill has the support of labor as well as management in the construction industry. Thank you for giving it your fullest consideration.

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB424  
PUBLISH DATE:

REQUEST: FISCAL NOTE

Revision Date:  
Title: An Act relating to procurement by state agencies from certain entities.  
Sponsor: Jones and Fischer  
Requestor: Sturgulewski

Agency Affected: DOT&PF  
BR 11  
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTURAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Because of the relatively few examples the department can refer to where a municipality or state agency actively competed for a bid or professional service solicitation, this bill would appear to have minimal or no impact on staffing or cost. It could affect some operational functions of the department, which are further described on the next page.

Prepared by: *Jeffery C. Ottosen*  
Jeffery C. Ottosen, Director  
Division: Engineering & Operations Standards

Phone: 465-2951  
Date: Feb. 29, 1988

Approved by Commissioner: *Mark D. Hill*  
Agency: Department of Transportation and Public Facilities

Date: *3/1/88*

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

Currently, the department has a number of relatively small operational-type contracts with other governmental agencies for a variety of purposes. These include contracts with local communities for docking of Marine Highway Vessels, terminal operations and ticketing for the Marine Highway system and contracts for maintenance and operations of airports and road systems. Other examples of disallowed inter-governmental contracting may occur depending on how the bill is interpreted. For example, if the department procures shipyard services at locations such as Ketchikan or Seward we may be viewed as being in violation of this proposed law. As each city controls a major shipyard, though leased to a shipyard service firm, legal questions may be raised as to an implied partnership or joint venture on the part of the city which owns or leases the shipyard facilities. A further potential conflict is with the anticipated selection of a southern terminus for the Alaska Marine Highway System. Many of the likely candidate sites involve a governmental entity, including the Alaska community of Hyder.

We believe the principal intent of this bill – to prevent governmental entities from competing in the construction arena – could be served while avoiding the types of conflicts described above with a simple language change. We suggest that the sentence on line 11 be amended as shown:

11 ...a state agency solicits bids for a construction contract over \$150,000 by issuing ...

With the change described above, the operational contracts described herein could continue while construction contracts would be subject to the limitations of public entity contracting as intended by this bill.

→ THIS HAS BEEN DONE IN THE CS. MCA

## MEMORANDUM

TO: FILE  
LEGISLATIVE COMMITTEE

FROM: WFR

RE: BIDS BY POLITICAL SUBDIVISIONS; SUGGESTED CHANGES

DATE: NOVEMBER 21, 1987

The following is a suggestion to amend existing state statutes to preclude state agencies and political subdivisions of the state from bidding on state contracts.

- Amend A.S. 36.30.110 by adding a new subsection to read:

(c) state agencies or political subdivisions of the state are prohibited from responding to an invitation to bid. Bids received from state agencies, political subdivisions of the state or a joint venture or corporation including a state or political subdivision shall not be accepted by the contracting agency.

QA/bidbymun.WFR

# MEMORANDUM

# State of Alaska

TO: Marty Rutherford, Director  
Municipal & Regional Asst. Div.  
Dept. of Community & Regional  
Affairs

DATE: April 7, 1987

FILE NO: 663-87-0189

TELEPHONE NO: 465-3600

FROM: Grace Berg Schaible  
Attorney General

SUBJECT: Municipality as general contractor for public works project

*Marjorie L. Odland*  
Thru: Marjorie L. Odland  
Assistant Attorney General  
Governmental Affairs-Juneau

*Bruce Weyhrauch*  
By: Bruce Weyhrauch  
Legal Assistant  
Governmental Affairs-Juneau

You have asked whether a municipality may act as a general contractor on a competitively bid public works project. The short answer is: no.

We have previously opined that municipalities performing work on public works projects, a practice commonly referred to as "forced accounting," are not required to pay prevailing wages under AS 36.05.010 -- 36.05.110 (Little Davis Bacon Act). 1983 Inf. Op. Att'y Gen. (Apr. 19; 663-83-0554). See 1983 Inf. Op. Att'y Gen. (Mar. 11; 663-83-0267). We have also approved of situations where municipalities carry out their public construction projects by hiring private contractors to perform project management and supervision while using municipal employees to do the construction work. 1978 Inf. Op. Att'y Gen. (Oct. 11; 663-79-0195). However, none of these opinions address the question posed. Based upon our analysis, we find that a municipality may not act as a general contractor on competitively bid public works projects.

Generally, the policy of the Department of Transportation and Public Facilities (DOT/PF) is "to require the construction of all public works under bid contracts." AS 35.15.010. Public work contracts are required to comply with Title 35, AS 36.30 (the State Procurement Code), and regulations adopted under those laws. AS 35.15.040. <sup>1/</sup> Contractor is defined as "the contractor including subcontractors performing work necessary to

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<sup>1/</sup> The effective date of AS 35.15.040 and AS 36.30 is July 1, 1987.

Marty Rutherford, Director  
Municipal & Regional Asst. Div.  
Dept. of Community & Regional Affairs

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facilitate public construction." AS 36.95.010(1). 2/ DOT/PF is given the authority to "enter into contracts or agreements relating to public works with ... political subdivisions...." AS 35.-05.040(7).

Basically, the legislature has provided three ways for the construction of public works projects. First, if a project is estimated to cost less than \$100,000, or if it is in the best interests of the state, DOT/PF may perform the work. AS 35.15.-010. Second, when the estimated construction costs exceed \$100,000, DOT/PF must advertise, request bids, and award contracts competitively. See AS 35.15.020 -- 35.15.050. Third, a municipality can request DOT/PF to give the municipality all the authority to plan and construct "public works projects of the state which [are] to be located within the boundaries or the operating area of the municipality...." AS 35.15.080(a). See 1981 Inf. Op. Att'y Gen. (May 29; 663-81-0044).

Nothing in Alaska law specifically prohibits municipalities from acting as a general contractor on competitively bid contracts. And, the powers given local government units are to be liberally construed. See Alaska Const. art. X, § 1; AS 29.-35.400. Yet, if an affirmative response is given to your question, ostensibly, a municipality could bid on all kinds of public works projects in all areas of the state, just like any other general contractor. We believe the legislature did not intend to give municipalities this authority. By specifically bestowing upon a municipality the authority to "adopt" the planning and construction of public works projects located within the boundaries of the municipality under AS 35.15.080 the legislature intended to give municipalities the authority to carry out public works projects without competition. Similarly, the legislature constrained municipalities to assume the construction of relevant public works projects only within the boundary or operating area of the municipality. AS 35.15.080(a). By implication, a munici-

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2/ AS 39.95.010(3) defines public works as "the on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecoration of buildings, highways or other improvements to real property under contract for the state, a political subdivision of the state, or a regional school board...." AS 35.25.020(7) defines public work as "a structure or project constructed or maintained by [DOT/PF] except airports and highways and includes public buildings, boat harbors, port facilities, dikes, jetties, and breakwaters." A political subdivision of the state includes boroughs, cities, and villages. AS 36.95.010(6).

Marty Rutherford, Director  
Municipal & Regional Asst. Div.  
Dept. of Community & Regional Affairs

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pality venturing outside its boundaries to compete with the private sector for public works projects would be engaging in an ultra vires act, because this action is neither allowed by statute nor by municipal charter. Cochran v. City of Nome, 10 Alaska 425, 435 (D.C. Alaska 1944). See 10 E. McQuillin, The Law of Municipal Corporations § 29.104c (3d ed. 1981); 3A C. Antieau, Independent Local Government Entities § 30B.08 (1987) ("Ultra vires contracts are agreements beyond the borough's power under all circumstances."). See generally 72 C.J.S. Supp. Public Contracts § 4 (1975). On a practical level a municipality competitively bidding against private sector contractors would, in all probability, cause quite a political fuss and raise numerous logistic, ethical, and practical problems for the municipality.

Finally, as we noted earlier, powers given local governments are liberally construed. E.g., Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1120 (Alaska 1979). In this instance, municipalities are not given the authority to compete as a general contractor for public works projects. Thus, if a municipality were to adopt such a power, it would have to be implied. "[I]nsofar as municipal corporations do possess implied powers, such powers are to be strictly construed against the entity claiming them." Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1224 (Alaska 1975) (footnote omitted). Given this rule, a municipality would be barred from asserting implied powers so as to involve itself as a general contractor on a competitively bid public works project.

Notwithstanding this conclusion, municipalities are not completely barred from competing with members of the private sector, such as general contractors.

Engaging in enterprises usually owned and operated by private individuals has also been sanctioned provided the public interest so requires. The opinion has been given that as long as the city refrains from extending its activity into active competition with private enterprise in dealing with others, it should be allowed considerable latitude in providing for itself those things necessary to carry on a legitimate municipal function if there are valid reasons for becoming a self-supplier. The word "private," as used in the opinions discussing the powers of a municipality, is used to designate proprietary as distinguished from governmental functions.

Marty Rutherford, Director  
Municipal & Regional Asst. Div.  
Dept. of Community & Regional Affairs

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ed. 1986) (emphasis added, footnotes omitted). But that competition is limited by what the legislature allows.

A municipal corporation is invested with full power to do everything necessarily incident to a proper discharge of its public functions, but no right to do more can be implied, and in the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals.

Ravettino v. City of San Diego, 160 P.2d 52, 56 (Cal. 1945) (emphasis added). Accord Ace Ambulance Service, Inc. v. City of Augusta, 337 A.2d 661 (Me. 1975); Keeter v. Town of Lake Lure, 141 S.E.2d 634, 643 (N.C. 1965). See Stanley v. Dept. of Conservation & Dev., 199 S.E.2d 641, 652 (N.C. 1973) ("A municipal corporation ... even with legislative sanction, cannot engage in a private enterprise or assume any function which is not in a legal sense public in nature.").

We hope this answers your question. If we can be of further assistance, please feel free to call.

BW/pjg

cc: Michael Cushing, Planner  
DCRA/MARAD - Juneau

Michael Tavoliero, City Manager  
Hoonah

Robert M. Maynard, Esq.  
Assistant Attorney General  
Dept. of Law - Juneau

*KFC*

1 IN THE SENATE

BY JONES AND FISCHER

2

SENATE BILL NO. 424

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act relating to procurement by state agencies  
7 from certain entities."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 36.30 is amended by adding a new section to read:

10 Sec. 36.30.760 PROHIBITION AGAINST CERTAIN CONTRACT AWARDS. If  
11 a ~~state agency~~ <sup>DOT/PP</sup> solicits bids for a contract over \$150,000 by issuing  
12 an invitation to bid under AS 36.30.100 - 36.30.190 or a request for  
13 proposals under AS 36.30.200 - 36.30.270, the agency may not award the  
14 contract to a bidder or offeror who is another state agency, a politi-  
15 cal subdivision of the state, a partnership whose partners include a  
16 state agency or political subdivision of the state, or a joint venture  
17 whose venturers include a state agency or political subdivision of the  
18 state. In this section, "political subdivision" includes school  
19 districts.

*DOT/PP contracts only*

# ALASKA STATE LEGISLATURE


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**Senator Lloyd Jones**

MEMORANDUM

TO: Senate members,  
Community & Regional Affairs

FROM: Senator Lloyd Jones 

RE: Senate Bill 424

---

I introduced SB 424, "An Act relating to procurement by state agencies from certain entities," because of my concern that state government should help the private sector, not hinder or compete with it.

In a nutshell, it was my intent with this piece of legislation to prevent municipalities from competing with private contractors on state jobs.

There have been a couple of instances lately where municipal organizations either by themselves or in conjunction with a partner have bid or wanted to bid on state projects. It is unfair to private businesses to compete with publicly funded, not-for-profit organizations.

This bill has the support of labor as well as management in the construction industry. Thank you for giving it your fullest consideration.



SKILL  
RESPONSIBILITY  
INTEGRITY

THE ALASKA CHAPTER  
**ASSOCIATED GENERAL CONTRACTORS  
OF AMERICA, INC.**

BOX 92500 • ANCHORAGE, ALASKA 99509  
TELEPHONE (907) 561-5354



3201 SPENARD ROAD  
ANCHORAGE  
WILLIAM E. SCHNEIDER  
EXECUTIVE DIRECTOR

September 23, 1987

Mark Hickey, Commissioner  
Department of Transportation  
and Public Facilities  
P.O. Box 2  
Juneau, Alaska 99811

Dear Commissioner Hickey:

I am writing to register concern over the facts surrounding the bids for the improvements to Kotzebue's Ralph Wien Memorial Airport, DOT/PF Project No. 60434 AIP No. 3-02-0160-04.

The apparent low bidder on this \$1.8 million project includes the City of Kotzebue as a joint venture partner. To my knowledge this is the first time a political subdivision of the State has bid on a DOT/PF project.

The concept of a non-profit public corporation competing against private construction companies is contrary to principles of free enterprise. Quite simply, a private company cannot compete with a non-profit, non-taxable public entity which utilizes publicly owned and non-taxable equipment.

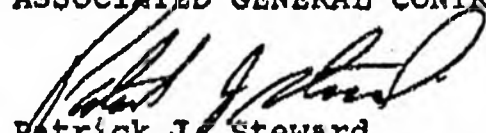
AGC Alaska requests a thorough investigation by DOT/PF into the responsiveness and appropriateness of this bid. Additionally, the capability of the joint venture to bond this project should be reviewed.

Mark Hickey, Commissioner  
Page 2

Please keep me advised of your actions in this matter.

