

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

11377 SENATE TRANSPORTATION

refuge. The statute also provides that land owned by the municipality within the ACWR boundary may be included in the refuge and managed pursuant to a management agreement approved by ADF&G and the municipality. Unlike the statutes establishing some state game refuges, the statutes establishing the ACWR and its predecessor Potter Point State Game Refuge do not specify that land and water acquired in the future by the state lying within the exterior boundaries of the refuge are included in the refuge.

2. Point Campbell Military Reserve

In 1971, when the refuge was created, most of the land at Point Campbell was owned by the United States and was within the Point Campbell Military Reserve. E.O. 1920½, April 21, 1914. In 1976, the United States, the state, and Cook Inlet Region, Inc. (CIRI), entered an agreement to settle CIRI's land claims that, among other things, provided for conveyance of the Point Campbell land to the state with the condition that the land be used for park, recreation, or other public purposes. Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area (T & C). Congress and the Alaska Legislature approved this agreement. Public Law 94-204, 43 U.S.C. 1611 note; ch. 19, SLA 1976.

Anchorage selected various portions of the Point Campbell land in 1966, 1975, and 1981. In June 1968, DNR issued a decision to convey to the municipality portions of Sections 5 and 8, T. 12N, R. 4W, S.M., totaling 320 acres, and State Patent No. 854 was issued later that year. Also in 1968, DNR issued a final decision to convey to the municipality GLO Lots 6 and 7, Section 8, T. 12N, R. 4W, S.M., totaling 69.55 acres.

Patent No. 1626 for this land was issued in 1973. It is our understanding that these conveyances are not at issue.

The United States conveyed the Point Campbell Military Reserve land to the state in June 1982 in Patent No. 50-82-074, subject to the restriction as to use required by the T & C. In October 1982, DNR issued a final decision to convey the land to the municipality pursuant to then AS 38.05.315 (renumbered AS 38.05.810 in 1984), which allows conveyance of land for public and charitable use, and State Patent No. 6757 was issued October 29, 1982. The conveyance included land between the toe of the bluff and the mean high tide line.³

3. Land at the Mouth of Campbell Creek

Anchorage applied for approximately 75 acres of land at the mouth of Campbell Creek in 1979 as part of its municipal entitlement. DNR initially rejected the selection in 1980 on the ground that the land was within the Potter Point State Game Refuge and not available for municipal selection. The municipality appealed, and in 1982 DNR determined that approximately 6.14 acres in GLO Lot 4, Section 15, T. 12N, R. 4W, S.M.

³ It is our understanding that the portion of the conveyance in question is the land between the toe of the bluff and the mean high tide line within the following: GLO Lot 4 of Section 6, GLO Lots 1, 2, and 3 of Section 7, and GLO Lots 2 and 3 of Section 8, T. 12N, R. 4W, S.M.; and GLO Lot 1 of section 1, T. 12 N, R. 5W, S.M.

was not in the refuge and thus was available for selection. DNR issued a final decision approving the non-refuge portion of the selection and rejecting the rest on June 10, 1986.⁴

DNR issued survey instructions to the municipality in 1988 for survey of the 6.14 acres. The municipality has only recently performed the survey; therefore, patent has not issued and legal title as shown in the Recorder's Office remains in the state. Also in 1988, this land was included within the land description for the ACWR pursuant to AS 16.20.031.

DISCUSSION

1. Is the 1982 conveyance to the Municipality of Anchorage of Point Campbell land, including land below the toe of the bluff, void?

Your framing of this question lists a number of concerns about the validity of this conveyance. However, all of the arguments are premised on the assumption that the Point Campbell land was part of the refuge. We do not believe that any of the Point Campbell land conveyed in State Patent No. 6757 has ever been part of the refuge; therefore, DNR acted well within its authority when it conveyed the land to the municipality.

The statutes establishing the Potter Point State Game Refuge and the ACWR both limit the refuge to state-owned land and water within an area that includes a large amount of private and municipal land. As detailed in the Cantor memo, the private and municipal

⁴ A 0.86 acre parcel containing a municipal lift station was also approved for conveyance under AS 38.05.810 in the decision.

land, while within the outer boundary line of the refuge, are not part of the refuge and are not within the jurisdiction of the refuge. That memorandum is consistent with previous opinions issued by this department, including 1985 Op. Att'y Gen. No. 4 (Nov. 8, 1985) and 1980 Inf. Op. Att'y Gen. (Oct. 9, 1980; A66-022-31).

Significantly, the statutes establishing the Potter Point State Game Refuge and the ACWR, unlike those for some refuges and state parks, did not include language designating as part of the refuge land and water acquired in the future by the state lying within the described boundaries. Cf. AS 16.20.030(c); AS 16.20.033; AS 16.20.036; AS 16.20.038. It is a basic principle of statutory construction that every word in a statute must be given effect if possible. *Homer Elec. Ass'n. v. Towsley*, 841 P.2d 1042, 1045 (Alaska 1992). The courts will construe state statutes *in pari materia*, i.e., give the same terms the same meaning, where the statutes were enacted at the same time or deal with the same subject matter. *Underwater Construction, Inc. v. Shirley*, 884 P.2d 150 (Alaska 1994). Furthermore, absent legislative history to the contrary, the courts will interpret all omissions as exclusions.⁵ *John v. Baker*, 982 P.2d 738, 762 (Alaska 1999).

The statutes establishing some refuges specifically provided that land acquired in the future by the state lying within the refuge boundary would automatically become part of the refuge. Others, including the statutes governing the ACWR, omitted that language.

⁵ This principal is commonly expressed using the Latin phrase "expressio unius est exclusio alterius."

The statutes establishing refuges clearly relate to the same subject matter, and several were adopted by the same legislature. For example, the Ninth Alaska Legislature established the Goose Bay State Game Refuge and included land acquired in the future. Ch. 101, SLA 1975; AS 16.20.030(c). The same legislature omitted that language in establishing the Palmer Hay Flats State Game Refuge. Ch. 102, SLA 1975; AS 16.20.032. When the legislature wanted to add land acquired by the state after 1975 to the Palmer refuge, it did so by legislation, obviously viewing the legislation as necessary to include the land. *See* ch. 49, SLA 1985.

The omission of the language including land acquired in the future from the ACWR legislation leads to the conclusion that land acquired by the state after enactment of the statute did not automatically become part of the refuge. In 1971, when the Potter Point State Game Refuge was created, the United States owned the Point Campbell land and held it as a military reserve. When the statute was amended in 1973 and 1975, the federal government still owned the land.⁶ The state received the Point Campbell land from the United States and conveyed it to the Municipality of Anchorage in 1982. The legislature took no action regarding the ACWR refuge until 1988, still omitting the language to include after-acquired state land and six years after title vested in the

⁶ The 1975 amendment was enacted by the same legislature that included land acquired in the future in the Goose Bay, Susitna Flats, and Trading Bay State Game Refuges. Ch. 101, SLA 1975; ch. 140, SLA 1976; ch. 255, SLA 1976. The legislature did not include that language in its amendments to the Potter Point State Game Refuge statute. Ch. 192, SLA 1975.

municipality. The Point Campbell lands have never been part of the refuge, and nothing prohibited DNR from conveying the land.⁷

Because the Point Campbell lands were never included in the refuge, the questions raised in your request for advice relating to the availability of the land for municipal selection, notice requirements, and whether a conveyance of legislatively designated land is unconstitutional and void are not at issue, but a brief discussion of these points may be helpful.

The 1985 Attorney General's opinion concludes that land in refuges cannot be transferred out of state ownership without legislative action. This opinion, in and of itself, does not "void" any conveyance or nullify the patent to the municipality. Although, if the land was part of the refuge the conveyance might be subject to attack on the grounds that DNR lacked authority to issue it, that attack would be subject to equitable defenses, with the municipality in a strong position to claim the status of a bona fide purchaser. *See* 1980 Inf. Op. Att'y Gen. (Oct. 9, 1980; A66-022-81).

You correctly note that, in general, legislatively designated land and land acquired by the state in any manner except under the Alaska Statehood Act is not available under

⁷ An argument may be raised that the language in the ACWR statute (and other refuge statutes) prohibiting acquisition of land for the refuge by eminent domain, but allowing acquisition by purchase or exchange, indicates legislative intent to include after-acquired land in the refuge. We do not think this overcomes the omission of the after-acquired language. The legislature's actions to add land to the Palmer Hayflats State Game Refuge supports this view, as does the conclusion in the 1985 opinion and the Cantor memo that the language in the legislation referring to private land as "within the refuge" does not mean that private land is actually a part of the refuge.

the Municipal Entitlement Act. However, the municipality received the Point Campbell land pursuant to AS 38.05.315 (renumbered AS 38.05.810). Conveyances to municipalities under this statute do not conflict with the Municipal Entitlement Act.

Next, you question whether the apparent lack of notice to ADF&G under AS 16.20.050 of the proposed conveyance and the agencies' lack of knowledge that the land was in the refuge void the conveyance. In fact, ADF&G did receive notice under AS 38.05.945. In addition, any objection from ADF&G would be "internal to state government, and it appears unlikely that equity would allow such an objection to overturn [a conveyance to] an innocent third party, a party which had no knowledge of the boundary confusion." 1980 Inf. Op. Att'y Gen. (Oct. 9, 1980; A66-022-81) at p.5.

Finally, you ask whether the legislative designation of land seaward of the "toe of the bluff" is a valid existing right to which the conveyance is subject. "Valid existing rights" refer to vested property rights such as homestead claims or easements. The "toe of the bluff" is simply the descriptor used by the legislature in establishing the exterior boundary of the Potter Point State Game Refuge, rather than a claim to land in its own right. It would not cause the land to be retained.

2. Does the land at the mouth of Campbell Creek belong to the state or to the municipality?

As we understand the facts, the land in question at the mouth of Campbell Creek was not included in the Potter Point State Game Refuge, but is within the boundaries of the land designated as the ACWR in 1988. DNR issued a final decision approving the land for conveyance to the municipality in 1986. You question whether the land is still

owned by the state and therefore became a part of the ACWR in 1988 because the land has not yet been patented to the municipality. Although the state still holds bare legal title to the land, it is well established that equitable title passed to the municipality when the decision to convey became final. Former AS 29.18.204 (now AS 29.65.040) specifically provides that municipal entitlements are vested property rights. Former AS 29.18.205 (now AS 29.65.050(b)) mandates that a patent for an approved selection *shall be issued* within three months after approval of the survey. Issuance of patent is not discretionary. In addition, former AS 29.18.207 (now AS 29.65.070(b)) authorizes the municipality to execute conditional leases and make conditional sales with approval of the director. This approval was granted to the municipality in the decision approving the conveyance. The municipality has a vested right to receive a patent to this land; the subsequent inclusion of the land at the mouth of the creek in the legislation describing the refuge cannot defeat the municipality's right to patent.