Sincerely,

ALASKA CHAPTER OF  
ASSOCIATED GENERAL CONTRACTORS



Patrick J. Steward  
President

cc: Lynn Harnisch, Regional Director  
DOT/PF - Northern Region  
AGC Board of Directors  
Senator Jan Faiks  
Representative Ben F. Grussendorf

WFR/mjc



SKILL  
RESPONSIBILITY  
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THE ALASKA CHAPTER  
**ASSOCIATED GENERAL CONTRACTORS  
OF AMERICA, INC.**

BOX 92500 • ANCHORAGE ALASKA 99509  
TELEPHONE (907) 561-5354



3201 SPENARD ROAD  
ANCHORAGE  
WILLIAM E. SCHNEIDER  
EXECUTIVE DIRECTOR

January 27, 1988

Mark Hickey, Commissioner  
Department of Transportation &  
Public Facilities  
3132 Channel Drive  
P.O. Box 2  
Juneau, Alaska 99811

Re: Kotzebue Airport Project

Dear Commissioner Hickey,

On behalf of the contracting community in Alaska, AGC requests your response to un-resolved issues surrounding the award of a \$1.8 million Kotzebue Airport improvement project to a joint venture comprised in part by a political subdivision of the State.

This circumstance continues to warrant our attention because we believe a system which allows non-profit tax exempt political subdivisions of the State to bid on a competitive basis against private business undermines the free enterprise system on which this country and this State are founded.

In November 1987, at the AGC annual convention, you indicated that the award to the joint venture KIC Corporation /R. & S. Stores/City of Kotzebue (herein after referred to as the City of Kotzebue) was based on an attorney general's opinion. I am not certain you indicated a written opinion, but the audience assumed that to be the case.

I now understand the facts to be different. First, there was no written attorney general's opinion recommending project award to the City of Kotzebue. Second, a written attorney general's opinion was issued in a memorandum dated April 7, 1987 succinctly stating that a municipality may not act as a general contractor on a competitively bid public works project.

Commissioner Hickey  
Page 2

The October 12, 1987 Intent to Award letter by DOT/PF Regional Director Lynn Harnish directly contradicts this April 7, 1987 attorney general's opinion. Harnish states in part:

There is no law which prohibits a municipality from bidding on a public works project as a joint venture with other contractors. Article X, paragraph 1 provides that "a liberal construction shall be given to the powers of local government units." A.S. 29.35.010(B) allows a municipality to enter into agreement. Considering the broad construction of powers by municipalities required by the constitution and by statute (A.S. 29.35.400 and A.S. 29.35.410), I am unable to conclude that it is illegal for the City of Kotzebue to enter into a joint venture agreement for the purpose of bidding on State construction contract, and the DOT/PF is obligated by A.S. 35.15.050 to award to the lowest responsible bidder regardless of considerations of policy.

The April 7, 1987 attorney general memorandum states in part:

- You have asked whether a municipality may act as a general contractor on a competitively bid public works project. The short answer is no. Finally as we noted earlier, powers given local governments are liberally construed. (Citations omitted) In this instance, municipalities are not given the authority to compete as a general contractor for public works projects. Thus, if a municipality were to adopt such a power, it would have to be implied. "[I]nsofar as municipal corporations do possess implied powers, such powers are to be strictly construed against the entity claiming them." (Citations omitted) Given this rule, a municipality would be barred from asserting implied powers so as to involve itself as a general contractor on a competitively bid public works project.

Commissioner Hickey  
Page 3

As you might guess, we find these revelations to be quite disturbing. Our concern is for the future. Are tax exempt political subdivisions going to be allowed to compete against the private sector? Will DOT/PF ignore the April 7, 1987 attorney general opinion if a similar situation occurs in the future?

I am sure you understand our concerns. Can you please indicate what if anything, DOT/PF plans on doing to address these concerns.

Sincerely,

ALASKA CHAPTER  
ASSOCIATED GENERAL CONTRACTORS



William E. Schneider  
Executive Director

WES/mjc

\WES\HICKEY.LTR

**BROWN CONSTRUCTION COMPANY, INC**

GENERAL CONTRACTOR  
BOX 1313 - KENAI, ALASKA 99611  
(907) 283-9408

September 18, 1987

Mr. Robert Venusti  
Department of Transportation/PF  
Technical Services Bldg.  
2301 Peger Road  
Fairbanks, Alaska 99709-6364

Re: Notice of Bid Protest  
Ralph Wien Memorial Airport  
AIP NO.-3-02-0160-04  
Project No.: 60434

Dear Robert Venusti:

This letter is a formal bid protest for the Kotzebue Airport Project which was tentatively awarded to the City of Kotzebue/ K.I.C./R&S Stone, Inc., a Joint Venture. As of September 17, 1987, no notice of "intent to award" had been issued.

I feel that the inclusion of the "City of Kotzebue" as a Joint Venture partner for a construction project may; (1) be a conflict of interest, (2) give "unfair competitive advantage" to K.I.C./R&S Stone, Inc. in obtaining the contract, (3) undercut the competitive bid process, (4) possibly misuse public funds for private gain, and (5) make the bid "unresponsive."

The apparent ability of K.I.C./R&S. Stone, Inc. to use city owned equipment and rely on city funds for bonding clearly seems inappropriate, to say the least. The bid bond for the project was posted by the City of Kotzebue. See Exhibit B. It usually takes a licensed General Contractor with a proven track record to obtain the proper bonds to perform contracts such as the Kotzebue Airport Project. The use of "city funds" to provide bonding undercuts other contractors' abilities to compete on a fair basis. Brown maintains that the low bid submitted by the Joint Venture reflects the advantage gained by including a municipal entity in the partnership. (Brown's Bid \$2,262,911.00 - Joint Venture's Bid \$1,791,501.00.) The municipality's participation creates the definite appearance of a "conflict of interest."

Mr. Robert Venusti  
September 18, 1987  
Page Two

If Brown Construction Inc. had known that the City of Kotzebue was going to be a participant in the bidding process, Brown would never have gone to the expense of preparing a bid in the first place. The participation of the "City of Kotzebue" cannot be found on the planholders list. See Exhibit C. The use of "city funds" seemingly allows a private individual, i.e., Joint Venture partners, to profit with the use of funds which are derived from the citizens of Koztebue (Public Funds). The use of such funds could provide the basis for an injunction to prohibit the City of Kotzebue from using any funds on the project.

In addition, any proposed use of city owned equipment by the Joint Venture adds to the "unfair advantage" gained at the expense of other bidders. The DOT/PF should also note that all Joint Venture partners have agreed to sign for bonding on the project. See Proposal submitted to DOT/PF by Joint Venture (Exhibit A). The DOT/PF should determine whether or not a surety will even bond an unlicensed municipality involved in a joint venture. The unfair advantage which the Joint Venture has over other contractors becomes even more apparent if the City of Kotzebue intends to furnish a cash bond for the Joint Venture. All other contractors that cannot rely on municipal funds are put at a disadvantage since commercial sureties or private cash bonds must be relied upon by non-municipal entities. The DOT/PF could end up using the municipal funds, i.e. cash bond, to complete the project, in the event of incomplete performance on behalf of the contractor.

The DOT/PF may find it useful to review the Joint Venture agreement between the parties in order to clarify some of the issues mentioned above. A Joint Venture similiar to the Kotzebue/K.I.C/ R & S Stone Inc. is required to keep a copy of the agreement on file at each parties main place of business. See 12 AAC 21.010, Joint Venture Agreement, A.S. 08.18.011. Also see Exhibit D.

If a precedent is set which allows "municipalities" to compete against private enterprise in the construction business, the competitive bid process will ultimately suffer as will the individual contractor. Brown requests that DOT/PF reject the Joint Venture's bid and accept the next lowest bid which was prepared in accordance with recognized standards for bidding on public projects. Please contact me concerning DOT/PF's position on this matter immediately.

Very truly yours,

Don Brown

# STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

NORTHERN REGION, REGIONAL DIRECTOR

STEVE COWPER, GOVERNOR

3301 PEGGER ROAD  
FAIRBANKS, ALASKA 99709-5316  
PHONE: (907) 461-2210

October 12, 1987

Re: Kotzebue Airport Improvements  
Project No. 60434

Brown Construction  
P.O. Box 1313  
Kenai, Alaska 99611

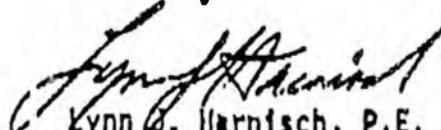
Kotzebue/KIC/R & S Stores, Inc., J.V.  
P.O. Box 46  
Kotzebue, Alaska 99762

Gentlemen:

Having considered the bid protest of Brown Construction, and reviewing the materials submitted by Brown Construction and Kotzebue/KIC/R & S Stores, JV, it is my decision to deny the bid protest. There is no law which prohibits a municipality from bidding on a public works project as a joint venture with other contractors. Article X, paragraph 1 provides that "a liberal construction shall be given to the powers of local government units." A.S. 29.35.010(B) allows a municipality to enter into agreements. Considering the broad construction of powers by municipalities required by the constitution and by statute (A.S. 29.35.400 and A.S. 29.35.410), I am unable to conclude that it is illegal for the City of Kotzebue to enter into a joint venture agreement for the purpose of bidding on a state construction contract, and the DOT&PF is obligated by A.S. 35.15.050 to award to the lowest responsible bidder regardless of considerations of policy. It is for the legislature to determine whether, as a matter of policy, governmental entities should be permitted to compete for public contracts.

The contract for Project No. 60434 will be awarded to Kotzebue/KIC/R&S Stores, JV. It is expected that the contract award will be made on October 14, 1987.

Sincerely

  
Lynn G. Harnisch, P.E.  
Regional Director  
Northern Region

Submitted on Behalf of:

BROWN CONSTRUCTION, INC.

MEMORANDUM IN SUPPORT OF BID PROTEST

Kotzebue Airport Project  
A.I.P. No. 3-02-0160-04  
Project No. 60434  
1987

Grant E. Watts  
WADE & DE YOUNG  
310 K Street, Suite 410  
Anchorage, Alaska 99501  
(907) 279-3544

Attorney for Brown Construction, Inc.

RECEIVED  
OCT 07 1987  
ASSOC. GENERAL COUNCIL



1 (9) to expend money for a community pur-  
2 pose, facility, or service for the good of the  
3 municipality to the extent the municipality is  
4 otherwise authorized by law to exercise the  
5 power necessary to accomplish the purpose or  
6 provide the facility or service;

7 \* \* \*

8 (11) to borrow money and issue evidences of  
9 indebtedness.

10 Id. (Emphasis added).

11 AS 29.35.250 provides in pertinent part:

12 (a) A city inside a borough may exercise any  
13 power not otherwise prohibited by law.

14 Id. (Emphasis added).

15 It is axiomatic that the City of Kotzebue cannot violate the  
16 Constitutional and Statutory law governing the exercise of power  
17 by a second class city. Any express prohibition curtailing the  
18 power of a City, such as Kotzebue, must be adhered to and  
19 respected. In the present case, the City of Kotzebue is ex-  
20 pressly prohibited by the Constitution of Alaska and Statutory  
21 mandate from participating in a private enterprise which seeks  
22 profit as an overall goal.

23 I. THE USE OF FUNDS FROM THE CITY OF KOTZEBUE IS AN  
24 UNLAWFUL LENDING OF CREDIT TO A PRIVATE COPORATION

25 The City of Kotzebue has provided at least one-third of the  
26 \$50,000 bid bond which has been submitted to the DOT/PF on be-  
half of the Joint Venture. See Exhibit A. The Joint Venture  
partners include: City of Kotzebue, K.I.C., Inc. and R & S  
Stores, Inc. The private joint venture has two participants

1 that are private corporate entities, i.e. KIC and R&S Store  
2 Inc. The City of Kotzebue cannot "pledge" its credit on behalf  
3 of a private joint venture. The prohibition against such acts  
4 is provided in AS 37.10.085, which states:

5 Financial aid to corporations by state or po-  
6 litical subdivision. Neither the state nor a  
7 political subdivision of the state may

8 (1) make a subscription to the capital  
9 stock of a corporation;

10 (2) lend its credit for the use of a corpo-  
11 ration; or

12 (3) borrow money for the use of a corpora-  
13 tion.

14 Id. (Emphasis added).

15 At the present time, there is no guarantee that a commer-  
16 cial surety will provide a surety bond to this particular Joint  
17 Venture at all. The Joint Venture has two options, either sup-  
18 ply a commercial surety bond, or two individual sureties to pro-  
19 vide the amounts required by AS 36.25.010. The Joint Venture is  
20 apparently trying to secure a bond through a commercial surety.  
21 The Joint Venture partners have each agreed to pay 1/3 of the  
22 total price required by the commercial surety to supply the  
23 bond. Thus, if a surety agrees to bond the Joint Venture, the  
24 City of Kotzebue will assume responsibility for indemnifying the  
25 surety for either 1/3 or all of any amounts paid out of the pay-  
26 ment and/or performance bonds. The City of Kotzebue will act as  
a source of indemnification for acts of any participant in the  
Joint Venture should the surety ultimately pay out funds from

MEMORANDUM IN SUPPORT OF BID PROTEST  
Page 3

1 the payment and performance bond. The indemnification would  
2 also cover any indebtedness to the surety which is brought about  
3 solely by the other private corporate Joint Venture partners.  
4 The City of Kotzebue is essentially "loaning its credit" to the  
5 private corporate partners by indemnifying the surety and  
6 assuming the risk associated with prospective liability in the  
7 future. The possibility that the City of Kotzebue may only be  
8 indemnifying 1/3 of any amount which may ultimately be sought by  
9 the surety is irrelevant. If the City of Kotzebue provides \$1.00  
10 of its credit for the use of any corporation, AS 37.10.080 is  
11 violated. In the present case, the bond requirement would be  
12 \$716,600.00 for the payment bond and an additional \$716,600.00  
13 for the performance bond or a total bond amount of  
14 \$1,433,200.00. Thus, the City of Kotzebue is lending a credit of  
15 \$477,733.00 for the benefit of two private corporate joint ven-  
16 ture partners. This is nearly half a million dollars for pro-  
17 spective indemnification of the surety. K.I.C. and R & S  
18 Stores, Inc. ultimately benefit by being absolved of this pro-  
19 spective liability. Thus, \$477,733.00 of "public monies" is  
20 pledged for the benefit of a private "corporation."