The municipality's title to the land at issue is analogous to the title the state has in land tentatively approved for conveyance by the United States. Upon receipt of tentative approval, all right, title, and interest of the United States vest in the state. Congress made this explicit in the Alaska National Interest Lands Conservation Act. See 43 U.S.C. 1635(c). The Alaska Supreme Court has quoted with approval U.S. Supreme Court caselaw holding that "[I]t is . . . well settled that a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the government and that his right to a legal title is to be determined as of that time. . . ."

Moore v. State, 992 P.2d 576, 580 (Alaska 1999), quoting *Payne v. New Mexico*, 255 U.S. 367, 371 (1921); see also *Wyoming v. United States*, 255 U.S. 489 (1921). Similarly, the final decision by the state approving the municipal selection vested title in the municipality.

You have also asked whether DNR was required to notify and obtain approval from ADF&G pursuant to AS 16.20.050 – 16.20.060 before approving the municipal selection. When DNR approved the municipality's selection, the land at the mouth of the creek was not within the ACWR; therefore AS 16.20.050 – 16.20.060 do not apply. See 1985 Op. Att'y Gen. No. 4. In any event, actual notice of the selection was given. Based on the amount of time that has passed and equitable considerations, any defect that might exist based on the notice would not be fatal to the municipality's vested right to receive patent.

The opinion request also asks whether DNR's decision can be amended to retain the land in state ownership since patent has not yet issued. Unless the municipality consents, DNR has no authority to alter the conveyance.

3. Could a third party sue to invalidate the conveyances at Point Campbell or the mouth of Campbell Creek, and would such a suit be successful?

It is always possible that someone will sue to invalidate these conveyances. Even assuming a third party met the jurisdictional prerequisites for standing, for the reasons outlined in response to the first and second questions, we do not believe such a suit would be successful. The mere possibility that someone might bring a lawsuit does not cloud the municipality's title.

4. Are private and municipal lands within the external boundaries of the ACWR inholdings?

Both the 1985 Attorney General's opinion and the Cantor memo conclude that only the described state-owned land and water within refuge boundaries are included in the refuge and subject to the statutes governing refuges. We reaffirm that conclusion. Private and municipal land within the exterior boundaries of the ACWR are not "inholdings" subject to regulation by ADF&G.⁸

5. Does the reservation of the mineral estate in non-state-owned land allow ADF&G to assert regulatory authority over activities on the non-state-owned land?

Numerous parcels of private and municipal land lie within the exterior boundaries of the ACWR. As discussed above and in previous memoranda, such parcels are not part of the refuge. We understand that the United States conveyed the private land directly to the owners or their predecessors and the conveyances included the entire fee title; there is no reserved mineral estate underlying this land.

State and federal law require that the state reserve the mineral estate to itself when the state conveys land or interests in land out of state ownership. AS 38.05.125; sec. 6(i), Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339, as amended. This requirement applies to conveyances to political subdivisions of the state, including the Municipality of Anchorage, under AS 29.65 and its predecessors. For the land in question that the state

⁸ Municipal land within the ACWR boundary may be included in the refuge, but only pursuant to an express agreement between ADF&G and the municipality. AS 16.20.031(d). We understand that no such agreement exists currently.

conveyed to the municipality, the state retained the mineral estate. However, the municipally-owned land estate is not part of the refuge. *Hayes v. A.J. Associates, Inc.*, 960 P.2d 556, 562, n. 14 (Alaska 1998) ("Privately owned surface lands are not 'state land' even though the State has reserved mineral rights in them under AS 38.05.125(a).").

The mineral estate reserved in conveyances by the state consists of the "oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils." AS 38.05.125. It does not include sand and gravel which are "material" and part of the land estate. AS 38.05.965(10).⁹

State ownership of the reserved mineral estate is very unlikely to be of any relevance to the coastal trail extension project. To our knowledge, mineral exploration and development are neither occurring nor proposed. In fact, AS 16.20.031(f) closed the refuge to mineral entry. Development of a recreational trail will occur in the land estate and unless the land estate is itself included in the refuge, it is not subject to ADF&G's authority over refuge land. While ADF&G and the Boards of Fisheries and Game have general authority over fish and game resources and habitat throughout the state irrespective of land ownership (*see, e.g.*, AS 16.05.020, AS 16.05.251, and

⁹ Confusion often arises as to ownership of sand and gravel in Alaska because under the Alaska Native Claims Settlement Act, the regional corporations receive the "subsurface estate" underlying "surface estate" conveyed to the village corporations. 43 U.S.C. 1613. For purposes of ANCSA, the courts have construed "subsurface estate" to include sand and gravel, leading to disputes over use of these materials to develop the surface estate. *Koniag, Inc., v. Koncor Forest Resource*, 39 F.3d 991 (9th Cir. 1994). "Subsurface estate" and "mineral estate" are not the same. *See Norken Corp. v. McGahan*, 82 P.2d 622 (Alaska 1991).

AS 16.05.255), there is no indication in your request for advice that those authorities are at issue here.

6. Would a right-of-way acquired by DOT&PF across private land within the refuge boundaries automatically become part of the refuge?

The Cantor memo concluded that DOT&PF can acquire private land within the refuge boundaries for a coastal trail and the land does not become refuge land. For the reasons stated in that memorandum and here, we believe that conclusion is correct.

7. Does any provision of state law extend ADF&G's authority to regulate refuge land to adjacent land similar to the federal case law on "constructive use"?

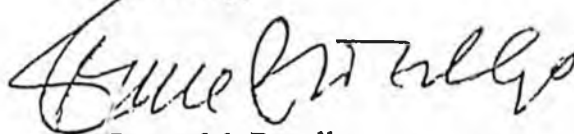
A provision of federal law commonly referred to as 4(f) allows federal funds to be used for a transportation project using publicly owned park, refuge, or recreation land of national, state, or local significance only if there is "no prudent and feasible alternative" and every effort is made to minimize the harm. 49 U.S.C. 303(c). The federal courts, through a concept referred to as "constructive use," have extended this protection to apply to situations where "a road significantly and adversely affects park land even though the road does not physically use the park." *Sierra Club v. Department of Transportation*, 948 F.2d 568, 573 (9th Cir.1991). See also *Laguna Greenbelt, Inc. v. Department of Transportation*, 42 F.3d 517 (9th Cir. 1994).

We are aware of no similar state statute or interpretation that would provide a basis for extending ADF&G's refuge permitting and regulatory authority to land the legislature did not designate as refuge land.

CONCLUSION

For the reasons discussed above and in previous memoranda we conclude that the land at Point Campbell and at the mouth of Campbell Creek is not part of the ACWR and is not subject to ADF&G's refuge permitting and regulatory authorities.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bruce M. Botelho".

Bruce M. Botelho
Attorney General

Attachment

BMB/EJB

MEMORANDUM

State of Alaska
Department of Law

To: Bruce M. Botelho
Attorney General

Date: January 17, 2001

AG File No: 661-01-0080

Telephone: 465-5160

Subject: Anchorage Coastal
Trail Planning

From: James E. Cantor *je.*
Assistant Attorney General
Transportation Section, Anchorage

With review
and edits by: Kevin Saxby *KMS* and Lance Nelson *LN*
Assistant Attorneys General
Natural Resources Section, Anchorage

I. Questions Presented.

The Department of Law's Transportation and Natural Resources Sections have received written requests for advice from the Department of Transportation and Public Facilities and the Department of Fish and Game. Neither agency has followed the process for requesting a memorandum of advice or opinion of the Attorney General.

The agencies seek advice concerning the effect of the statute establishing the Anchorage Coastal Wildlife Refuge upon one potential routing of a coastal trail. The questions involve the location and effect of the refuge boundary, the applicability of § 4(f) of the federal transportation act of 1966 to private property within the outer boundary of the refuge, and the authority to condemn land for a coastal trail.

II. The location and effect of the refuge boundary.

AS 16.20.031(a) establishes the Anchorage Coastal Wildlife Refuge as follows:

The following described state-owned land and water is established as the Anchorage Coastal Wildlife Refuge and shall be managed as a state game refuge for the protection of waterfowl, shorebirds, salmon, and other fish and wildlife species, and their habitat and for the use and enjoyment of the people of the state:

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(1) Township 13 North, Range 4 West, Seward Meridian

Section 20: SE 1/4 seaward of the 20 foot elevation contour

SE 1/4 NE 1/4 seaward of the 20 foot elevation contour

Section 29: E 1/2 seaward of the 20 foot elevation contour

[The detailed land description of the refuge continues in the bound version of the statutes for an additional 48 lines.]

A large amount of private and municipal property exists within the area described in AS 16.20.031(a). Much of the property within and along the landward boundary of the area described in AS 16.20.031(a) is not owned by the state. The Department of Transportation and Public Facilities has examined the potentiality of routing a trail over these private and municipal properties, which has raised questions about whether such a trail would be within and part of the refuge. For the reasons stated below, the answer is that although such a trail would be within the outer boundaries of the refuge, the trail would not be part of nor within the jurisdiction of the refuge.

A. Historical analysis of the extent of the Anchorage Coastal Wildlife Refuge.

The legislature established the predecessor to the Anchorage Coastal Wildlife Refuge in 1971. § 1 ch. 81 SLA 1971, enacting AS 16.20.030(b). That predecessor, the Potter Point State Game Refuge, extended northwards along the coast from Potter Creek to Campbell Point. According to a 1981 management plan, approximately 32 percent of the land within the outer boundary of the refuge was privately owned.

In 1975, the legislature added a provision to AS 16.20.030(b) giving the Municipality of Anchorage one year to zone the privately owned land within the outer boundary of the Potter Point State Game Refuge. If the Municipality did not act within a year, the Department of Natural Resources was given the power to adopt zoning regulations governing privately owned land within the refuge. A similar scheme exists in some other refuges. Although the legislative history of the 1975 provision is sparse, the sponsor of the bill, Senator Rodey, explained to the House Committee on Community and Regional Affairs that "The State is attempting to buy all the lands that have been dedicated for park purposes but don't [sic] have enough money right now. There are still private lands inside the boundaries of the refuge and it is important to zone these to keep them consistent with the use of the refuge." Meeting Minutes, May 6, 1975.