21 The \$1,433,200.00 figure is reached by taking 40% of the  
22 amount of the contract award - \$1,791,501.00 i.e. amount bid by  
23  
24  
25

26 MEMORANDUM IN SUPPORT OF BID PROTEST  
Page 4

1 KIC/City of Kotzebue/R & S Stores, Inc. x 2. One-third of  
2 \$1,433,200.00 is \$477,773.00. AS 36.25.010 provides:

3 Bond of contractors for public buildings or  
4 works. (a) Except as provided in AS  
5 44.33.300, before a contract exceeding  
6 \$100,000 for the construction, alteration, or  
7 repair of a public building or public work of  
8 the state or a political subdivision of the  
9 state is awarded to a general or specialty  
10 contractor, the contractor shall furnish to  
11 the state or a political subdivision of the  
12 state the following bonds, which become bind-  
13 ing upon the award of the contract to that  
14 contractor:

15 (1) a performance bond with a corporate  
16 surety qualified to do business in the state,  
17 or at least two individual sureties who shall  
18 each justify in a sum equal to the amount of  
19 the bond; the amount of the performance bond  
20 shall be equivalent to the amount of the pay-  
21 ment bond;

22 (2) a payment bond with a corporate surety  
23 qualified to do business in the state, or at  
24 least two individual sureties who shall each  
25 justify in a sum equal to the amount of the  
26 bond for the protection of all persons who  
supply labor and material in the prosecution  
of the work provided for in the contract; when  
the total amount payable by the terms of the  
contract is not more than \$1,000,000, the pay-  
ment bond shall be in a sum of one-half the  
total amount payable by the terms of the con-  
tract; when the total amount payable by the  
terms of the contract is more than \$1,000,000  
and not more than \$5,000,000, the payment bond  
shall be in a sum of 40 percent of the total  
amount payable by the terms of the contract;  
when the total amount payable by the terms of  
the contract is more than \$5,000,000, the pay-  
ment bond shall be in the sum of \$2,500,000.

(b) This section does not limit the authority  
of a contracting officer to require a perfor-  
mance bond or other security in addition to  
those, or in cases other than the cases spe-  
cified in (a) of this section.

MEMORANDUM IN SUPPORT OF BID PROTEST

Page 5

1 (c) When no payment bond has been furnished  
2 the contracting department shall not approve  
3 final payments to the contractor until the  
4 contractor files a written certification that  
all persons who supplied labor or material in  
the prosecution of the work provided for in  
the contract have been paid.

5 Id.

6 The City of Kotzebue would be indemnifying 1/3 of that  
7 amount. A similiar result would occur if the City of Kotzebue  
8 provided an individual surety bond. AS 37.10.085 is violated if  
9 the Joint Venture procures a commercial bond under the terms  
10 which have been mentioned above. The DOT/PF should also verify  
11 whether or not any bond holder designated by the Joint Venture  
12 is licensed to do business in Alaska. In addition, the  
13 indemnification by the City of Kotzebue could very well increase  
14 should the C.O. decide to require additional security for this  
15 project.

16 The impropriety of such acts by a city is described in Port  
17 Of Longview, Cowlitz Cty. v. Taxpayers, Etc., 527 P.2d 263

18 (Wash. 1974) in which the court stated:  
19 The loan of its name by a city to bring about  
20 a benefit to a private project, even though  
general liability does not exist, is nothing  
short of a loan of its credit.

21 \* \* \*

22 It is not material what such undertakings may  
23 be called, or what forms are devised to con-  
24 ceal their main purpose, or how worthwhile  
they may appear to be, when the question of  
25 constitutionality is presented, their sub-  
stance will be examined. The financing of  
private enterprises with public funds is

26

1 foreign to the fundamental concepts of our  
2 constitutional system. To permit such en-  
3 croachments upon the prohibitions of the Con-  
4 stitution would bring about, as experience and  
5 history have demonstrated, the ultimate  
6 destruction of the private enterprise system.

7 Id. at 269, 271.

8 In Cole v. City of La Grange, 5 S. Ct. 416 (January 5, 1885),  
9 the court analyzed a statute similiar to AS 37.10.085 and stated  
10 as follows:

11 Otherwise, as it makes no provision for com-  
12 pensation except when the use is public, it  
13 would permit private property to be taken or  
14 appropriated for private use without any com-  
15 pensation whatever. It is true that this  
16 article regards the right of eminent domain,  
17 and not the power to tax; for the taking of  
18 property by taxation requires no other compen-  
19 sation than the tax-payer receives in being  
20 protected by the government to the support of  
21 which he contributes. But, so far as respects  
22 the use, the taking of private property by  
23 taxation is subject to the same limit as the  
24 taking by the right of eminent domain. Each  
25 is a taking by the state for the public use,  
26 and not to promote private ends.

27 Id. at 419.

28 In Giles v. City of Biloxi, 112 So.2d 815 (Miss. 1959), the  
29 court stated:

30 It is argued that the contract constitutes a  
31 joint venture between the Commission, an  
32 agency of the City of Biloxi, and Aponaug, a  
33 private corporation, and that such joint  
34 undertaking is invalid as being a loan of  
35 municipal credit to the private corporation.

36 \* \* \*

37 In 37 Am.Jur., Municipal Corporations, Section  
38 135, page 751, it is said: "It is generally

1 held, however, that a contract whereby a muni-  
2 cipal corporation engages jointly with a pri-  
3 vate individual or corporation in the con-  
4 struction of an improvement for joint use is  
5 invalid as being a loan of the municipal  
6 credit for private benefit."

7 Although many states have constitutional  
8 provisions similar to Section 183, there does  
9 not appear to have been any great amount of  
10 litigation on the subject.

11 In a case involving a similar provision in the  
12 Ohio Constitution, the Ohio court said  
13 in Wyscaver v. Atkinson, 37 Ohio St. 80, that,  
14 "The mischief which this section interdicts is  
15 a business partnership between a municipality  
16 or subdivision of the state and individuals or  
17 private corporations or associations. It  
18 forbids the union of public and private  
19 capital or credit in any enterprise whatever.  
20 \* \* \* And I will add that it makes no  
21 difference whether the scheme for the union of  
22 public and private money or credit originates  
23 with the party or parties representing the  
24 public or the private interests. In short,  
25 the thing prohibited is the combination in any  
26 form whatever of the public funds or credit of  
any county, city, town, or township with the  
capital of any other person, whether  
corporated or unincorporated, for the purpose  
of promoting any enterprise whatever."

\* \* \*

18 We hold that the contract between the  
19 Commission and Aponaug is void.

20 Id. at 822, 823

21 In Whelan v. New Jersey Power & Light Company, 212 A.2d 136,  
22 141, (N.J. 1965) the court stated:

23 [S]uch cases seemingly mean that, however  
24 public the purpose and however defensible the  
25 use of public funds to achieve it through  
26 arrangements with private sources, still the  
arrangement may not take the form of a

1 partnership or joint enterprise involving  
2 either a sharing of the underlying ownership  
or a sharing in the operating experience.

3 Id. at 142.

4 14 A.L.R. 1152, provides:

5 The authorities are quite generally  
6 agreed that statutes expressly authorizing the  
7 use of public funds in the carrying on of  
8 enterprises of a private nature, or in  
9 assisting such an enterprise or business by  
10 making loans or subscribing for capital stock,  
11 are invalid, at least in the absence of a  
12 constitutional provision authorizing it. The  
13 following cases, which for the purpose of this  
14 proposition proceed upon the assumption that  
15 the purpose was a private one, support this  
16 general rule: [citations omitted] . . . The  
17 promotion of the interests of individuals,  
18 either in respect of property or business,  
19 although it may result incidentally in the  
20 advancement of the public welfare, is, in its  
21 essential character, a private and not a pub-  
22 lic object. However certain and great the  
23 resulting good to the general public, it does  
24 not, by reason of its comparative importance,  
25 cease to be incidental. The incidental  
26 advantage to the public, or to the state,  
which results from the promotion of private  
interests, and the prosperity of private  
enterprises or business, does not justify  
their aid by the use of public money raised by  
taxation, or for which taxation may become  
necessary. It is the essential character of  
the direct object of the expenditure which  
must determine its validity, as justifying a  
tax, and not the magnitude of the interests to  
be affected, nor the degree to which the gen-  
eral advantage of the community, and thus the  
public welfare, may be ultimately benefited by  
their promotion. The principle of this dis-  
tinction is fundamental. It underlies all  
government that is based upon reason rather  
than upon force.

1 Id. at 1153, 1154.

2 56 Am.Jur.2d Municipal Corporations § 579 provides:

3 A state legislature can neither compel  
4 nor authorize a municipal corporation to  
5 expend any of its funds for a private purpose,  
6 and consequently, since practically every  
7 undertaking of a municipality does or may  
8 require the expenditure of money, a municipal  
9 corporation cannot, even with express  
10 legislative sanction, embark in any private  
11 enterprise, or assume any function which is  
12 not in a legal sense public. If there is any  
13 restriction implied and inherent in the spirit  
14 of American constitutions, it is that the  
15 government and its subdivisions shall confine  
16 themselves to the business of government for  
17 which they were created, but if a specific  
18 provision prohibiting the expenditure of  
19 public funds for private purposes is required,  
20 it is found in the clause which forbids the  
21 taking of property for other than public uses;  
22 for since the funds of a municipality are  
23 necessarily directly or indirectly raised by  
24 taxation, the expenditure of money by a  
25 municipality for private purposes does or may  
26 necessarily result in the taking of the  
property of individuals under the guise of  
taxation for other than public uses. In such  
a case it can make no difference that the  
payment of municipal funds for private  
purposes is to be made out of borrowed money,  
and that no immediate provision for taxation  
is made. So also, it can make no difference  
that the money to be devoted to a use not  
public is derived from a specified source  
which is not public. If the funds from such  
source are public funds and subject to such  
public use as the municipality may see fit to  
devote them, their use for a private purpose  
increases the burden of taxation as certainly  
as if a tax for a private purpose was directly  
levied.

24 Id. at 628, 629.

25 [T]he rule that municipal corporations must  
26 exercise their powers for public purposes is  
nowhere more strictly applied than in the case

1 of borrowing money and otherwise incurring in-  
2 debtedness. The legislature may not consti-  
3 tutionally authorize a municipal corporation  
4 to contract debts for private objects. In  
5 some jurisdictions, municipalities are ex-  
6 pressly prohibited by constitutional, statu-  
7 tory, or charter provision from incurring in-  
8 debtedness except for municipal purposes.

9 Id. at 632.

10 The City's participation in the Joint Venture Agreement  
11 provides for additional "use of the City's credit" for the bene-  
12 fit of private corporations in the Joint Venture. Provisions  
13 (2.0),(2.1),(2.2),(2.3), (2.4), and (3.6) make it evident that  
14 the City obligates public funds for contingent liability between  
15 the Joint Venture partners. See Exhibit B. The DOT/PF should  
16 also review the remainder of the JV provisions in order to fully  
17 understand the extent of the City's proposed participation.

18 JV provision 2.1 provides,

19 2.1 All necessary working capital, subject to  
20 the provisions of paragraphs 2.3 and 6.2, when  
21 and as required for performance of the joint  
22 venture, shall be furnished by the parties  
23 according to the following schedule:

24 City of Kotzebue	33 1/3%
25 Kikiktagruk Inupiat Corp.	33 1/3%
26 R.S. Store, Inc.	33 1/3%

Working capital shall be held to the  
minimum necessary. Whenever feasible and  
economic, costs shall be met by allocations of  
in kind contributions, treated as expenses,  
made by the parties. The joint venture shall  
have no employees and own no property outright  
except as approved by the committee or requir-  
ed by the bid. With the approval of the com-

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1           mittee, the manager may designate one of the  
2 parties to hire new personnel or purchase or  
3 lease equipment required specifically for the  
4 project according to the requirements of the  
5 project and the distribution of, contributions  
6 required by this agreement.

7  
8           JV provision 2.2 provides:

9           2.2 The interest of the parties in the joint  
10 venture and in all property, materials, and  
11 equipment acquired in connection therewith and  
12 held by it, and in all profits and losses in-  
13 curred in the performance of the project and  
14 losses incurred in the performance of the pro-  
15 ject shall also be in accordance with the per-  
16 centages set forth above.

17  
18           JV provision 2.3 provides:

19           2.3 If, at any time any party, after reason-  
20 able notice, fails to contribute its share of  
21 project requirements in either working capital  
22 or in kind contributions, the party or parties  
23 not in default may require that the allocation  
24 of profits be changed to be proportionate in  
25 kind contributions actually made; provided,  
26 that the parties shall continue to share in  
losses according to the original schedule.  
The parties have agreed to provide the funds  
and assets necessary for mobilization under  
the project through their own payrolls, which  
contributions shall be treated as in lieu con-  
tributions.

          JV provision 2.4 provides:

          2.4 The manager shall give adequate notice of  
the schedule of requirements for cash, ser-  
vices, equipment, property and materials re-  
quired for performance of the project. In the  
event that a cash requirement in excess of  
Fifty Thousand Dollars (\$50,000.00) is not met  
by a party, the cash may be advanced by another  
party at an allocated interest rate of  
12.5% per annum or the cost of the funds,  
whichever is greater, chargeable to the party  
not advancing the funds, with the consent of  
the committee. In the event that a party does

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1 not adequately meet an in kind contribution  
2 assigned to it, the committee may reassign the  
3 responsibility for making the in kind contri-  
4 bution and may assess the cost of delay  
5 against the party not providing its timely in  
6 kind contribution, or it may determine that  
7 the party is in default under this agreement.

8 JV provision 3.6 provides:

9 3.6 Except as otherwise agreed by the commit-  
10 tee, subject to the availability of personnel  
11 and equipment and as required in the opinion  
12 of the manager of the project the parties  
13 shall make approximately equal contributions  
14 of personnel, equipment, materials and pro-  
15 perty, herein referred to as "in kind" contri-  
16 butions to the project. Before any in kind  
17 contribution is committed to the project, the  
18 committee shall approve an hourly or other  
19 rate or cost schedule for the contribution as  
20 proposed by the manager. Such a rate schedule  
21 may include costs of payroll, insurance, taxes  
22 and other overhead costs deemed reasonable.

23 The provisions mentioned above violate the statutory prohibition  
24 provided in AS 37.10.085.

25 II. THE PARTICIPATION OF THE CITY OF KOTZEBUE MAY VIOLATE  
26 ARTICLE IX, § 9 OF THE ALASKA CONSTITUTION.

The City of Kotzebue has provided 1/3 of the \$50,000 bid  
bond for the project. The City will also incur 1/3 of the costs  
associated with procuring a payment and performance bond, in the  
event a surety can actually be found to supply the bonding. The  
prospective liability which the City would assume through indem-  
nification of the surety could reach \$477,733.00 or more. This  
sum could increase if common law principles of indemnity are  
ultimately pursued in the future. The City of Kotzebue could be  
put in the position of utilizing its own indebtedness to finance

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1 its participation in the Joint Venture. The Constitution of  
2 Alaska, Art. IX, § 9 provides:

3 Local Debts. No debt shall be contracted by  
4 any political subdivision of the State, unless  
5 authorized for capital improvements by its  
6 governing body and ratified by a majority vote  
of those qualified to vote and voting on the  
question.

7 Id.

8 There is no "capital improvement" involved or resulting  
9 from the City of Kotzebue participating in a construction  
10 contract for a project already funded with State and Federal  
11 dollars. In City of Juneau v. Hixson, 373 P.2d 743 (Alaska  
12 1962), the court described capital improvement as follows.

13 There is nothing in the history of  
14 municipal bonding in Alaska, or in the minutes  
of the Constitutional Convention that causes  
15 us to believe that the term "capital  
improvements" was intended to denote projects  
16 radically different than those for which  
municipalities had been permitted to incur  
17 bonded indebtedness in the past. We believe  
"capital" was used in the sense in which it is  
18 associated with assets in the form of real or  
personal property and that it was intended to  
19 connote a degree of permanency. We believe  
that it includes the "public works of a  
20 permanent character" such as "streets,  
bridges, wharves and harbor facilities, sewers  
21 and sewage-disposal plants, municipal  
buildings, schools, libraries, gymnasias and  
athletic fields, fire houses, and public  
22 utilities" as mentioned in the original act of  
Congress. It includes "off-street parking  
23 facilities" and "public works or facilities of  
a permanent character" as provided in recent  
24 acts of the state legislature. We believe  
that in selecting the term "capital  
25 improvements" the convention had in mind that

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1 it was including all the projects just  
2 mentioned which had historically been as-  
3 sociated with municipal bonding, but under a  
4 better generic term-one which did not require  
5 illustration by actually listing the type pro-  
6 jects that were considered to be included  
7 within its meaning and stating that the list  
8 itself was not exclusive as was done in the  
9 original act of Congress.

10 Id. at 747 (footnotes omitted).

11 The City retains no "tangible asset" for all the money which  
12 could be expended in participating in a "private enterprise."  
13 The City actually stands to lose a great deal without retaining  
14 a single tangible asset for the sacrificed "public funds." The  
15 "public funds" relied on by the City in participating in the  
16 Joint Venture ultimately aid only the Joint Venture partners,  
17 and then only if the contract is performed in a flawless man-  
18 ner. The Joint Venture is merely participating to perform the  
19 work associated with construction of a State-operated airport.  
20 The use of public funds by the City of Kotzebue is being  
21 utilized to facilitate work which is traditionally performed by  
22 the private sector. The voters have not had a voice in dis-  
23 cussing the propriety of indemnifying a private commercial sure-  
24 ty, and even if they had, the absence of any capital improvement  
25 for the debt incurred is clearly violative of the Alaska Con-  
26 stitution.

27 The City has contracted a "debt" by assuming responsibility  
28 as an indemnitor on the payment and performance bonds, in the  
29 event the surety actually accepts the arrangement. Although

1 this is not a situation where the City has issued bonds to  
2 secure funds, it can be analogized since the City is relying on  
3 tax dollars to pay off any indemnification of the surety which  
4 may come to pass in the future. The City of Kotzebue did not  
5 put this issue before the voters i.e. taxpayers, prior to enter-  
6 ing into any agreement which mandates indemnification by the  
7 municipality. The surety arrangement with the City and other  
8 Joint Venture partners results in a situation similiar to a  
9 municipality issuing a general obligation bond; only in this  
10 case, no capital improvement is gained, although the City is  
11 definitely obligated. The legislation provided in AS 29.47.180  
12 and AS 29.47.190 can be analogized to the present financial  
13 realities which the City must face. AS 29.47.180 provides:

14       General obligation bonds. A municipality may  
15       acquire, construct, improve, and equip capital  
16       improvements and issue negotiable or nonnegoti-  
17       able general obligation bonds for these pur-  
18       poses.

19       Id. AS 29.47.190 provides:

20       Vote and notice of existing indebtedness re-  
21       quired. (a) A municipality may incur general  
22       obligation bond debt only after a bond authori-  
23       zation ordinance is approved by a majority vote  
24       at an election. Any municipal voter may vote  
25       in the bond election, except as otherwise pro-  
26       vided by law.

27       (b) Before a general obligation bond issue  
28       election, the governing body shall have pub-  
29       lished a notice of the total existing bond in-  
30       debtedness at least once a week for three con-  
31       secutive weeks. The first notice shall be

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1 published at least 20 days before the date of  
2 the election. A notice shall include

3 (1) the current total general obligation  
4 bonded indebtedness, including authorized but  
5 unsold bonds of the municipality;

6 (2) the cost of the debt service on the cur-  
7 rent indebtedness;

8 (3) the total assessed value of property in  
9 the municipality.

10 Id.

11 It is Brown's contention that the actions of the City in  
12 "indemnifying" a commercial security violates the mandate of  
13 AS 29.47.190 since voter participation is absent.

14 III. THE CITY OF KOTZEBUE FULFILLS NO PUBLIC PURPOSE BY  
15 PARTICIPATING IN A PRIVATE JOINT VENTURE.

16 Art. IX, § 6 of the Alaska Constitution provides that:

17 No tax shall be levied, or appropriation of  
18 public money made, or public property  
19 transferred, nor shall the public credit be  
20 used, except for a public purpose.

21 Id.

22 The participation of the City of Kotzebue in a joint  
23 venture for the performance of a construction contract violates  
24 this provision. The City of Kotzebue has embarked in a joint  
25 venture for profit. In Wright v. City of Palmer, 468 P.2d 326  
26 (Alaska 1970), the court considered the parameters of the term  
"public purpose" and stated:

[T]he test which we must apply is whether the  
plan is so unreasonable as to transgress the  
limitations of our constitution. If the plan  
of action were plainly foolhardy, or if it  
amounted to the pledging of credit or the  
giving away of assets without any correspond-  
ing discernible benefit, we might be per-  
suaded to strike down the plan.

1 Id. at 331.

2 The City of Kotzebue cannot designate the hiring of private  
3 individuals from Kotzebue as the basis for finding a "public  
4 purpose. Addendum 4 of the Kotzebue Airport Project provides,

5 NOTICE TO BIDDERS.

6 Regarding employment of labor, there are  
7 indications from the FAA that the hiring pre-  
8 ference for local residents announced August  
9 20, 1987 is not enforceable on this type of  
10 project. Bidders should therefore assume  
11 employment preference regulations do not apply  
12 to this project . . . .

13 The City of Kotzebue is apparently making an attempt to  
14 circumvent Addendum 4 and insure the hiring of local residents  
15 by entering the construction business. This is not a valid pub-  
16 lic purpose for committing a substantial public funds. A  
17 "public purpose" of this nature would allow any political sub-  
18 division of the State to bid on public works to insure employ-  
19 ment of local residents, under the guise of a profit-seeking  
20 joint venture. Furthermore, there is no evidence that the local  
21 residents will not be hired if a non-municipal contractor is  
22 awarded the contract. The invalidity of such acts is described  
23 in 14 A.L.R. 1155, which provides in pertinent part,

24 It also has been held that a legislative  
25 authorization that public funds be used in a  
26 business of a private nature cannot be  
justified on the theory that the state power  
to tax is the same as the limits of the police  
power of the state.

27 Id. at 1155.

1 [T]rade is not, and cannot properly be,  
2 regarded as one of the functions of  
3 government. On the contrary, its function is  
4 to protect the citizen in the exercise of any  
5 lawful employment, the right to which is  
6 guaranteed to the citizen by the terms of the  
7 Constitution, and certainly has never been  
8 delegated to any department of the  
9 government. We do not deem it necessary to go  
10 into any extended consideration of the fearful  
11 consequences of recognizing the power of the  
12 legislature to embark the state in any trade,  
13 arising from the hazards of all business of  
14 that character, or to comment upon the danger  
15 to the people of the monopoly of any trade by  
16 the state,--for if it can monopolize one it  
17 may monopolize any or all other trades or  
18 employments,--although it is permissible for a  
19 court, when called upon to construe an act, to  
20 consider its effects and consequences; for it  
21 may be said--indeed, has been said--that the  
22 good sense and patriotism of the members of  
23 the general assembly may be safely relied upon  
24 to protect the people from such apprehended  
25 dangers. But that great luminary of the law,  
26 Chief Justice Marshall, did not seem to think  
that this was a sufficient protection, as may  
be seen by what he said in *M'Culloch v.*  
*Maryland.*

Id. at 1157-1158

In the case of Burns v. Essling, 194 N.W. 404 (Minn. 1923), the  
court concluded that the city's use of funds for a hockey rink  
which benefitted only a few select individuals was an  
inappropriate use of public funds. The court stated,

[I]t is well settled that, if the primary  
object of an expenditure of municipal funds is  
to subserve a public purpose, the expenditure  
is legal, although it may also involve as an  
incident an expenditure which, standing alone,  
would not be lawful. It is equally well  
settled that, if the primary object is to pro-  
mote some private end, the expenditure is  
illegal, although it may incidentally serve  
some public purpose also.

1 Id. at 405 (emphasis added).

2  
3 The primary objective of the Joint venture is seeking  
4 profit for a private enterprise. The "public" receives no  
5 discernable benefit for the overall liability that is assumed  
6 by the City. At best, an unknown number of individuals receive  
7 wages which cannot be said to benefit the "public." The City  
8 "gambles" and receives little, if anything in return. Brown  
9 maintains that the City of Kotzebue's participation in the Joint  
10 Vent Enterprise has the overall result of giving away assets  
11 without any discernible benefits to the public. The City of  
12 Kotzebue is clearly pledging its credit for the use of private  
13 concerns and this transgresses the Alaska Constitution. In  
14 DeArmond v. Alaska State Development Corporation, 376 P.2d 717,  
15 721 (Alaska 1962) the court stated,

16 Appellant's first point is that the  
17 appropriation of funds for the corporation and  
18 the issuance of debenture certificates by the  
19 corporation constitutes the transfer of public  
funds and the use of public credit for other  
than a public purpose, in violation of article  
IX, section 6 of the Alaska Constitution which  
states:

20 "No tax shall be levied, or appropriation  
21 of public money made, or public property  
22 transferred, nor shall the public credit  
be used, except for a public purpose."

23 At the outset we observed that the phrase  
24 "public purpose" represents a concept which is  
25 not capable of precise definition. We believe  
26 that it would be a disservice to future  
generations for this court to attempt to  
define it. It is a concept which will change

1 as changing conditions create changing public  
2 needs. Whether a public purpose is being  
3 served must be decided as each case arises and  
4 in the light of the particular facts and  
5 circumstances of each case.

6 Id. at 721.

7 The fact that the City is participating in the performance  
8 of a construction contract and the circumstances which establish  
9 that public funds are being utilized to promote a private enter-  
10 prise, i.e. loan public funds for private gain.

11 IV. THE JOINT VENTURE'S BID SHOULD BE DISQUALIFIED IN THE  
12 BEST INTEREST OF THE STATE OF ALASKA.

13 Information to Bidders, provides at pages 4 and 5:

14 The Department reserves the right to reject  
15 any and all bids when such rejection is in the  
16 best interest of the State;...to reject the  
17 bid of a bidder who is not , in the opinion of  
18 the Contracting Officer, in a position to  
19 perform the contract;. . . .

20 The City of Kotzebue is arguably in no position to participate  
21 in the JV which intends to perform the contract. As the DOT/PF  
22 is well aware, the circumstances surrounding the disappearance  
23 of the gravel which was to be used for the Kotzebue Airport may  
24 make it "inappropriate" to award any contract to the City of  
25 Kotzebue. See Exhibit E. The State of Alaska paid the City of  
26 Kotzebue \$150,000 for gravel as part of a previous settlement  
agreement. See, Exhibit D. This agreement also requires the  
State of Alaska to provide additional funds based on a formula  
which is calculated on the basis of Bid Items from the Kotzebue  
Airport Contract bid submittals. The formula designated under

1 4(b) of the settlement agreement makes it apparent that an  
2 additional \$113,400 is currently owed if the agreement is  
3 performed as stated. The City of Kotzebue would receive a total  
4 of \$263,400 for the gravel which was to be used for the  
5 construction project. It is clear that the Bid Item #3 supplied  
6 by the City of Kotzebue increases the overall amount which the  
7 State of Alaska must pay as provided in the "market value  
8 formula. The figures for Bid Item #3 submitted by the three  
9 lowest contractors were: City of Kotzebue \$8.78; Brown \$7.50;  
10 Knik \$7.00. The calculations as provided in settlement  
11 agreement 4(b) result in \$3.78 market value additive per cubic  
12 yard of gravel x 30,000. The City of Kotzebue has been given  
13 the opportunity to supply that number by engaging in the  
14 competitive bid process for the Kotzebue Airport Project.