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The legislative history of the 1975 provision includes an unpublished memorandum from the Attorney General, drafted by Rodger Pegues, dated February 18, 1975, evaluating whether in the absence of specific legislation the state has the power to regulate the use of private land within the boundaries of a state park or recreation area. The memorandum notes that the statutes establishing the parks and recreation areas refer to those areas as consisting of "state-owned lands" and provide for the acquisition of private land within the parks and recreation areas. In this way, the question is similar to that presented by statute establishing the Anchorage Coastal Wildlife Refuge. The memorandum concludes that the state may not regulate the private lands that are within the outer boundaries of the parks and recreation areas and suggests, somewhat semantically, that because the private lands are not regulated as parks and recreation area lands they are not actually within the parks and recreation area boundaries. The 1975 provision allowing the Department of Natural Resources to zone the privately owned lands within the Potter Point State Game Refuge appears to be a response to the concern that the state has no other power to regulate private lands within the outer boundary of the refuge. Its enactment indicates legislative awareness of the concern. As will be seen below, this zoning provision was later repealed, leaving the private land within the refuge unregulated.

In 1980, the Office of the Attorney General issued a memorandum of advice, drafted by Assistant Attorney General Thomas Meacham, evaluating whether the Department of Fish and Game had authority over a tract of land within the Potter Point State Game Refuge that the Department of Natural Resources had mistakenly conveyed to a private party. 1980 Inf. Op. Att'y Gen. (October 9; A66-022-81). The memorandum is particularly applicable because the Potter Point State Game Refuge was the predecessor to the Anchorage Coastal Wildlife Refuge. The memorandum "concluded that the subject lands are not now a part of the Potter Point State Game Refuge, and that the Commissioner does not have the authority to review and approve development plans for these lands pursuant to AS 16.20.060." AS 16.20.060 is a statute giving the Department of Fish and Game authority to review construction plans in a game refuge; however, pursuant to AS 16.20.050 this authority only applies "[w]here the use, lease, or disposal of real property in state game refuges created by AS 16.20.010 - 16.20.080 is under the control or jurisdiction of the state, whether through federal permit or state ownership." The Department of Fish and Game lacked authority over the land at issue because that land was private, not public, land within the outer boundary of the refuge.

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The conclusion reached in the 1980 memorandum of advice was based in part on an interpretation of the statute creating the Potter Point State Game Refuge. That statute stated, in pertinent part:

The following described state-owned lands and adjacent state waters, excluding existing and applied for highway, pipelines and railway rights-of-way as of May 20, 1971, are established as the Potter Point State Game Refuge: All lands and waters south and west of and adjacent to the toe of the bluff which extends from Campbell Point southeasterly to Potter Creek.

AS 16.20.030(b): Because the lands conveyed into private ownership are no longer "state-owned," the memorandum advised, "they are not a part of the refuge." Because they are not a part of the refuge, development plans are not subject to review by the Department of Fish and Game under AS 16.20.060. The Department of Fish and Game still had jurisdiction under other, non-refuge statutes such as the statutes governing anadromous fish streams.

The memorandum analyzed an inconsistency in the language of the statute concerning the use of the word "within" in the description of the authority to zone "privately owned land within the refuge." The memorandum mused that if "the refuge description, by its own terms, includes only 'state-owned lands' within the refuge . . . by definition there could be no privately-owned lands within the refuge." The Department of Fish and Game recently considered a similar conundrum created by the words of the current statute establishing the Anchorage Coastal Wildlife Refuge. The problem was resolved in the 1980 memorandum of advice by reasoning that because such an interpretation would nullify the statute's zoning authority, "[t]he proper interpretation of such a boundary description appears to be that while only state-owned lands are designated as refuge lands (and indeed, the Legislature could not designate private lands as refuge lands without paying fair compensation to the private landowners), the boundary line encompassing all of the state-owned lands may contain within it parcels of private land." Thus, although the Department of Fish and Game would not have authority over the private lands, the private lands would be considered within the refuge for the purpose of the statutorily-authorized activity – in that case zoning by the Department of Natural Resources.

In 1985, the Attorney General issued a formal opinion regarding the respective authorities of the Departments of Natural Resources and Fish and Game in game refuges, game sanctuaries, and fish and game critical habitat areas. This opinion and the chart attached to it formally confirmed the Department of Law's position that state game

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refuges only consist of the state-owned land within the refuge boundaries (in contrast to critical habitat areas which include both private and state land).

In approximately 1983, a task force evaluated the Potter Point State Game Refuge. Among other problems, the 1971 legislation had not clearly defined the landward or the seaward boundaries of the refuge. The Anchorage Municipal Property Management Division and the Alaska Department of Fish and Game drafted proposed legislation based on the recommendations of the Potter Marsh Task Force. The proposed legislation would, among other things, define a seaward boundary for the Potter Point State Game Refuge to exclude certain mineral interests while extending the refuge further to the north from Point Campbell to Point Woronzoff.

This legislation was ultimately enacted in 1988. Ch. 8 SLA 1988, enacting AS 16.20.031. The legislative enactment redrew the boundaries essentially as proposed and renamed the refuge the Anchorage Coastal Wildlife Refuge. It eliminated the Department of Natural Resources' power to adopt zoning regulations governing privately owned land within the refuge, § 3 ch. 8 SLA 1988, and limited government's ability to acquire the privately owned land within the refuge by prohibiting the use of eminent domain as a means of acquiring land for the refuge. The Department of Fish and Game and the Municipality of Anchorage were only given authority to acquire privately owned land within the refuge by purchase, exchange, or otherwise, but not by eminent domain. The Anchorage Coastal Wildlife Refuge legislation appears to have accorded greater rights to private land owners than the law establishing the Potter Point State Game Refuge because zoning and eminent domain for refuge purposes were no longer allowed.

The 1988 legislation mimicked the opening line of the statute that had established the Potter Point State Game Refuge, stating "The following described state-owned land and water is established as the Anchorage Coastal Wildlife Refuge . . .". In establishing certain powers and prohibitions, the legislation also mimicked the prior description of privately owned land "within" the refuge (that description had previously applied to the power to zone within the refuge). Thus, AS 16.20.031(e) was enacted to read: "The state or the Municipality of Anchorage may not acquire privately owned land within the Anchorage Coastal Wildlife Refuge described in (a) of this section by eminent domain for inclusion within the Anchorage Coastal Wildlife Refuge." AS 16.20.031(d) uses similar language in authorizing the Department of Fish and Game and the Municipality of Anchorage to enter an agreement "for the management of the land within the Anchorage Coastal Wildlife Refuge that is owned by the Municipality of Anchorage . . .".

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There is no indication that anyone interpreted the legislature's use of the 'state-owned land' or 'within the refuge' phrases as attempts to change or override prior interpretations of those phrases. To the contrary, the Department of Fish and Game's 1981 plan for the management of the Potter Point State Game Refuge states: "Only State-owned lands and adjacent State waters comprise the Refuge as established by Alaska Statute 16.20.030(b)." 1981 plan at 1. The Department of Fish and Game's 1991 plan for the management of the Anchorage Coastal Wildlife Refuge similarly states: "Only state land and water encompassed by the boundary are included in the refuge. Privately owned lands within the refuge boundaries are not managed as refuge lands," 1991 plan at A-1, and "Private lands within the refuge boundary are not part of the refuge and may only be acquired from willing sellers," 1991 plan at A-26. The land status map appended to the 1991 plan similarly and unambiguously states the Department of Fish and Game's understanding that "The refuge boundary shown depicts the statutory extent of the refuge. Private lands within this boundary are not part of the refuge."

- B. Private properties within the outer boundary of the refuge are not a part of the refuge.

The Department of Fish and Game has traditionally drawn the refuge boundary as the outer boundary of the area defined by the legislature. This interpretation is reasonable and not inconsistent with the statute. However, private properties within the outer boundary are not part of the refuge. The Department of Fish and Game as refuge manager has no jurisdiction over private properties within the outer boundary. The Department of Fish and Game as refuge manager may have jurisdiction over municipal properties, but only to the extent allowed by management agreements adopted pursuant to AS 16.20.031(d). The Department of Fish and Game's authority, if any, under other non-refuge statutes is not impacted by this opinion.

To the extent the limitations of the English language led the statutory drafters to use the word 'within' in differing manners in the same statute, the private and municipal properties within the outer boundary of the refuge are only 'within the refuge' for the specific purposes enumerated. Thus, the Department of Fish and Game and the Municipality of Anchorage may enter into agreements governing the management of municipal lands 'within the refuge' as specified in AS 16.20.031(d), and the Department of Fish and Game and Municipality of Anchorage may acquire privately owned land 'within the refuge' by purchase, exchange, or otherwise, except by eminent domain, as specified in AS 16.20.031(e).

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III. The applicability of § 4(f) to private lands within the outer boundary of the Anchorage Coastal Wildlife Refuge.

Section 4(f) is embodied in 23 U.S.C. § 138 and 49 U.S.C. § 303, both of which set conditions upon the Secretary of Transportation for the approval of a transportation program or project requiring the use of "publicly owned land" of a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance. Although the determination of whether § 4(f) applies in a given situation is a federal decision, the words of the statutes exclude the private lands within the outer boundary of the Anchorage Coastal Wildlife Refuge from the strictures of § 4(f). This result comports with the determination that refuge managers have no jurisdiction over privately owned lands within the outer boundary of the Anchorage Coastal Wildlife Refuge.

IV. The authority of the Department of Transportation and Public Facilities to condemn land for a coastal trail.

The agencies have asked if the Department of Transportation and Public Facilities can acquire land within the outer boundary of the Anchorage Coastal Wildlife Refuge by eminent domain so that it can construct a coastal trail as a federally-funded transportation project. The answer is that the Department of Transportation and Public Facilities can acquire land by eminent domain for this purpose. Land acquired by eminent domain does not become refuge land.