15 The fact remains that the State of Alaska remains liable  
16 for payment on gravel which has subsequently disappeared, in  
17 part. It has been alleged that the City of Kotzebue is  
18 responsible for the disappearance of gravel from the stockpile.  
19 If this ultimately proves to be true, it is not in the best  
20 interest of the State to have the City of Kotzebue participating  
21 in a contract awarded by the DOT/PF, especially if no  
22 constitutional basis exists to allow for it in the first  
23 instance. The State could very well end up litigating against  
24 the party which is performing the DOT/PF contract. If the City  
25

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1 of Kotzebue is responsible for the disappearance of the gravel,  
2 their acts increased the overall cost of the project. Bid Item  
3 #2 was increased to 75,000 cubic yards to make up for the  
4 disappearance of gravel from the stockpile previously designated  
5 for the project. It is totally inappropriate for the City of  
6 Kotzebue to gain two windfalls: (1) being paid for gravel which  
7 is not actually in the stockpile; and (2) making additional  
8 profits on the increased amounts of Bid Item #2, i.e. dredge and  
9 place 75,000 cubic yards of gravel, if responsibility is  
10 attributed to the municipality. The taxpayers of the State of  
11 Alaska should not be required to reward behavior which results  
12 in needless added costs for a "public contract."

13 In addition, the participation of a city in a Joint Venture  
14 or private enterprise lends itself to the appearance of impro-  
15 priety. The mixing of private and public funds makes it more  
16 difficult for the general public to oversee the business of  
17 government. Further complications arise because: (1) the City  
18 cannot provide any materials or supplies which were procured  
19 with tax-exempt public funds; and (2) the Freedom of Information  
20 Act does not carry over into the private sector of the business  
21 world. Intermingling of city-owned equipment, personnel, etc.  
22 with private enterprise provide "fertile ground" for "conflicts  
23 of interest" and other decimations of the public confidence in  
24 government. The taxpayer's are not benefited by having to pay  
25

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1 for construction bonding, licensing, insurance etc., or having  
2 to bear the burden of indemnifying a private surety. The laws  
3 governing the power that a city can properly exercise were  
4 enacted to protect the citizens from government misuse of funds.

5 a. Interference with the Competitive Bid Process.

6 The participation of the City of Kotzebue in a private enter-  
7 prise for profit disrupts the entire competitive bid system.  
8 The City has embarked into uncharted water which have tradi-  
9 tionally been navigated by the private sector. A political sub-  
10 division of the state has no "business" competing with the pri-  
11 vate enterprise. Normally, it is the state or political sub-  
12 divisions which accept bids and award contracts under competi-  
13 tive bid regulations. The competitive bid system will be  
14 destroyed if an entity of the government is allowed to partici-  
15 pate against the private sector. If a precedent is set which  
16 allows such participation, it would allow a government entity to  
17 bid on the very contracts it puts out for bid and award to the  
18 general public. A "precedent" of this nature would allow any  
19 and every government entity to participate in the competitive  
20 bid process so long as any public purpose, i.e. hiring of local  
21 residents, could be shown. The flip side to such a proposition  
22 is the disservice which results to the "public." A contractor  
23 may eventually be "competing" against the government in the very  
24 city in which he resides. A private contractor cannot possibly

25  
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1 compete with a political subdivision in bidding on construction  
2 projects. The private contractor must rely on paying his own  
3 funds for licensing, bonding, equipment, etc. without the bene-  
4 fit of relying on public funds to meet those needs. A city, on  
5 the other hand, meets those needs by relying on public equip-  
6 ment, public employees, public funds etc. The contractors who  
7 are Alaska taxpayers could very well end up financing their com-  
8 petitors, i.e. Government participation in future construction  
9 project endeavors. If the City of Kotzebue is allowed to par-  
10 ticipate in the construction business under the guise of the  
11 public interest, where will it end? If such behavior is  
12 allowed, no prohibition would stop a city such as Kotzebue from  
13 entering into a "Joint Venture" for a McDonald's Restaurant or  
14 some other enterprise which is essentially "private." Private  
15 contractors will probably quit bidding on public projects all  
16 together if they are forced to compete economically against the  
17 governments they support. If a precedent is set along the lines  
18 mentioned above, irreparable harm will come to Brown and other  
19 private contractor's within the State of Alaska.

20 b. Competitive Advantage Over Other Private Contractors.

21 The participation of the municipality results in an unfair ad-  
22 vantage over other contractors bidding on the Kotzebue Airport  
23 Project. The City of Kotzebue designated \$146,000 for Pay Item  
24 100, i.e. Mobilization And Demobilization. The second and third  
25

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1 low bidders provided figures for Pay Item 100 as follows: (1)  
2 Brown - \$389,000.00; and (2) Knik - \$460,000.00. See Exhibit  
3 C. The wide variance results from the proposed use of City-  
4 owned equipment on the Kotzebue Airport Project. The Joint  
5 Venture benefits by being able to utilize equipment provided by  
6 the City. The other contractors must rely on traditional  
7 methods of transporting equipment to and from the job site. If  
8 this had been a Kotzebue based contractor providing the equip-  
9 ment, it might be acceptable as part of the competitive bid  
10 process, but such is not the case. The Joint Venture does bene-  
11 fit by including the City as a participant at an extreme advan-  
12 tage over other private contractors. The Joint Venture is no  
13 less than \$245,000 below the next bid. Thus, a \$245,000 advan-  
14 tage is evidenced on this singular item alone. The use of  
15 City-owned equipment etc. would result in an additional advan-  
16 tage since the maintenance etc. are not incurred to the same  
17 degree as a private owner. The City has already gained a cer-  
18 tain economic advantage by receiving money for stockpiling  
19 gravel on the project which could carry over into its ability to  
20 provide a lower bid on the Kotzebue Airport Project. Since the  
21 City had entered into the settlement agreement prior to submit-  
22 ting a bid, the ability to weigh the overall economics in com-  
23 puting a bid was clearly enhanced. The other private contrac-  
24 tors were also put at a disadvantage by the fact that neither  
25

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1 the City or other Joint Venture partners appeared on the plan-  
2 holder list. Brown would not have gone to the expense of pre-  
3 paring a bid if the participation of the City of Kotzebue had  
4 been known prior to submission of bids. The DOT/PF should  
5 ascertain the specifics regarding each pay item that the City  
6 plans to provide so the exact figures on economic advantage can  
7 be determined. The overall amount of economic advantage enjoyed  
8 by the City could very well affect its position as low bidder.  
9 Other private contractors also do not enjoy the benefit of hav-  
10 ing bonding and licensing costs provided by a municipal part-  
11 ner. In the present Joint Venture Agreement, the City of  
12 Kotzebue is obligated to pay 1/3 of the costs associated with  
13 getting the proper General Contractor's License for one of the  
14 private corporate partners in addition to its share of mobiliza-  
15 tion costs. The State of Alaska Contractor Licensing Division  
16 has no information on record which shows that "any" of the JV  
17 partners is licensed at the present time. As the DOT/PF knows,  
18 the costs associated with licensing is \$10,000.

19 V. CONCLUSION.

20 The DOT/PF has a duty to disqualify the bid submitted on  
21 behalf of the Kotzebue/KIC/R & S Stores, Inc., Joint Venture.  
22 The legal authority provided herein mandates such action by the  
23 State of Alaska since both Statutory and Constitutional prohibi-  
24 tions will be violated in the event the contract is awarded to  
25

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1 the City of Kotzebue/KIC/R & S Stores, Inc., JV. The State of  
2 Alaska has now been provided with the "Smoking Gun" which estab-  
3 lishes the impropriety of the City's participation in the con-  
4 tracting business.

5 Brown provided a proper responsive bid for the Kotzebue  
6 Airport Project in accordance with the guidelines established by  
7 the State of Alaska. Brown hereby requests that the Kotzebue  
8 Airport Project be awarded to Brown Construction, Inc. since it  
9 is the lowest responsive bid as reflected in the DOT/PF  
10 records. It is in the best interest of the State of Alaska to  
11 have a licensed Alaska contractor with a proven track record in  
12 the construction industry perform a public works contract,  
13 rather than accept a government participant who could wreak  
14 havoc to private enterprise, the state, and the competitive bid  
15 process. Please contact Brown Construction Inc. and Grant E.  
16 Watts as soon as the DOT/PF renders a decision on this matter.

17 RESPECTFULLY SUBMITTED this 2nd day of October, 1987, from  
18 Anchorage, Alaska.

19 WADE & DE YOUNG  
20 (A Professional Corporation)  
21 Attorneys for Brown Construction  
22 Company

23 By Grant E. Watts  
24 Grant E. Watts

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26 MEMORANDUM IN SUPPORT OF BID PROTEST  
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SB

426

*DNR - oil + gas*

1 IN THE SENATE

BY FISCHER

2

SENATE BILL NO. 426

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6

For an Act entitled: "An Act establishing Redoubt Bay Critical Habitat

7

Area; and providing for an effective date."

8

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9

\* Section 1. PURPOSE. The Redoubt Bay Critical Habitat Area is estab-  
lished to ensure the protection and enhancement of fish and wildlife habi-  
tat and populations, especially Tule geese; the continuation of fish and  
wildlife harvest; and public use and enjoyment of the area in a high qual-  
ity environment.

14

\* Sec. 2. AS 16.20 is amended by adding a new section to read:

15

Sec. 16.20.610. REDOUBT BAY CRITICAL HABITAT AREA. (a) The

16

state owned land and water contained in the following described par-

17

cels are designated as the Redoubt Bay Critical Habitat Area:

18

(1) Township 6 North, Range 15 West, Seward Meridian

19

Sections 4 - 9

20

Section 18

21

(2) Township 6 North, Range 16 West, Seward Meridian

22

Sections 1 - 18

23

Sections 20 - 24

24

(3) Township 6 North, Range 17 West, Seward Meridian

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Sections 1 - 6

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Sections 10 - 12

27

(4) Township 7 North, Range 14 West, Seward Meridian

28

Section 5: S1/2

29

Sections 6 - 8

1                   Section 18  
 2                   (5) Township 7 North, Range 15 West, Seward Meridian  
 3                   Sections 1 - 24  
 4                   Sections 26 - 34  
 5                   (6) Township 7 North, Range 16 West, Seward Meridian  
 6                   (7) Township 7 North, Range 17 West, Seward Meridian  
 7                   Sections 1 - 4  
 8                   Section 8: E1/2  
 9                   Sections 9 - 17  
 10                  Sections 19 - 27  
 11                  Section 30  
 12                  Sections 34 - 36  
 13                  (8) Township 8 North, Range 15 West, Seward Meridian  
 14                  Section 1: S1/2  
 15                  Section 2: S1/2  
 16                  Section 3: W1/2  
 17                  Sections 4 - 11  
 18                  Section 12: N1/2  
 19                  Sections 13 - 36  
 20                  (9) Township 8 North, Range 16 West, Seward Meridian  
 21                  (10) Township 8 North, Range 17 West, Seward Meridian  
 22                  Sections 1 - 17  
 23                  Sections 20 - 29  
 24                  Sections 32 - 36  
 25                  (11) Township 8 North, Range 18 West, Seward Meridian  
 26                  Sections 1 - 12  
 27                  (12) Township 9 North, Range 15 West, Seward Meridian  
 28                  Sections 29 - 30  
 29                  (13) Township 9 North, Range 16 West, Seward Meridian

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Sections 19 - 36

(14) Township 9 North, Range 17 West, Seward Meridian

Sections 21 - 36

(b) Notwithstanding AS 16.20.500 and the establishment of the Redoubt Bay Critical Habitat Area under (a) of this section, egress and ingress to and from private property within the Redoubt Bay Critical Habitat Area shall be permitted through access corridors established through agreement between the department and the private property owners involved.

(c) The state may not acquire by eminent domain privately owned land within Redoubt Bay Critical Habitat Area but may acquire privately owned <sup>within</sup> land by purchase, exchange, or otherwise for inclusion in the Redoubt Bay Critical Habitat Area.

\* Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Dept. of Fish and Game  
Title: Redoubt Bay Critical Habitat BRU: Habitat  
Area \_\_\_\_\_  
Sponsor: Senator Fischer Components: \_\_\_\_\_  
Requestor: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		0				
TRAVEL		0				
CONTRACTUAL		0				
SUPPLIES		0				
EQUIPMENT		0				
LAND & STRUCTURES		0				
GRANTS, CLAIMS		0				
MISCELLANEOUS		0				
TOTAL OPERATING		0				
CAPITAL		0				
REVENUE		0				

FUNDING: (Thousands of Dollars)

GENERAL FUND		0				
FEDERAL FUNDS						
OTHER						
TOTAL		0				

POSITIONS:

FULL-TIME		0				
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Bruce H. Baker, Acting Director Phone: 465-4105  
Division: Habitat Date: 2/26/88  
Approved by Commissioner: [Signature] Date: 3-1-88  
Agency: Department of Fish and Game

Distribution (b, 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 99801-1796  
PHONE: (907) 465-2400

March 9, 1988

The Honorable Arliss Sturgulewski  
Chair, Senate Community  
and Regional Affairs  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

Dear Senator Sturgulewski:


Subject: Senate Bill 426, "An Act Establishing Redoubt Bay  
Critical Habitat Area."

Background: Senate Bill 426 creates a critical habitat area  
at Redoubt Bay.

Position: The Department of Natural Resources does not  
oppose this legislation with changes that have been  
submitted to the committee. These changes reduce the  
offshore area to low mean waterline and also recognize  
present and future oil and gas development and potential in  
the area. While the Department of Fish and Game advises  
that there is little distinction between a refuge and  
critical habitat area with respect to oil and gas  
development, there may be distinctions, for example, with  
respect to private land which is included within critical  
habitat areas but not refuges.

The Department of Natural Resources looks forward to working  
with committee staff and the sponsor as this bill  
progresses.

Sincerely,

  
Judith M. Brady  
Commissioner

cc: Committee Members  
Senator Fischer  
Rod Swope  
Bob Evans



STATE OF ALASKA  
OFFICE OF THE GOVERNOR

**BILL ANALYSIS**

DEPARTMENT Fish and Game	DIVISION Habitat	BILL NUMBER CSSB426	SPONSOR Fischer
SHORT TITLE OF BILL Redoubt Bay Critical Habitat Area			
DEPARTMENT POSITION Support			
PREPARED BY Bruce Baker, Hab. Actg. Dir.	DATE 3/10/88	COMMISSIONER'S SIGNATURE <i>[Signature]</i>	DATE 3/10/88

**SUMMARY**

OTHER AGENCIES AFFECTED BY BILL Department of Natural Resources	CONSTITUENT GROUP(S) AFFECTED BY BILL Southcentral recreational hunters and fishermen Commercial fishermen
ORGANIZATIONAL SUPPORT FOR BILL Kenai Peninsula hunters & fishermen (see attached list)	ORGANIZATIONAL OPPOSITION TO BILL None known

FISCAL IMPACT:  NONE  FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT

The purpose of establishing Redoubt Bay Critical Habitat Area is to provide:

1. Protection and enhancement for fish and wildlife habitat.
2. Conservation of fish and wildlife.
3. Continued opportunity for hunting, fishing and trapping.
4. Public use and enjoyment of the area.

ANALYSIS OF BILL/PROGRAM EFFECTS

1. Establishes Redoubt Bay Critical Habitat Area.
2. Identifies the purpose for which the area is established.
3. Ensures continued access to private inholdings.
4. Provides for acquisition of private property from willing sellers.

AMENDMENTS PROPOSED

None

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

Organizational Support for Redoubt Bay Critical Habitat Area

Kenai-Soldotna Fish and Game Advisory Committee  
Central Peninsula Fish and Game Advisory Committee  
Cooper Landing Fish and Game Advisory Committee  
Homer Fish and Game Advisory Committee  
Cook Inlet Aquaculture Association  
Kenai Peninsula Chapter Audubon Society  
Kenai Trappers Association

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_  
Title: Redoubt Bay Critical Habitat  
Area  
Sponsor: Senator Fischer  
Requestor: \_\_\_\_\_

Agency Affected: Dept. of Fish and Game  
BRU: Habitat  
Components: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		0				
TRAVEL		0				
CONTRACTUAL		0				
SUPPLIES		0				
EQUIPMENT		0				
LAND & STRUCTURES		0				
GRANTS, CLAIMS		0				
MISCELLANEOUS		0				
TOTAL OPERATING		0				

CAPITAL		0				
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REVENUE		0				
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FUNDING: (Thousands of Dollars)

GENERAL FUND		0				
FEDERAL FUNDS						
OTHER						
TOTAL		0				

POSITIONS:

FULL-TIME		0				
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Bruce H. Baker, Acting Director  
Division: Habitat

Phone: 465-4105  
Date: 3/10/88

Approved by Commissioner: [Signature]  
Agency: Department of Fish and Game

Date: 3/10/88

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)



STATE OF ALASKA  
OFFICE OF THE GOVERNOR

**BILL ANALYSIS**

DEPARTMENT Fish and Game	DIVISION Habitat	BILL NUMBER SB426	SPONSOR Fischer
SHORT TITLE OF BILL Redoubt Bay Critical Habitat Area			
DEPARTMENT POSITION Support			
PREPARED BY <i>Bruce H. Baker</i> Bruce Baker, Hab. Actg. Dir.	DATE 2/26/88	COMMISSIONER'S SIGNATURE <i>Conrad Selensworth</i>	DATE 3-1-88

**SUMMARY**

OTHER AGENCIES AFFECTED BY BILL Department of Natural Resources	CONSTITUENT GROUP(S) AFFECTED BY BILL Southcentral recreational hunters and fishermen <del>Commercial fishermen</del>
ORGANIZATIONAL SUPPORT FOR BILL Kenai Peninsula hunters & fishermen (see attached list)	ORGANIZATIONAL OPPOSITION TO BILL None known

FISCAL IMPACT:       NONE       FISCAL NOTE ATTACHED

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AMENDMENTS PROPOSED

None

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

Organizational Support for Redoubt Bay Critical Habitat Area

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Central Peninsula Fish and Game Advisory Committee  
Cooper Landing Fish and Game Advisory Committee  
Homer Fish and Game Advisory Committee  
Cook Inlet Aquaculture Association  
Kenai Peninsula Chapter Audubon Society  
Kenai Trappers Association

Please draft CS for  
3/10/88 committee meeting  
Thanks,  
M/F

1 IN THE SENATE

BY FISCHER

CS for SENATE BILL NO. 426 (C+RA)

2

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

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~~(1) Township 6 North, Range 15 West, Seward Meridian~~

19

~~Sections 4 - 9~~

20

~~Section 18~~

21

<sup>1</sup>(2) Township 6 North, Range 16 West, Seward Meridian

22

Sections 1 - <sup>12</sup>18

23

Sections 14 - 18  
Sections 20 - <sup>24</sup>22

24

<sup>2</sup>(3) Township 6 North, Range 17 West, Seward Meridian

25

Sections 1 - 6

26

Sections 10 - 12

27

<sup>3</sup>(4) Township 7 North, Range 14 West, Seward Meridian

28

Section 5: S1/2

29

Sections 6 - 8

1 Section 18  
 2 <sup>4</sup>  
 3 (~~5~~) Township 7 North, Range 15 West, Seward Meridian  
 4 Sections 1 - <sup>21</sup>~~24~~  
 5 Sections <sup>29</sup>~~26~~ - <sup>31</sup>~~34~~  
 6 <sup>5</sup>  
 7 (~~6~~) Township 7 North, Range 16 West, Seward Meridian  
 8 (~~7~~) Township 7 North, Range 17 West, Seward Meridian  
 9 Sections 1 - 4  
 10 Section 8: E1/2  
 11 Sections 9 - 17  
 12 Sections 19 - 27  
 13 Section 30  
 14 Sections 34 - 36  
 15 <sup>7</sup>  
 16 (~~8~~) Township 8 North, Range 15 West, Seward Meridian  
 17 Section 1: S1/2  
 18 Section 2: S1/2  
 19 Section 3: W1/2  
 20 Sections 4 - 11  
 21 Section 12: N1/2  
 22 Sections 13 - 36  
 23 <sup>8</sup>  
 24 (~~9~~) Township 8 North, Range 16 West, Seward Meridian  
 25 (~~10~~) Township 8 North, Range 17 West, Seward Meridian  
 26 Sections 1 - 17  
 27 Sections 20 - 29  
 28 Sections 32 - 36  
 29 <sup>0</sup>  
 30 (~~11~~) Township 8 North, Range 13 West, Seward Meridian  
 31 Sections 1 - 12  
 32 <sup>1</sup>  
 33 (~~12~~) Township 9 North, Range 15 West, Seward Meridian  
 34 Sections 29 - 30  
 35 <sup>2</sup>  
 36 (~~13~~) Township 9 North, Range 16 West, Seward Meridian

1                                Sections 19 - 36  
2                                (1<sup>3</sup>/<sub>4</sub>) Township 9 North, Range 17 West, Seward Meridian  
3                                Sections 21 - 36

4                                (b) Notwithstanding AS 16.20.500 and the establishment of the  
5 Redoubt Bay Critical Habitat Area under (a) of this section, egress  
6 and ingress to and from private property within the Redoubt Bay Crit-  
7 ical Habitat Area shall be permitted through access corridors estab-  
8 lished through agreement between the department and the private prop-  
9 erty owners involved.

10                                (c) The state may not acquire by eminent domain privately owned  
11 land within Redoubt Bay Critical Habitat Area but may acquire  
12 privately owned land within Redoubt Bay Critical Habitat Area  
13 in the Redoubt Bay Critical Habitat Area.

14                                \* Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

Add the following subsection:

(d) Entry upon the Redoubt Bay Critical Habitat Area for purposes of exploration and development of oil and gas resources shall be permitted when compatible with the purposes for which the critical habitat area was established; however, all existing leases shall be valid and continue in full force and effect according to their terms.

# STATE OF ALASKA

## DEPARTMENT OF FISH AND GAME

### OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

P.O. BOX 3-2000  
JUNEAU, ALASKA 99802-2000  
PHONE: (907) 465-4100

February 19, 1988

The Honorable Paul Fischer  
Alaska State Legislature  
P. O. Box V  
Juneau, AK 99811

ALASKA DEPT. OF  
FISH & GAME

FEB 23 1988

REGION II  
HABITAT DIVISION

Dear Senator Fischer:

Last November you requested Department of Fish and Game (ADF&G) staff to prepare background information regarding the proposed Redoubt Bay State Critical Habitat Area. As I understand, your request was prompted by resolutions which you received from several fish and game advisory committees on the Kenai Peninsula. The enclosed material is in response to your request.

The ADF&G would strongly support legislation to create a critical habitat area in Redoubt Bay, and we offer our assistance in this regard. An administration sponsored bill which would have created a Redoubt Bay State Game Refuge in 1982 did not pass, primarily because the issue of private cabin ownership was unresolved at that time. The cabin issue has since been resolved by regulations of the Department of Natural Resources which have guaranteed continued use of cabins located on remote state lands.

Department staff on the Kenai Peninsula have been in contact with advisory committees regarding their desire to create a critical habitat for Redoubt Bay. Three other local groups have joined the four advisory committees in supporting this land classification, and we have received a copy of their joint endorsement and letter of intent which was recently sent to you and other Kenai Peninsula legislators. I am certain that many other local, regional, statewide and national groups and individuals would also endorse critical habitat legislation for Redoubt Bay.

The legal description of the critical habitat area reflects boundaries depicted on the enclosed map, and these boundaries are those supported in the letter of intent sent to you by local residents. There are also important wildlife resources located in the southern portion of Redoubt Bay in the drainages of Jack and Cannery Creeks, but they are not encompassed by the map boundary. Land ownership in this area is complex, and the authors of the joint letter of intent have chosen not to include the southern area at this time. We can provide information about this area and discuss it further if you wish.

February 19, 1988

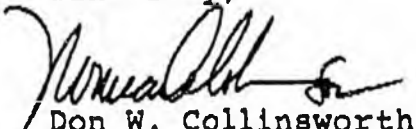
Members of the public and other potential affected interests would undoubtedly have questions about how ADF&G--as the principal resource manager for a critical habitat--would regulate the area, and how people who use Redoubt Bay would be affected. If you or other legislators choose to introduce the bill, we could prepare a comprehensive list of probable questions and our answers, and make them widely available. The letter of intent provides considerable guidance in this regard, and ADF&G can support the stated intent.

The following ADF&G staff are knowledgeable about the enclosed material and are prepared to assist you and your staff in this matter:

Jim Faro, Area Game Biologist, Soldotna	262-9369
Dan Timm, Game Regional Supervisor, Anchorage	344-0541
Greg Bos, Game Regional Management Coord., Anchorage	344-0541
Tom Rothe, Waterfowl Coordinator, Anchorage	344-0541
Debby Clausen, Habitat Special Areas Coord., Anchorage	344-0541
Lance Trasky, Habitat Regional Supervisor, Anchorage	344-0541
Roland Shanks, Special Assistant to the Commissioner, Juneau	465-4100

I am sending copies of this letter to Representatives Navarre and Swackhammer because they also received a copy of the joint letter of intent. Thank you for your interest in this matter.

Sincerely,



Don W. Collinsworth  
Commissioner

Enclosures

cc w/enclosures:

Representative Navarre  
Representative Swackhammer  
Greg Bos, Regional Management Coordinator, Game Division  
Debby Clausen, Special Areas Coordinator, Habitat Division  
Jim Faro, Area Game Biologist  
Lew Pamplin, Director, Game Division  
Ken Parker, Director, Commercial Fisheries Division  
Tom Rothe, Waterfowl Coordinator, Game Division  
Roland Shanks, Special Assistant to the Commissioner  
Dan Timm, Regional Supervisor, Game Division  
Lance Trasky, Regional Supervisor, Habitat Division  
Advisory Committee Chairmen: Kenai/Soldotna, Homer, Central  
Peninsula, Cooper Landing  
Cook Inlet Aquaculture Association  
Kenai Trappers Association  
Kenai Chapter Audubon Society

Proposed Redoubt Bay Critical Habitat Area  
Background Information

Location: The proposed Redoubt Bay Critical Habitat Area is located approximately 40 miles southwest of Anchorage, on the west side of Cook Inlet, beginning south and west of Trading Bay and extending to the Drift River.

Area Description: The proposed Redoubt Bay Critical Habitat Area is a large expanse of low lying wetlands bordered by Trading Bay and Kustatan River on the north and the Drift River on the south. Several drainages flow through the area, including Montana Bill Creek, Seal River, Big River and Bachatna Creek. The wetlands area extends west to the foot of the Alaska Range.

Vegetation consists primarily of wetland plant communities increasing in complexity as they extend inland from the coastal zone. Drier sites are unevenly distributed throughout the lowlands, and are occupied by communities of mixed deciduous forest with occasional isolated stands of white spruce.

Justification: Redoubt Bay wetlands are especially critical to the successful nesting and molting of tule white-fronted geese and are also used by thousands of mallards, pintails, wigeons, and other waterfowl.

Upper Cook Inlet supports the world's only known nesting, brood rearing, and molting areas for tule white-fronted geese (Anser albifrons gambelli), a subspecies whose entire population is currently estimated to be between four and five thousand birds. Redoubt Bay is the primary nesting and molting area for this subspecies, supporting the largest known concentration of tule geese in Cook Inlet, and thus the world. Habitats within the proposed Redoubt Bay Critical Habitat Area are essential to the successful nesting, brood rearing, and annual feather molt of this subspecies.

Small populations are especially susceptible to any environmental change or disturbance that alters habitat or modifies behavior. Environmental change or disturbance can affect nest initiation, hatching success or brood survival. These factors can also affect adult survival during the flightless molting period by increasing susceptibility to predation or eliminating feeding areas or feeding time, thus reducing nutrient uptake.