A. Historical analysis of the authority to exercise eminent domain within the Anchorage Coastal Wildlife Refuge.

As discussed above, the Anchorage Municipal Property Management Division and the Alaska Department of Fish and Game drafted the original proposed legislation for the creation of the Anchorage Coastal Wildlife Refuge based on the recommendations of the Potter Marsh Task Force. The original proposal contained a prohibition on the acquisition of land within the refuge boundary by eminent domain. The Department of Natural Resources reviewed the proposed legislation before it was introduced in the legislature. The Department of Natural Resources memorialized its concerns and recommendations in Decision Memorandum #57, dated April 6, 1984, signed by all of the department's divisions, its two deputy commissioners, and its commissioner, Esther Wunnicke.

Decision Memorandum #57 included a recommendation to adopt specific wording concerning state land acquisition powers to clarify that the limitation on eminent domain

Bruce M. Botelho
Attorney General
Re: Anchorage Coastal Trail Planning

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related only to the purpose of adding land to the refuge. Decision Memorandum #57 explained:

5. State land acquisitions.

The proposed legislation reads "the State may not acquire by eminent domain privately owned land within the refuge boundary . . .". The refuge encompasses several miles of the Alaska Railroad and the Seward Highway (old and new). The proposed wording would not distinguish land acquisition for transportation purposes from refuge purposes. The substitutions presented below should clarify this situation.

"The State may not acquire land for refuge purposes by eminent domain within the refuge boundary . . .".

In letters dated June 20 and July 19, 1984, the Municipality of Anchorage asked Senator Vic Fischer to sponsor the proposed legislation. The Municipality forwarded to Senator Fischer the original proposal drafted by the Anchorage Municipal Property Management Division and the Alaska Department of Fish and Game, as well as the Department of Natural Resources' Decision Memorandum #57. On July 30, 1984, Senator Fischer sent a request to Legislative Legal Services asking it to draft a bill based on the proposal from the Anchorage Municipal Property Management Division and the Alaska Department of Fish and Game, with amendments incorporating all of the recommendations contained in Department of Natural Resources' Decision Memorandum #57.

The broad eminent domain language initially proposed by the Anchorage Municipal Property Management Division and the Alaska Department of Fish and Game was accordingly changed. The working draft distributed on November 26, 1984 by Senator Fischer and co-sponsor Representative Mike Szymanski contained the following language:

- (e) The state or the Municipality of Anchorage may not acquire privately owned land within the Anchorage Coastal State Wildlife Refuge described in (a) of this section by eminent domain for inclusion within the Anchorage Coastal State Wildlife Refuge. The Department of Fish and Game or the Municipality of Anchorage may acquire privately owned land within the Anchorage Coastal State Wildlife Refuge by purchase, exchange, or otherwise except by eminent domain.

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With the exception of a small change to the name of the wildlife refuge and the addition of a comma to correct a grammatical error, this exact language remained in all subsequent versions of the bill and was ultimately enacted four years later in 1988.

The legislation appears to have been initially stalled by an unrelated political dispute between one of the sponsors of the bill and the chairperson of a committee. The bill also appears to have engendered controversy over the need for and wording of an easement to Fire Island, and when a new Commissioner of Natural Resources questioned the need for closing the area to mineral entry. While the legislative history is replete with factual references to the proposed prohibition on acquisition by eminent domain for inclusion in the refuge, that provision does not appear to have raised any questions until 1988 when the Municipality elected a new mayor.

The new municipal administration asked that the northwards extension of the refuge from Point Campbell to Point Woronzoff be deleted, and suggested the prohibition on eminent domain was too broad. The concern over eminent domain appears to spring from the second sentence of the eminent domain provision. That sentence does not mention refuge purposes, and thus could be interpreted to prohibit the Municipality of Anchorage from acquiring land by eminent domain for all purposes. In a February 1, 1988 presentation to the House Resources Standing Committee, municipal spokesman Mark Johnson stated his understanding that the prohibition on eminent domain was included to prevent the Municipality from using eminent domain powers to extend the coastal trail through private land holdings. We have been unable to locate any other legislative history upholding this understanding, although it is certainly possible some people intended this result. In any event, Mr. Johnson believed the language in the second sentence of subsection (e) would prohibit the exercise of eminent domain for all municipal services, such as water and sewer lines. On February 10, 1998, upon the second reading of the bill, Representative Martin offered an amendment stating: "The Municipality of Anchorage may acquire privately owned land within the Anchorage Coastal Wildlife Refuge by eminent domain for water and sewer purposes." A vote was taken and the amendment was not adopted. Ultimately, the bill passed with no change to the extension of the refuge or the eminent domain language.

A last potentially relevant legislative action occurred in 1999 with the passage of HB 131, which stated: "Except for the public right-of-way and utility corridor created in this subsection [to Fire Island] and identified in the management plan, for a realignment of the right-of-way for the new Seward Highway, or for a realignment of the right-of-way for the Alaska Railroad, a public right-of-way or other easement for surface transportation may not be created across the refuge without prior approval of the

Bruce M. Botelho
Attorney General
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January 17, 2001
Page 10

legislature by law." The legislative history makes it clear that the major aim of this bill was to require legislative approval of coastal trail construction. The bill was vetoed.

- B. The Department of Transportation and Public Facilities can condemn private land within the Anchorage Coastal Wildlife Refuge to construct a coastal trail as a federally-funded transportation project.

The first sentence of AS 16.20.031(e) prohibits the state and the municipality from acquiring land within the refuge by eminent domain for inclusion in the refuge. This sentence applies specifically to acquisitions for inclusion within the refuge. Decision Memorandum #57 and Senator Fischer's request that the recommendations in that memorandum be included in the bill indicate that the specificity was intentional. This sentence does not prohibit acquisitions by eminent domain for other purposes.

The second sentence of AS 16.20.031(e) allows the Department of Fish and Game and the municipality to acquire land by purchase, exchange or otherwise, but not by eminent domain. Whatever the extent of municipal powers under this clause, the linguistic switch from "the state" in the first sentence of AS 16.20.031(e) to "the Department of Fish and Game" in the second sentence appears to be a further effort to specify that acquisitions by eminent domain for non-refuge purposes are not prohibited. This sentence does not prohibit the use of eminent domain by departments other than Fish and Game. AS 16.20.031(e) does not prohibit acquisition of a coastal trail easement across private properties within the refuge by the Department of Transportation and Public Facilities so that it can construct a federally-funded transportation project.

- C. Land acquired by the Department of Transportation and Public Facilities through condemnation for a coastal trail project does not become refuge land.

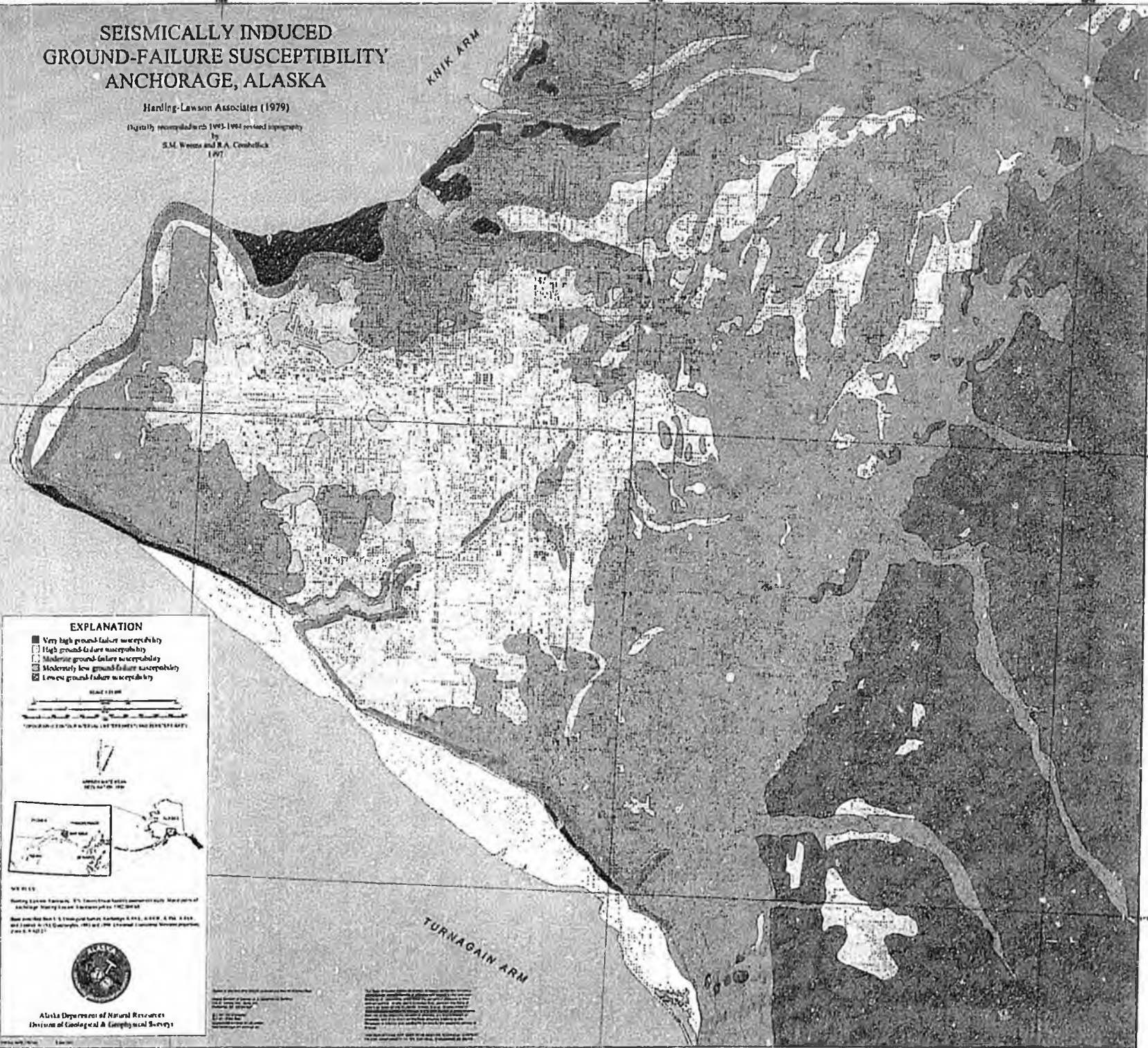
The state and municipality are prohibited from acquiring privately owned land within the refuge "by eminent domain for inclusion within the Anchorage Coastal Wildlife Refuge." AS 16.20.031(e). Thus, the Legislature intended, and stated, that the refuge may not be expanded through the use of the eminent domain power by the state, including all of its various agencies, or by the municipality. If this specific prohibition is to be given its intended meaning and effect, we think the appropriate interpretation is that if private land within the refuge boundaries is acquired by the state through use of the eminent domain power, even though that land becomes "state-owned" land, as that term is used in the refuge description, AS 16.20.031(a), the land does not thereby become refuge land. A contrary interpretation would circumvent the prohibition.

JEC/bap

SEISMICALLY INDUCED GROUND-FAILURE SUSCEPTIBILITY ANCHORAGE, ALASKA

Harding-Lawson Associates (1979)

Digitally recompiled to US 1983 revised topography
by
S.M. Weems and R.A. Combelluck
1997



EXPLANATION

- Very high ground-failure susceptibility
- High ground-failure susceptibility
- Moderate ground-failure susceptibility
- Low ground-failure susceptibility



Map compiled from U.S. Geological Survey maps and other sources. Map of Alaska showing location of Anchorage. Map of Alaska showing location of Anchorage. Map of Alaska showing location of Anchorage.



Alaska Department of Natural Resources
Division of Geological & Geophysical Surveys

Michael
1980
Stolle
JARV
DR.
Anchorage, AK 99515

RECEIVED BY
MAR 4 - 2003

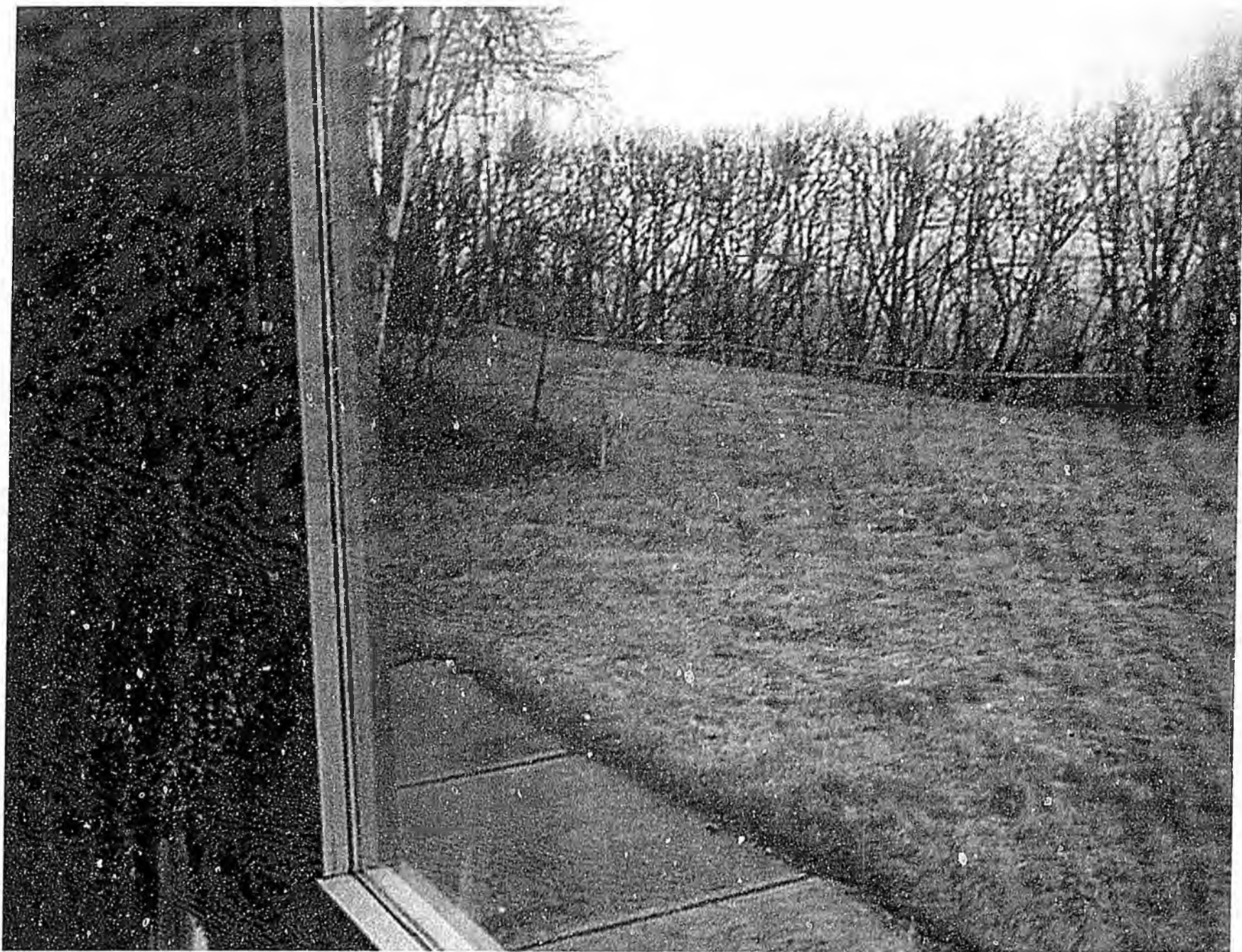
Proposed "Orange Modified" - 14 ft from bluff - "Trail" marked by Tape



View from lower deck - sliding door access

Sean Stolle
14020 SARVI DR.

Anchorage, AK 99515-



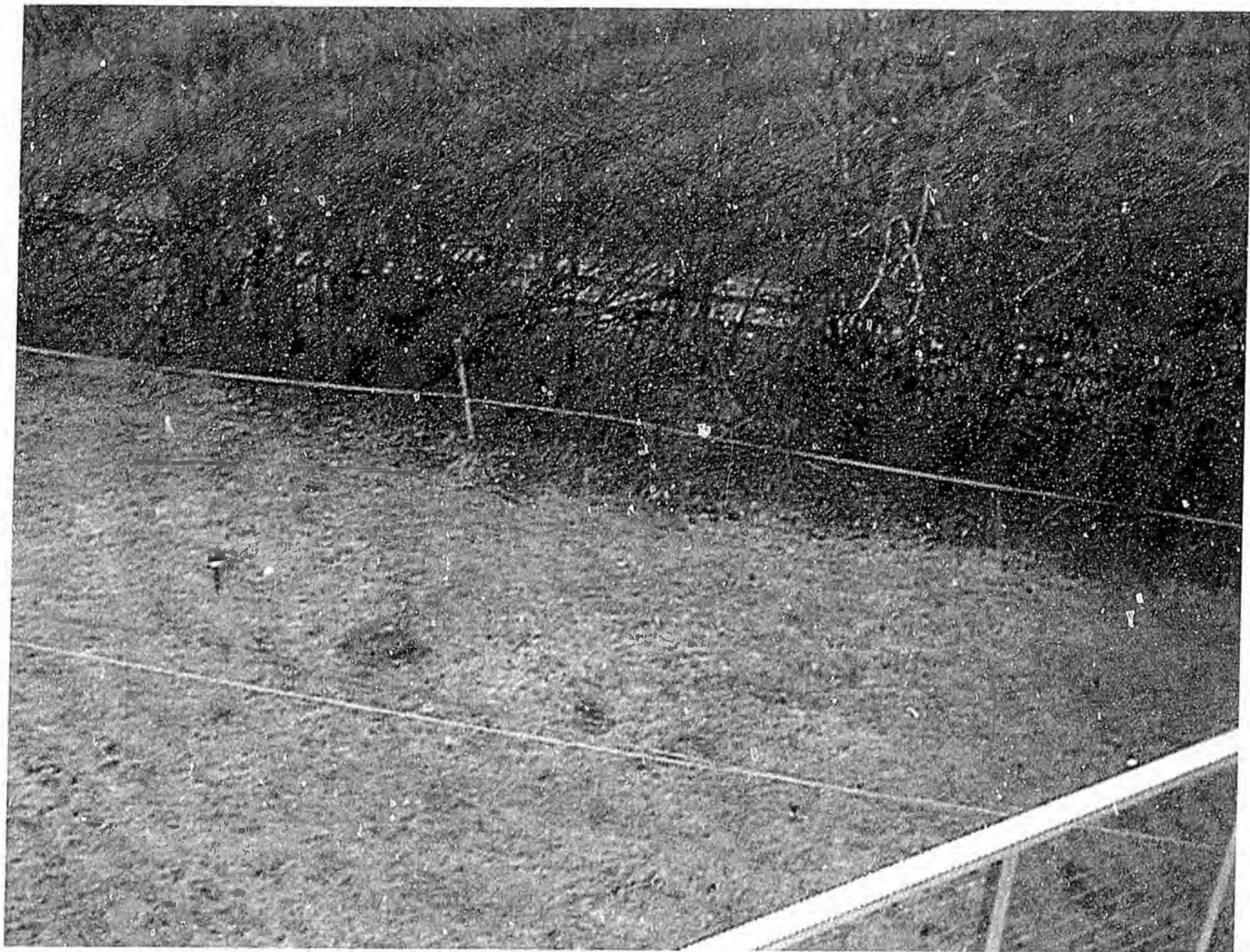
"Trail"