Tule white-fronted geese arrive in Cook Inlet by mid-April and usually depart for the California wintering grounds by early September. Because of population declines in the white-fronted goose population and special concern for the tule goose, sport harvest activities for white-fronted geese have been curtailed in California.

The cackling Canada goose (Branta canadensis minima), a subspecies of Canada goose which nests on the Yukon-Kuskokwim Delta in western Alaska, uses upper Cook Inlet coastal wetlands exclusively during spring migration. Approximately one-third of the cackling Canada geese staging in Cook Inlet utilize the Redoubt Bay flats. The population has experienced dramatic declines in recent years. From 1965 to 1984 the population dropped from over 350,000 to about 30,000. The population has begun to recover, and in 1987 numbered between 60-80,000.

Snow geese (Chen caerulescens) migrating through Cook Inlet nest on Wrangel Island off the coast of Siberia, where the population has ranged from about 40,000 to 100,000 birds since 1970. A large proportion of, if not the entire population, may pass through Cook Inlet in the spring. Even more than with Canada geese, Cook Inlet coastal marsh vegetation provides nutrients that replenish lipid reserves that snow geese require for successful nesting in the arctic.

Tundra swans (Cygnus columbianus) and trumpeter swans (C. buccinator) are commonly observed migrants in Redoubt Bay. Large numbers of swans occur in upper Cook Inlet from 25 April to 10 May, with at least 580 observed in Redoubt Bay on 2 May 1985. The majority of swans using Redoubt Bay are tundra swans, headed for nesting areas in the Yukon-Kuskokwim Delta and Alaska Peninsula. However, areas along the Big and Kustatan rivers within the proposed Critical Habitat Area provide some of the best trumpeter swan habitat within upper Cook Inlet, supporting a dozen nesting pairs and their young, over 30 non-nesting pairs, and over 50 single swans or swans in flocks.

Large numbers of two other subspecies of Canada geese, the Taverner's Canada goose (B. c. Taverneri) and the lesser Canada goose (B. c. parvipes) use Redoubt Bay as a feeding and resting area during spring and fall migration.

Large, undisturbed resting and feeding areas along the migration route are a key element to ensure the continued recovery and maintenance of high population levels of all arctic nesting species. Arctic nesting geese depend heavily upon stored energy reserves (lipids) for egg production and incubation. Accumulation of reserves along the migration

path is essential, so that upon arrival on the spring nesting grounds, nesting can be initiated before new food supplies become abundant. Redoubt Bay is part of a complex of coastal wetlands in upper Cook Inlet that provide a critical link in the migration route of birds wintering as far south as Mexico and Central America and nesting in eastern Russia and throughout Alaska. These wetlands provide a resting area and food sources to replenish energy reserves necessary to complete migration to the breeding grounds and for successful reproduction. Habitat within the proposed Critical Habitat Area is thus extremely important to the successful migration and nesting of a large portion of the cackling Canada goose population as well as other arctic nesting species.

The proposed Redoubt Bay Critical Habitat Area attracts and supports large numbers of other waterfowl during spring and fall migration and for nesting. Numerous birds remain to nest in available habitat. Redoubt Bay has the largest number of breeding ducks of any of the Cook Inlet coastal marshes according to ADF&G surveys conducted from 1976 to 1978. In 1977, the highest year, a total of 19,215 breeding ducks were estimated to occur in Redoubt Bay.

In addition to tule geese, Redoubt Bay wetlands are particularly important to other species of geese and swans as a feeding and resting area during spring migration to western and interior nesting areas. Peak use by geese and swans in Cook Inlet intertidal wetlands exceeds 100,000 birds during spring migration between 18 April and 10 May.

Redoubt Bay, as with other Cook Inlet marshes, also serves as staging areas for drake and nonbreeding ducks and non- or failed-breeding geese prior to migrating to molting areas in late June or early July.

The moose population in Redoubt Bay numbers approximately 300 animals. Important riparian moose winter habitat is found primarily along the Big, Drift, and Kustatan rivers.

Brown bears are abundant and during mid to late summer bears are frequently observed along intertidal drainages on the outer flats. Black bears are also abundant, but usually remain farther inland. Furbearers including coyote, fox, wolf, mink, otter, marten, muskrat, wolverine, weasel, lynx and beaver are present. Harbor seals haul out at the mouths of streams.

Five species of salmon spawn in the area's streams and lakes, although sockeye, coho, and pink salmon are the most abundant.

Land Status: The proposed critical habitat area encompasses approximately 183,640 acres and is composed primarily of state land. It is located within the Kenai Peninsula Borough and six sections have been identified as Municipal Selections by the borough. Two private inholdings totalling approximately 10 acres are present within the proposed area. There are no mental health lands within the area. Critical habitat area status would affect only state lands within the area boundaries.

Current Uses: Redoubt Bay is accessible by boat or plane, and has long been an important hunting, fishing and trapping area. Waterfowl hunters annually spend approximately 1,000 hunter-days harvesting over 500 ducks and several hundred geese. This use qualifies Redoubt Bay as one of the top ten waterfowl hunting areas in the state.

Moose hunting is also a popular activity. In 1984, 126 hunters spent 624 hunter-days and harvested 55 moose. The 1983 through 1986 average harvest from Redoubt Bay drainages is slightly lower, with 88 hunters harvesting 35 moose in 502 hunter-days.

Fly-in sport fishing on the Big River lakes and Kustatan River is also popular. In 1986, more than 2,700 angler-days were spent fishing the Kustatan River with a harvest of over 3,200 silver salmon.

Cook Inlet Aquaculture Corporation has been involved in salmon enhancement activities in the Big River Lakes area since 1981. A water control structure is in place, and additional fish-pass facilities are planned.

Commercial salmon fishing activities include a drift gillnet fishery offshore, and a set gillnet fishery onshore. There are over 40 cabins in the Redoubt Bay area, used mostly by waterfowl and moose hunters and setnet fishermen.

Other Natural Resources: The proposed Redoubt Bay Critical Habitat Area has been explored extensively for oil and gas. Although several leases exist in the area, numerous wells drilled to date indicate that little commercial potential exists for oil and gas development. An oil pipeline (Cook Inlet Pipeline Company) crosses the lowlands from West Foreland to the Drift River terminal where tankers are loaded offshore. There are no known mining claims or mineral leases in the area. Commercial timber values are low in the area due to the limited amount of forested lands. The area is of generally low suitability for grazing or agriculture due to the saturated soils. There are no large areas of land suitable for settlement, however there is one private residence at Bachatna Creek and one at Big River

Lakes. Additionally, ADNR/DLWM disposed of some remote settlement parcels at Cannery Creek, adjacent to the southern boundary of the area.

The critical habitat area would be managed similarly to other state Critical Habitat Areas regarding current and future uses. Future activities would be allowed, in a manner consistent with the purpose for which the critical habitat area was established.

Legal Description: The state-owned land and water contained in the following described parcels are proposed as the Redoubt Bay Critical Habitat Area:

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Section 18
- (2) Township 6 North, Range 16 West, Seward Meridian  
Sections 1-18  
Sections 20-24
- (3) Township 6 North, Range 17 West, Seward Meridian  
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Sections 19-27  
Section 30  
Sections 34-36

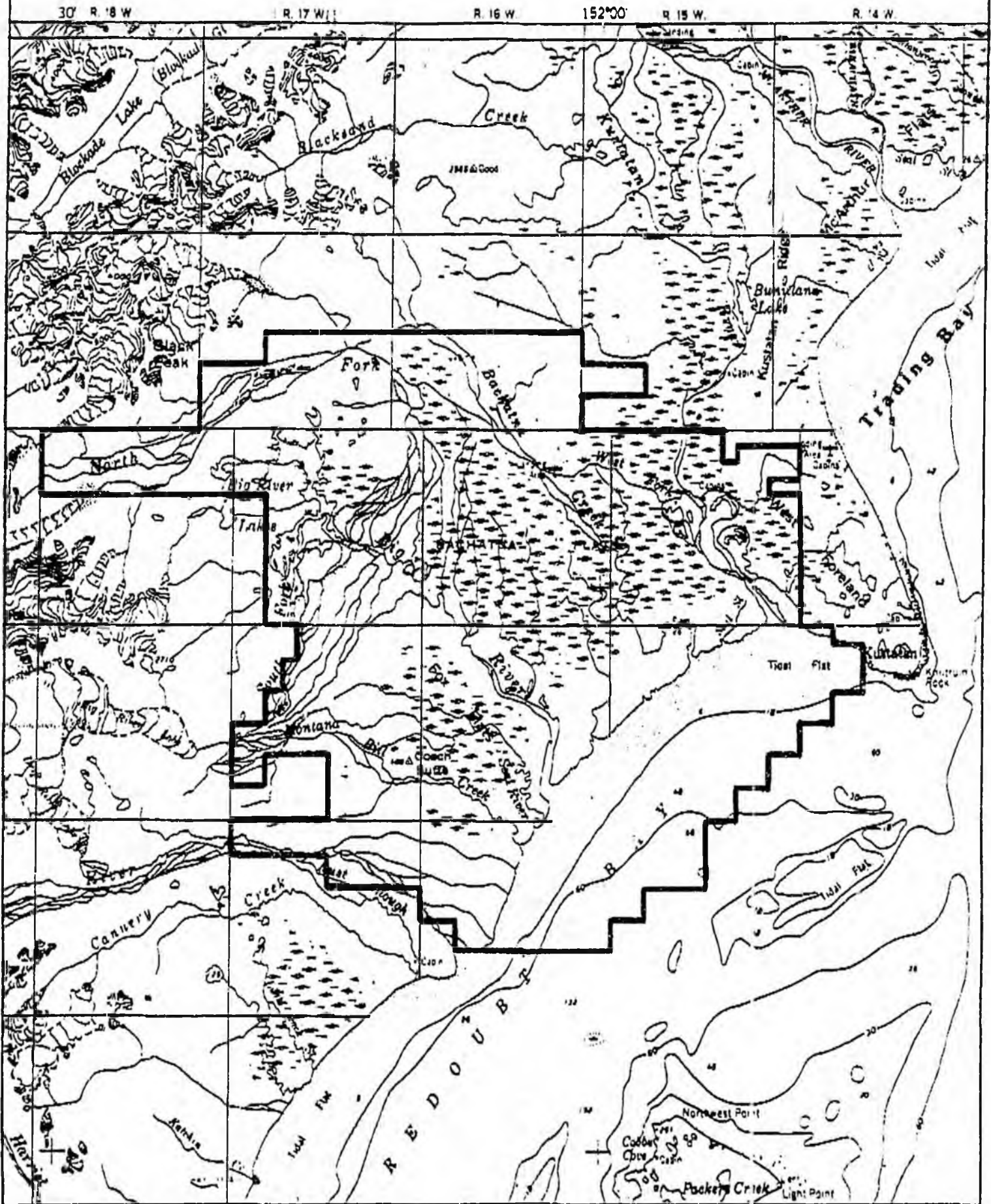
- (8) Township 8 North, Range 15 West, Seward Meridian  
Section 1: S1/2  
Section 2: S1/2  
Section 3: W1/2  
Sections 4-11  
Section 12: N1/2  
Sections 13-36
- (9) Township 8 North, Range 16 West, Seward Meridian  
Sections 1-36
- (10) Township 8 North, Range 17 West, Seward Meridian  
Sections 1-17  
Sections 20-29  
Sections 32-36
- (11) Township 8 North, Range 18 West, Seward Meridian  
Sections 1-12
- (12) Township 9 North, Range 15 West, Seward Meridian  
Sections 29-30
- (13) Township 9 North, Range 16 West, Seward Meridian  
Sections 19-36
- (14) Township 9 North, Range 17 West, Seward Meridian  
Sections 21-36

Support and Opposition: The Kenai-Soldotna, Homer, Ninilchik, Central Peninsula, and Cooper Landing Fish and Game Advisory Committees have passed resolutions supporting the creation of the Redoubt Bay Critical Habitat Area. The Department of Fish and Game, the Kenai Chapter of Audobon Society, Kenai Trappers' Association, Cook Inlet Aquaculture Association, and the Alaska Waterfowl Association have also supported special area designation for the Redoubt Bay area.

Opposition to proposed legislation in 1982, which would have designated the area as a state game refuge, came from some Kenai Peninsula residents concerned about the effect of special area designation on recreational cabin use. Since then, that issue has been resolved under regulations for private use cabins adopted by the Alaska Department of Natural Resources in 1983. Under the personal use cabin program, cabin owners were afforded the opportunity to

obtain state land use permits, or in the case of commercial setnet fishermen, apply for a commercial lease.

# (Proposed) Redoubt Bay Critical Habitat Area



# Alaska State Legislature

ARLISS STURGULEWSKI, Chairman  
TIM KELLY, Vice Chairman  
RICK HALFORD  
MIKE SZYMANSKI  
FRED ZHAROFF



P. O. BOX V  
JUNEAU, ALASKA 99811  
(907) 465-4989

## Senate Community and Regional Affairs Committee

March 1, 1988

TO: Senate Community and Regional Affairs Committee Members

FROM: Senate C&RA Staff

RE: SB 426 - "An Act establishing Redoubt Bay Critical Habitat Area."

SB 426 will create the Redoubt Bay Critical Habitat Area, approximately 40 miles southwest of Anchorage, on the west side of Cook Inlet. A map is included in the packet.

This bill has zero fiscal notes from the Departments of Fish and Game and Natural Resources. A letter from Fish and Game to Senator Fischer describing the wildlife and other natural resource values in the area is in the packet together with additional information.

Representatives from the Departments of Fish and Game and Natural Resources will be at the meeting as well as the sponsor, Senator Fischer, or his delegate.

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_  
Title: Redoubt Bay Critical Habitat Area  
Sponsor: Senator Fischer  
Requestor: Senate Comm and Reg Affairs

Agency Affected: DNR  
BRU: Oil and Gas, Mining, Land and Water  
Components: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE		0	0	0	0	0
---------	--	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME		0	0	0	0	0
TEMPORARY		0	0	0	0	0

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Janet Burleson  
Division: Land and Water Management  
Approved by Commissioner: [Signature]  
Agency: Department of Natural Resources

Phone: 465-3400  
Date: March 1, 1988  
Date: 3/1/88

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

# Alaska State Legislature

Senator Paul Fischer  
Senate District D  
Box 784  
Soldotna, Alaska 99669  
(907) 262-9427 W  
262-9203 H



## State Senate

While in Juneau  
P.O. Box V  
Juneau, Alaska 99811  
(907) 465-3791

### MEMORANDUM

TO: Senator Arliss Sturgulewski, Chair  
Senate Community & Regional Affairs Committee

FROM: Senator Paul Fischer *PF.*

SUBJECT: Senate Bill 426  
(establishing Redoubt Bay Critical Habitat Area)

DATE: February 26, 1988

Your staff recently contacted my office and asked if the above referenced bill was ready for hearing. It is and I am advised that you have scheduled the bill before the Senate Community & Regional Affairs Committee on Tuesday, March 1.

I am in receipt of a letter from the Department of Fish and Game in support of this legislation and have attached a copy for your files. Additionally, I have included a map of the proposed area, as well as, a position paper from the representative users of the Redoubt Bay area.

Thank you for scheduling a hearing on this legislation in such a timely manner.

PAF/sgn

Attachments

# STATE OF ALASKA

## DEPARTMENT OF FISH AND GAME

### OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

P.O. BOX 3-2000  
JUNEAU, ALASKA 99802-2000  
PHONE: (907) 465-4100

February 19, 1988

The Honorable Paul Fischer  
Alaska State Legislature  
P. O. Box V  
Juneau, AK 99811

Dear Senator Fischer:

Last November you requested Department of Fish and Game (ADF&G) staff to prepare background information regarding the proposed Redoubt Bay State Critical Habitat Area. As I understand, your request was prompted by resolutions which you received from several fish and game advisory committees on the Kenai Peninsula. The enclosed material is in response to your request.

The ADF&G would strongly support legislation to create a critical habitat area in Redoubt Bay, and we offer our assistance in this regard. An administration sponsored bill which would have created a Redoubt Bay State Game Refuge in 1982 did not pass, primarily because the issue of private cabin ownership was unresolved at that time. The cabin issue has since been resolved by regulations of the Department of Natural Resources which have guaranteed continued use of cabins located on remote state lands.

Department staff on the Kenai Peninsula have been in contact with advisory committees regarding their desire to create a critical habitat for Redoubt Bay. Three other local groups have joined the four advisory committees in supporting this land classification, and we have received a copy of their joint endorsement and letter of intent which was recently sent to you and other Kenai Peninsula legislators. I am certain that many other local, regional, statewide and national groups and individuals would also endorse critical habitat legislation for Redoubt Bay.

The legal description of the critical habitat area reflects boundaries depicted on the enclosed map, and these boundaries are those supported in the letter of intent sent to you by local residents. There are also important wildlife resources located in the southern portion of Redoubt Bay in the drainages of Jack and Cannery Creeks, but they are not encompassed by the map boundary. Land ownership in this area is complex, and the authors of the joint letter of intent have chosen not to include the southern area at this time. We can provide information about this area and discuss it further if you wish.

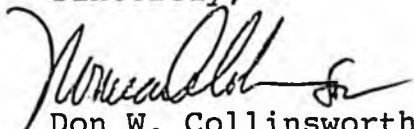
Members of the public and other potential affected interests would undoubtedly have questions about how ADF&G--as the principal resource manager for a critical habitat--would regulate the area, and how people who use Redoubt Bay would be affected. If you or other legislators choose to introduce the bill, we could prepare a comprehensive list of probable questions and our answers, and make them widely available. The letter of intent provides considerable guidance in this regard, and ADF&G can support the stated intent.

The following ADF&G staff are knowledgeable about the enclosed material and are prepared to assist you and your staff in this matter:

Jim Faro, Area Game Biologist, Soldotna	262-9369
Dan Timm, Game Regional Supervisor, Anchorage	344-0541
Greg Bos, Game Regional Management Coord., Anchorage	344-0541
Tom Rothe, Waterfowl Coordinator, Anchorage	344-0541
Debby Clausen, Habitat Special Areas Coord., Anchorage	344-0541
Lance Trasky, Habitat Regional Supervisor, Anchorage	344-0541
Roland Shanks, Special Assistant to the Commissioner, Juneau	465-4100

I am sending copies of this letter to Representatives Navarre and Swackhammer because they also received a copy of the joint letter of intent. Thank you for your interest in this matter.

Sincerely,



Don W. Collinsworth  
Commissioner

Enclosures

cc w/enclosures:

Representative Navarre  
Representative Swackhammer  
Greg Bos, Regional Management Coordinator, Game Division  
Debby Clausen, Special Areas Coordinator, Habitat Division  
Jim Faro, Area Game Biologist  
Lew Pamplin, Director, Game Division  
Ken Parker, Director, Commercial Fisheries Division  
Tom Rothe, Waterfowl Coordinator, Game Division  
Roland Shanks, Special Assistant to the Commissioner  
Dan Timm, Regional Supervisor, Game Division  
Lance Trasky, Regional Supervisor, Habitat Division  
Advisory Committee Chairmen: Kenai/Soldotna, Homer, Central  
Peninsula, Cooper Landing  
Cook Inlet Aquaculture Association  
Kenai Trappers Association  
Kenai Chapter Audubon Society

Proposed Redoubt Bay Critical Habitat Area  
Background Information

Location: The proposed Redoubt Bay Critical Habitat Area is located approximately 40 miles southwest of Anchorage, on the west side of Cook Inlet, beginning south and west of Trading Bay and extending to the Drift River.

Area Description: The proposed Redoubt Bay Critical Habitat Area is a large expanse of low lying wetlands bordered by Trading Bay and Kustatan River on the north and the Drift River on the south. Several drainages flow through the area, including Montana Bill Creek, Seal River, Big River and Bachatna Creek. The wetlands area extends west to the foot of the Alaska Range.

Vegetation consists primarily of wetland plant communities increasing in complexity as they extend inland from the coastal zone. Drier sites are unevenly distributed throughout the lowlands, and are occupied by communities of mixed deciduous forest with occasional isolated stands of white spruce.

Justification: Redoubt Bay wetlands are especially critical to the successful nesting and molting of tule white-fronted geese and are also used by thousands of mallards, pintails, wigeons, and other waterfowl.

Upper Cook Inlet supports the world's only known nesting, brood rearing, and molting areas for tule white-fronted geese (Anser albifrons gambelli), a subspecies whose entire population is currently estimated to be between four and five thousand birds. Redoubt Bay is the primary nesting and molting area for this subspecies, supporting the largest known concentration of tule geese in Cook Inlet, and thus the world. Habitats within the proposed Redoubt Bay Critical Habitat Area are essential to the successful nesting, brood rearing, and annual feather molt of this subspecies.

Small populations are especially susceptible to any environmental change or disturbance that alters habitat or modifies behavior. Environmental change or disturbance can affect nest initiation, hatching success or brood survival. These factors can also affect adult survival during the flightless molting period by increasing susceptibility to predation or eliminating feeding areas or feeding time, thus reducing nutrient uptake.

Tule white-fronted geese arrive in Cook Inlet by mid-April and usually depart for the California wintering grounds by early September. Because of population declines in the white-fronted goose population and special concern for the tule goose, sport harvest activities for white-fronted geese have been curtailed in California.

The cackling Canada goose (Branta canadensis minima), a subspecies of Canada goose which nests on the Yukon-Kuskokwim Delta in western Alaska, uses upper Cook Inlet coastal wetlands exclusively during spring migration. Approximately one-third of the cackling Canada geese staging in Cook Inlet utilize the Redoubt Bay flats. The population has experienced dramatic declines in recent years. From 1965 to 1984 the population dropped from over 350,000 to about 30,000. The population has begun to recover, and in 1987 numbered between 60-80,000.

Snow geese (Chen caerulescens) migrating through Cook Inlet nest on Wrangel Island off the coast of Siberia, where the population has ranged from about 40,000 to 100,000 birds since 1970. A large proportion of, if not the entire population, may pass through Cook Inlet in the spring. Even more than with Canada geese, Cook Inlet coastal marsh vegetation provides nutrients that replenish lipid reserves that snow geese require for successful nesting in the arctic.

Tundra swans (Cygnus columbianus) and trumpeter swans (C. buccinator) are commonly observed migrants in Redoubt Bay. Large numbers of swans occur in upper Cook Inlet from 25 April to 10 May, with at least 580 observed in Redoubt Bay on 2 May 1985. The majority of swans using Redoubt Bay are tundra swans, headed for nesting areas in the Yukon-Kuskokwim Delta and Alaska Peninsula. However, areas along the Big and Kustatan rivers within the proposed Critical Habitat Area provide some of the best trumpeter swan habitat within upper Cook Inlet, supporting a dozen nesting pairs and their young, over 30 non-nesting pairs, and over 50 single swans or swans in flocks.

Large numbers of two other subspecies of Canada geese, the Taverner's Canada goose (B. c. Taverneri) and the lesser Canada goose (B. c. parvipes) use Redoubt Bay as a feeding and resting area during spring and fall migration.

Large, undisturbed resting and feeding areas along the migration route are a key element to ensure the continued recovery and maintenance of high population levels of all arctic nesting species. Arctic nesting geese depend heavily upon stored energy reserves (lipids) for egg production and incubation. Accumulation of reserves along the migration

path is essential, so that upon arrival on the spring nesting grounds, nesting can be initiated before new food supplies become abundant. Redoubt Bay is part of a complex of coastal wetlands in upper Cook Inlet that provide a critical link in the migration route of birds wintering as far south as Mexico and Central America and nesting in eastern Russia and throughout Alaska. These wetlands provide a resting area and food sources to replenish energy reserves necessary to complete migration to the breeding grounds and for successful reproduction. Habitat within the proposed Critical Habitat Area is thus extremely important to the successful migration and nesting of a large portion of the cackling Canada goose population as well as other arctic nesting species.

The proposed Redoubt Bay Critical Habitat Area attracts and supports large numbers of other waterfowl during spring and fall migration and for nesting. Numerous birds remain to nest in available habitat. Redoubt Bay has the largest number of breeding ducks of any of the Cook Inlet coastal marshes according to ADF&G surveys conducted from 1976 to 1978. In 1977, the highest year, a total of 19,215 breeding ducks were estimated to occur in Redoubt Bay.

In addition to tule geese, Redoubt Bay wetlands are particularly important to other species of geese and swans as a feeding and resting area during spring migration to western and interior nesting areas. Peak use by geese and swans in Cook Inlet intertidal wetlands exceeds 100,000 birds during spring migration between 18 April and 10 May.

Redoubt Bay, as with other Cook Inlet marshes, also serves as staging areas for drake and nonbreeding ducks and non- or failed-breeding geese prior to migrating to molting areas in late June or early July.

The moose population in Redoubt Bay numbers approximately 300 animals. Important riparian moose winter habitat is found primarily along the Big, Drift, and Kustatan rivers.

Brown bears are abundant and during mid to late summer bears are frequently observed along intertidal drainages on the outer flats. Black bears are also abundant, but usually remain farther inland. Furbearers including coyote, fox, wolf, mink, otter, marten, muskrat, wolverine, weasel, lynx and beaver are present. Harbor seals haul out at the mouths of streams.

Five species of salmon spawn in the area's streams and lakes, although sockeye, coho, and pink salmon are the most abundant.

Land Status: The proposed critical habitat area encompasses approximately 183,640 acres and is composed primarily of state land. It is located within the Kenai Peninsula Borough and six sections have been identified as Municipal Selections by the borough. Two private inholdings totalling approximately 10 acres are present within the proposed area. There are no mental health lands within the area. Critical habitat area status would affect only state lands within the area boundaries.

Current Uses: Redoubt Bay is accessible by boat or plane, and has long been an important hunting, fishing and trapping area. Waterfowl hunters annually spend approximately 1,000 hunter-days harvesting over 500 ducks and several hundred geese. This use qualifies Redoubt Bay as one of the top ten waterfowl hunting areas in the state.

Moose hunting is also a popular activity. In 1984, 126 hunters spent 621 hunter-days and harvested 55 moose. The 1983 through 1986 average harvest from Redoubt Bay drainages is slightly lower, with 88 hunters harvesting 35 moose in 502 hunter-days.

Fly-in sport fishing on the Big River lakes and Kustatan River is also popular. In 1986, more than 2,700 angler-days were spent fishing the Kustatan River with a harvest of over 3,200 silver salmon.

Cook Inlet Aquaculture Corporation has been involved in salmon enhancement activities in the Big River Lakes area since 1981. A water control structure is in place, and additional fish-pass facilities are planned.

Commercial salmon fishing activities include a drift gillnet fishery offshore, and a set gillnet fishery onshore. There are over 40 cabins in the Redoubt Bay area, used mostly by waterfowl and moose hunters and setnet fishermen.

Other Natural Resources: The proposed Redoubt Bay Critical Habitat Area has been explored extensively for oil and gas. Although several leases exist in the area, numerous wells drilled to date indicate that little commercial potential exists for oil and gas development. An oil pipeline (Cook Inlet Pipeline Company) crosses the lowlands from West Foreland to the Drift River terminal where tankers are loaded offshore. There are no known mining claims or mineral leases in the area. Commercial timber values are low in the area due to the limited amount of forested lands. The area is of generally low suitability for grazing or agriculture due to the saturated soils. There are no large areas of land suitable for settlement, however: there is one private residence at Bachatna Creek and one at Big River

Lakes. Additionally, ADNR/DLWM disposed of some remote settlement parcels at Cannery Creek, adjacent to the southern boundary of the area.

The critical habitat area would be managed similarly to other state Critical Habitat Areas regarding current and future uses. Future activities would be allowed, in a manner consistent with the purpose for which the critical habitat area was established.

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