View from downtown/bedroom window



"Trail"

backyard & dog pen

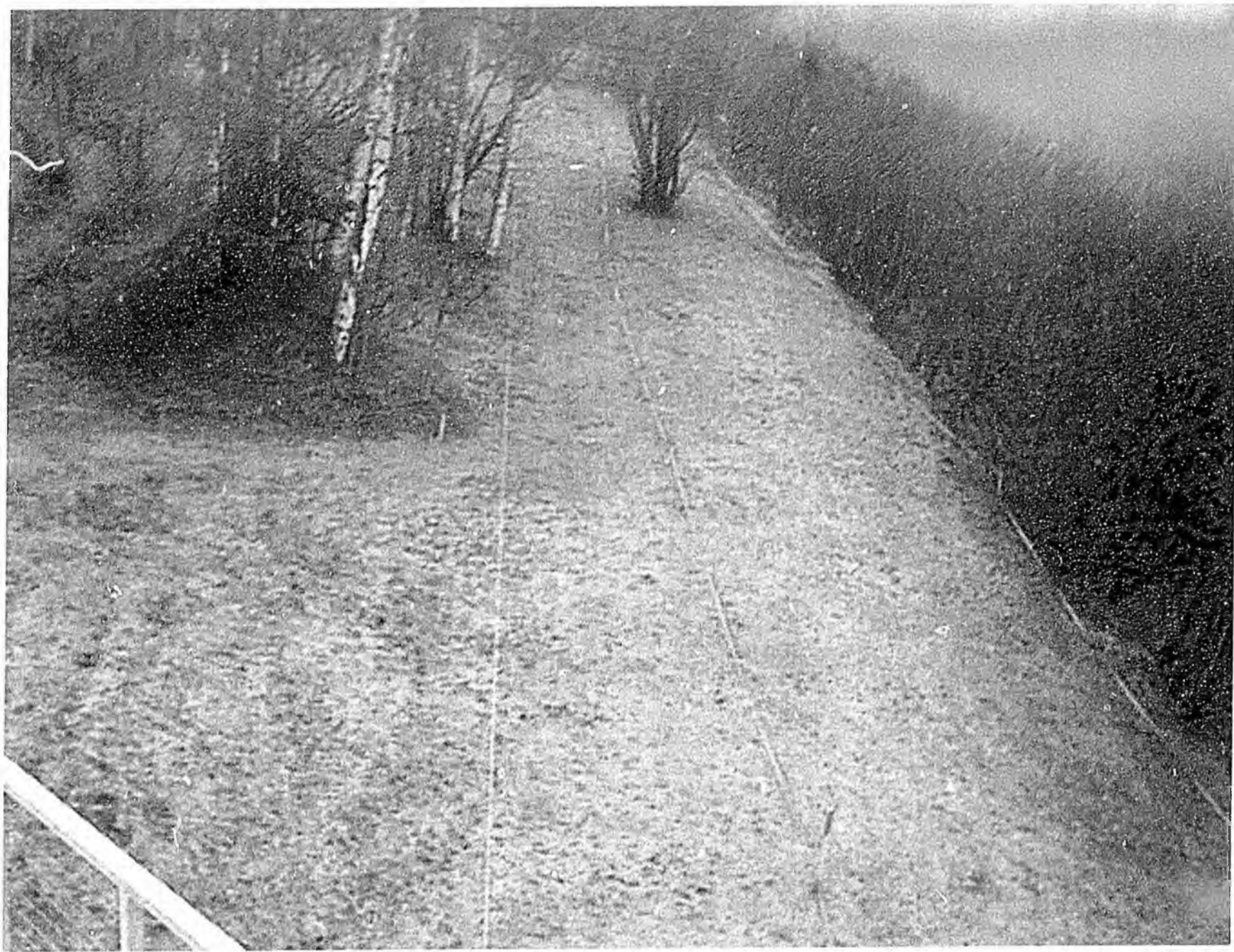


"Trail"

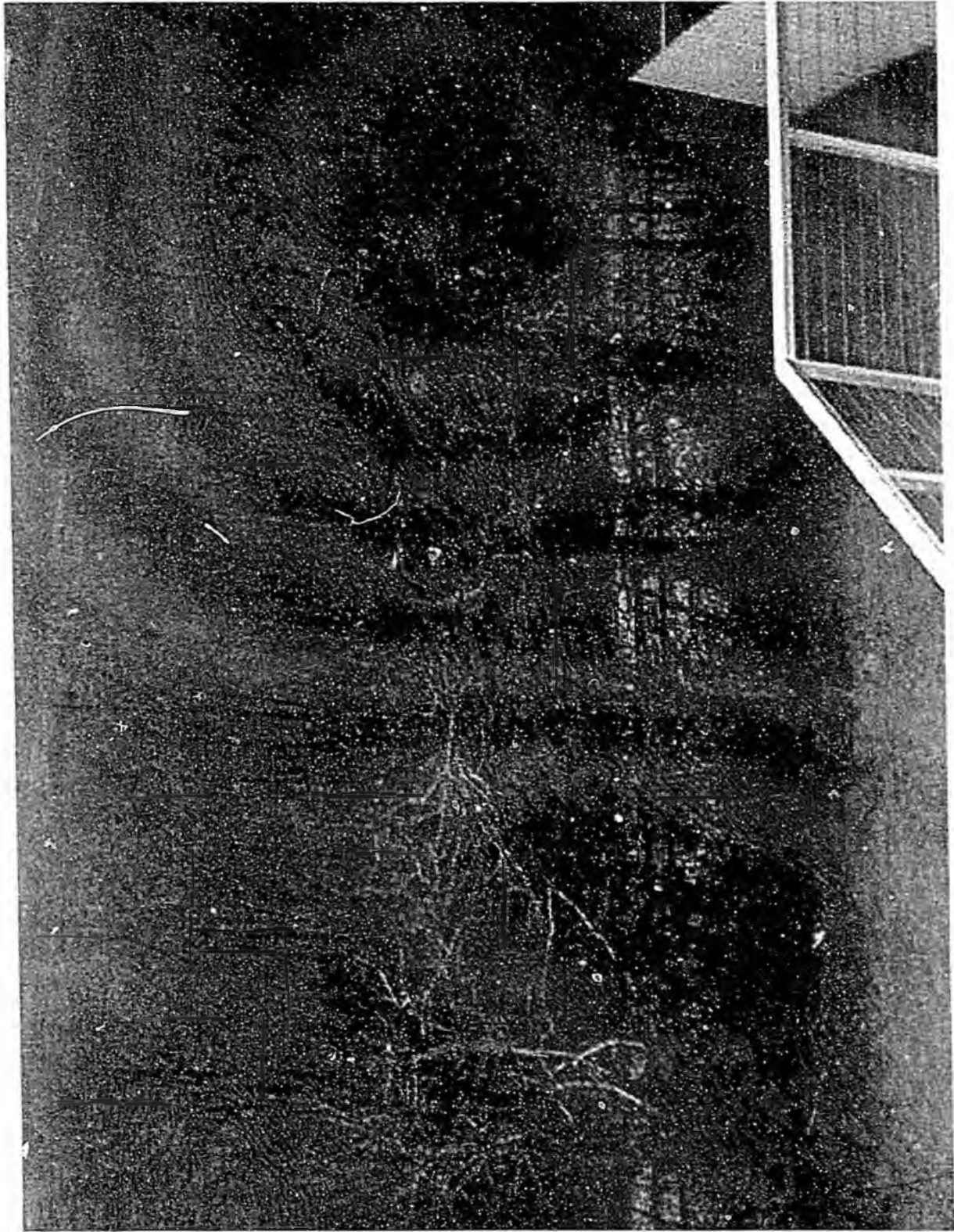
View from 2nd deck - "trail" below



2nd deck - "Trail" below



"Trail" across
backyard along bluff



Trachas below



Tracks

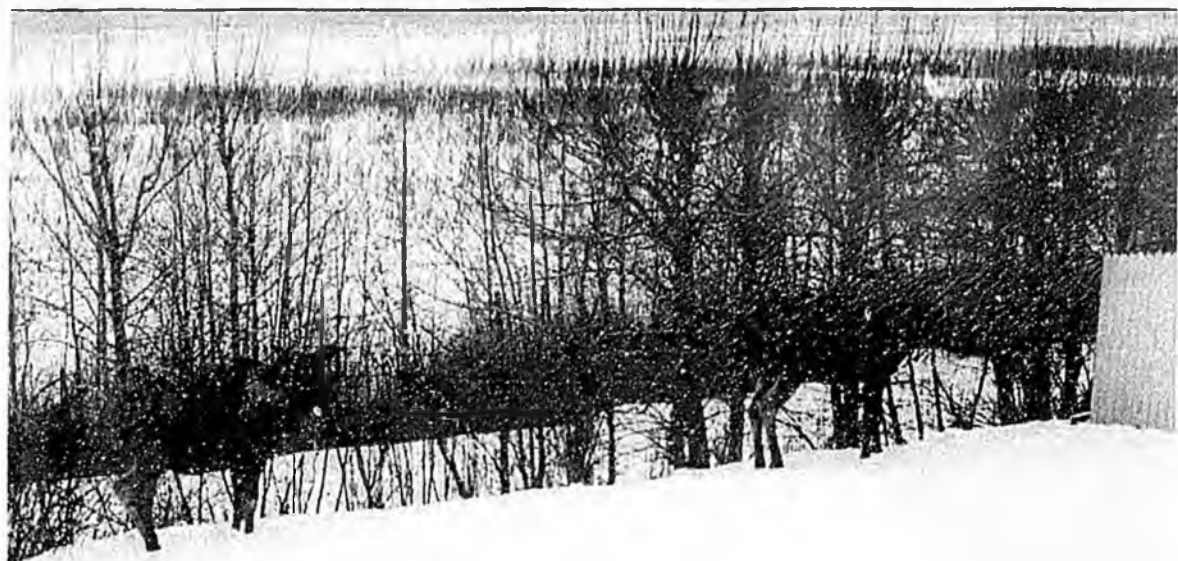
wildlife eat and access refuge
below bluff

Their route crosses proposed "trail"

Joan Stolle

14020 JARVI DR.

Anchorage, AK
99515



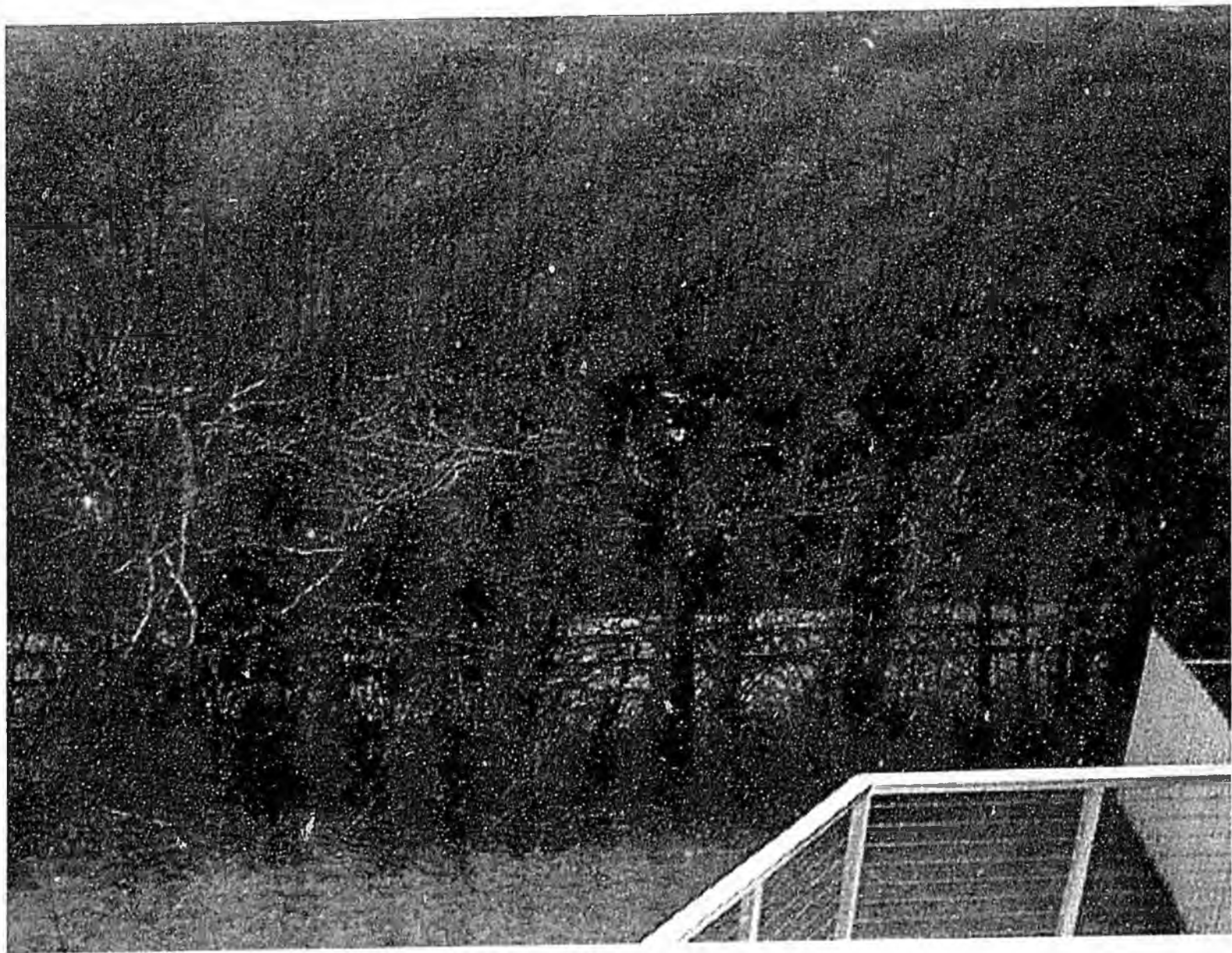
Wildlife escape train traffic
below bluff from Refuge
across proposed "trail"

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Central Microfilm Services
Department of Education & Early Development
State of Alaska



Tracks below.

Business.
affid. purchased, secured
informal of Mr. Dickson home.
available!

Process flawed

as property owner whose property would be taken - never contacted
att. has deed document in file re: easement - litigation for - Court
trial below. & State, federal + Mo. & 177

Property is now
on table as of 11/21/62!
Property devalued
on land
could all have been held.



Tracks

wildlife eat and access refuge
below bluff

Their route crosses proposed "trail"

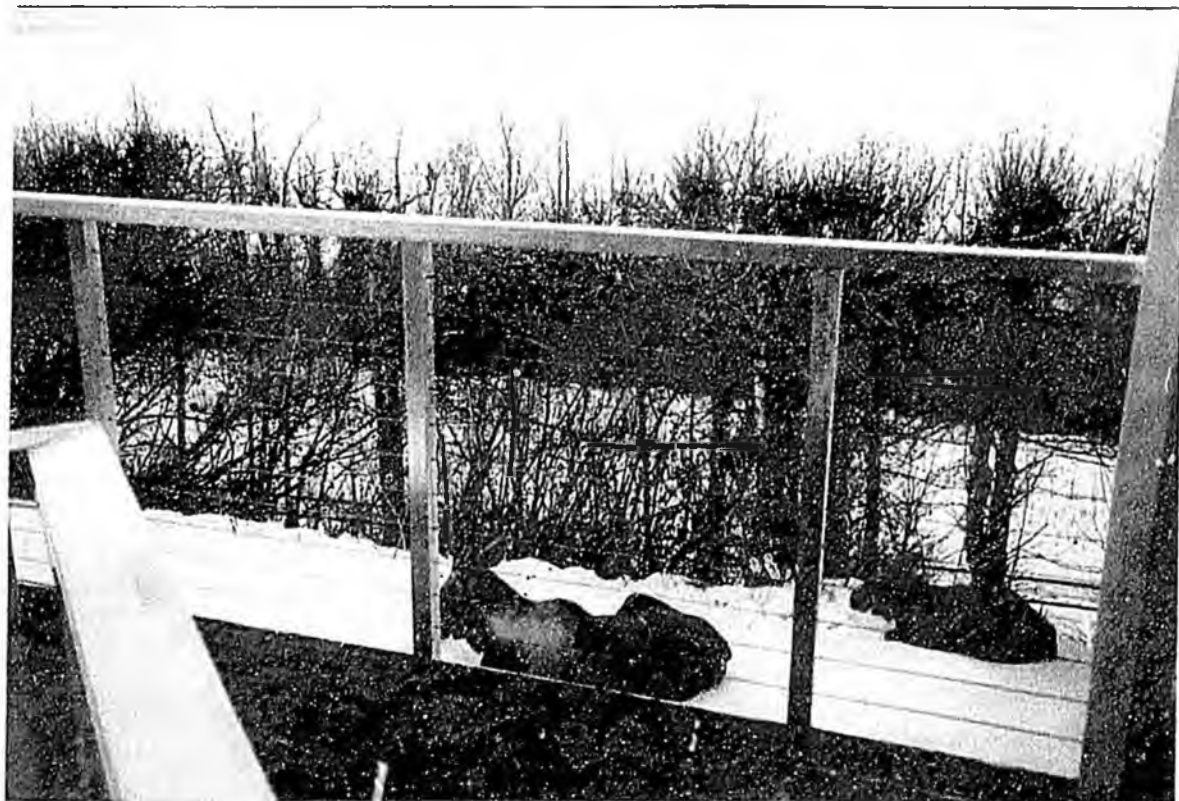
Joan Stolle

14020 JARVI DR.

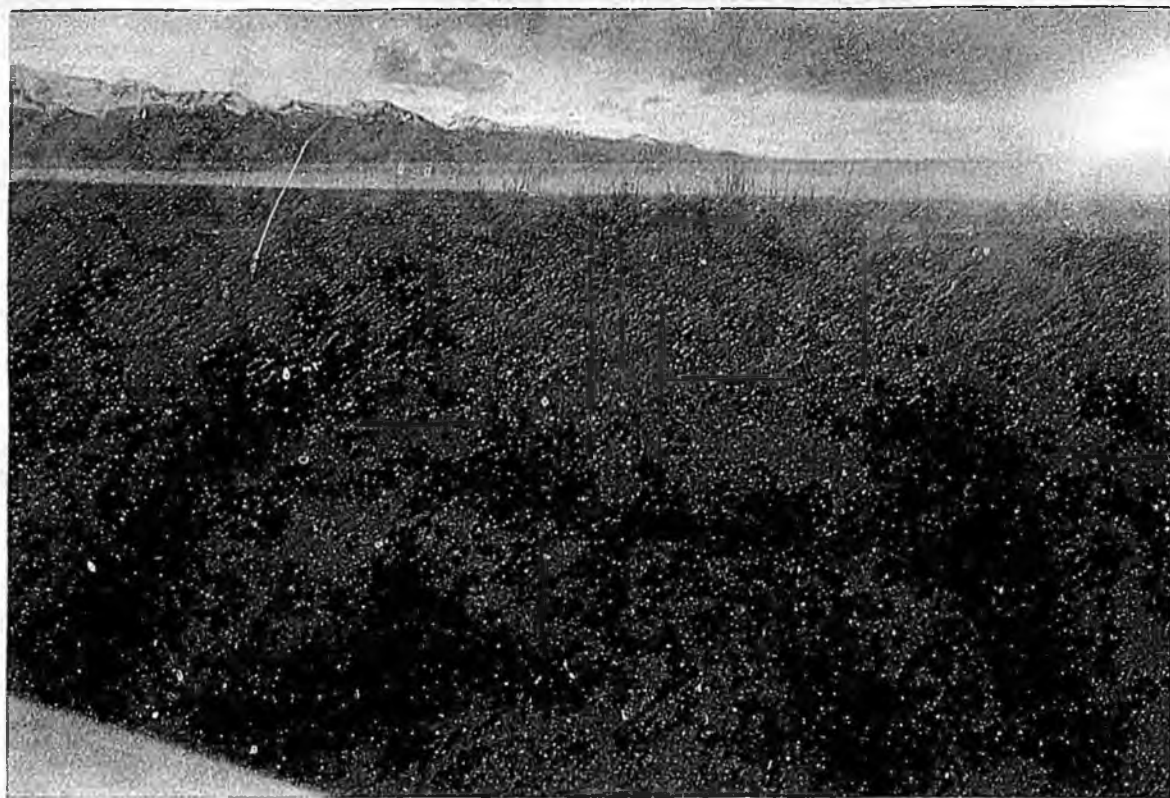
Anchorage, AK
99515



Wildlife escape train traffic
below bluff from Refuge
across proposed "trail"



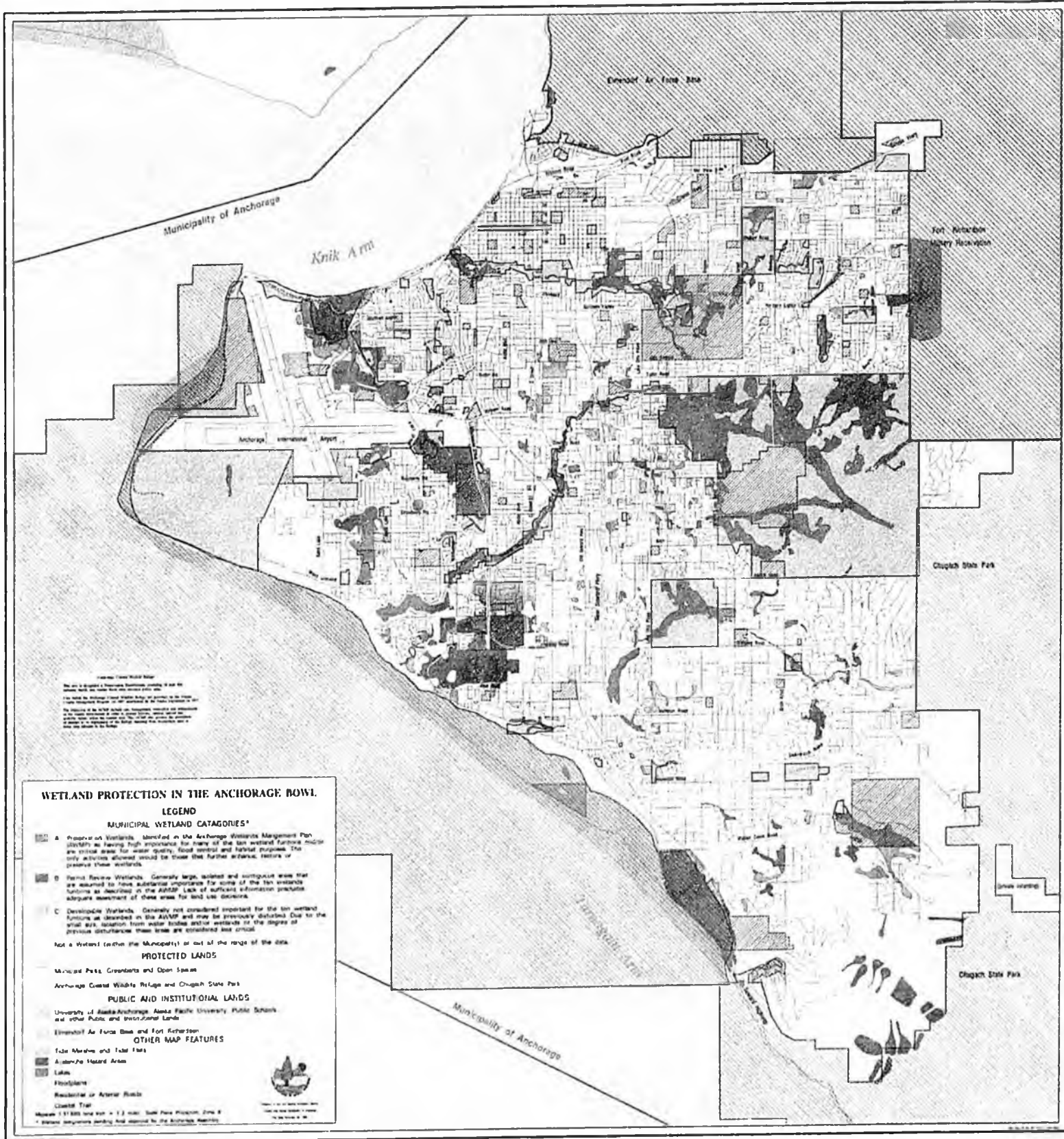
Wildlife nest where proposed
"trail" will be



Wildlife
nest

(Summer)











WETLAND PROTECTION IN THE ANCHORAGE BOWL

LEGEND



MUNICIPAL WETLAND CATEGORIES*

-  A Preservation Wetlands. Identified in the Anchorage Wetlands Management Plan (AWMP) as having high importance for many of the ten wetland functions and/or are critical areas for water quality, flood control and habitat purposes. The only activities allowed would be those that further enhance, restore or preserve these wetlands.
-  B Permit Review Wetlands. Generally large, isolated and contiguous areas that are assumed to have substantial importance for some of the ten wetland functions as described in the AWMP. Lack of sufficient information precludes adequate assessment of these areas for land use decisions.
-  C Developable Wetlands. Generally not considered important for the ten wetland functions as described in the AWMP and may be previously disturbed. Due to the small size, isolation from water bodies and/or wetlands or the degree of previous disturbance, these areas are considered less critical.
-  Not a Wetland (within the Municipality) or out of the range of the data.







PROTECTED LANDS

-  Municipal Parks, Greenbelts and Open Spaces
-  Anchorage Coastal Wildlife Refuge and Chugach State Park

PUBLIC AND INSTITUTIONAL LANDS

-  University of Alaska Anchorage, Alaska Pacific University, Public Schools and other Public and Institutional Lands
-  Elmendorf Air Force Base and Fort Richardson

OTHER MAP FEATURES

-  Tidal Marshes and Tidal Flats
-  Avalanche Hazard Areas
-  Lakes
-  Floodplains
-  Residential or Aesthetic Hazards
-  Coastal Trail

Scale: 1:31,600 (not to scale) State Plane Projection, Zone 4

* Wetland designations pending final approval by the Anchorage Assembly



PLANNED BY: JAY BIRD, VICTOR BIRD
DESIGNED AND DRAWN BY: VICTOR BIRD
FOR USE BY: ANCHORAGE, ALASKA

Anchorage Coastal Wildlife Refuge

This area is designated a Preservation Environment, consisting of tidal flat, saltwater marsh, and coastal flood zone resource policy units.

Uses within the Anchorage Coastal Wildlife Refuge are governed by the Alaska Coastal Management Program (ACMP) established by the Alaska Legislature in 1977.

The objectives of the ACMP include use, management, restoration and enhancement of the coastal environment in order to protect historic, cultural, natural and aesthetic values within the coastal area. The ACMP also governs the prevention of damage to or degradation of the Refuge resulting from inconsistent land or water uses adjacent to the Refuge.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB23
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: DOT&PF
 Title An Act relating to public rights-of-way and easements for surface transportation BRU Administration and Support
 Component Commissioner's Office
 Sponsor B Stevens
 Requester STRA Component No. 530

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation, unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	***	***	***	***	***	***
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 *** The environmental document approval for the south coastal trail extension project is the only current project that could be affected by this legislation. That project is already subject to the "Section 4(f)" provisions addressed in 23 CFR 771.135. Section 4(f) sets an extraordinarily high standard for placing the trail within the ACWR including a determination that "there is no feasible and prudent alternative to the use of land from the property." Due to the 4(f) provision, the possibility of a trail being placed within the refuge is highly unlikely. Therefore, this legislation will likely have no affect on the project or the department's capital or operating budget.

Prepared by: Dennis R. Poshard Phone 465-3900
 Division: Special Assistant to Commissioner Date/Time 3/4/03 10:48 AM
 Approved by: Commissioner Mike Barton Date 3/4/2003
 Agency: Alaska Department of Transportation and Public Facilities

SB

40

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB 40
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: DOT&PF
 Title Construction of Highways by DOT&PF BRU Construction and CIP Support
 Component All Regional Components
 Sponsor Cowdery
 Requester S TRA Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

If approved, SB 40 would prohibit the department from using state forces to construct (Force Account Construction or FAC) highway projects if the value of the project was greater than \$250,000. The majority of projects that are considered for force account construction are federally funded. Federal provisions require that prior to approval of a force account project, the state must determine that this method will result in cost savings.

Since it is not possible to determine which projects will be considered for FAC over the next six years, we will base the projected savings on Calendar Year 2002. The estimated savings on 2002 force account projects (greater than \$250,000) was \$4,267,700. Assuming the amount of force account projects remains constant over the next six years, the lost savings would total \$25,606,200.

Prepared by: Dennis R. Poshard Phone 465-3904
 Division: Special Assistant to Commissioner Date/Time 2/18/03 11:07 AM
 Approved by: Acting Commissioner Mike Barton Date 2/18/2003
 Agency: Alaska Department of Transportation and Public Facilities



Sen. John J. Cowdery, Chair

Senate Transportation Committee

Call: 465-4921 Fax: 465-2069

CONTENTS OF PACKET: SB 40

- A SB 53 version 23-LS0381\A**
- B Fiscal Note (*pending*)**
- C Sponsor Statement**
- D ABC position paper**
- E DOT force account report**

- Sen. Pres. THERIAULT
- Sen. WAGONER
- Sen. LINCOLN
- Sen. OLSON

DOT&PF FORCE ACCOUNT REPORT

By Calendar Year - Dollar Amounts are in Thousands

Labor = The "Labor" column includes State owned equipment charges. And, where applicable, it includes small contracts let to entities that supplemented State Force Account work.

Other = Material, rental equipment, etc. costs are shown in the "Other" column. Where only an estimated overall cost was available, the cost was placed solely in the "Labor" column. This results in an inflated estimate of the Labor costs associated with Force Account projects.

1998

Number	Name	M&O	Local Agency	Village Safe Water	Labor \$	Other \$
001	NR NHS Road Pave & Bridge Refurb	X			1,764.0	1,386.0
002	CE NHS Crack Sealing & Bridge Repair	X			670.0	249.3
003	KTN-Cent Bus Dist Sidewalk Imp.		X		134.5	70.3
004	NR Surface Maintenance & Bridge Rehab.	X			1,064.0	
005	Selawik Boardwalk Improvements		X		75.0	310.0
006	Rural Ak. Sanitation Rds.-Chitgenik Lagoon			X	350.0	450.0
007	SE Gold Rush Centennial Enhancements	X			20.2	7.0
008	SE NHS/Non Pave & Bridge Refurb.	X			500.0	
009	Konglginak Sanitation Boardwalk			X	250.0	450.0
010	SE Jnu-Hazard Elimination	X			48.7	
011	KTN-Waterfront Promenade		X		82.2	17.5
Totals					\$ 4,958.6	\$ 2,940.1

Total dollars committed to surface transportation funding for 1998 was \$ 406.3 million.

1998 FA work performed = 1.94 % of the total surface transportation program

\$ 7,898.7

1999

001	NR FFY 99 NHS Prev. Maint. & Repairs	X			2,000.0	1,850.0
002	CE Bridge Maint/Repair FY 99	X			284.3	74.8
003	NR FFY 99 Non-NHS Maint. & Repairs	X			836.0	1,064.0
004	CE Crack Seal Program FY 99	X			643.4	224.3
005	SE NHS Pavement Rehab.	X			147.0	653.0
006	CE Asphalt Pave. Surface Refurb. FY 99	X			383.9	399.6
007	Force Account (AMHS) Wireless Com.	X			33.4	135.6
008	SE Non-NHS Pave. Rehab. FY 99	X			600.0	
009	NR Dalton Hwy. Erosion Control	X			15.3	102.7
010	NR Surface Treatment, Brenwick/Craig	X			73.6	129.4
011	CE FY 99, Non-NHS Fed. Crack Seal Pro.	X			200.4	69.3
Totals					\$ 5,217.3	\$ 4,702.7

Total dollars committed to surface transportation funding for 1999 was \$ 524.0 million.

1999 FA work performed = 1.89 % of the total surface transportation program

\$ 9,920.0

2000

001	NR FFY 00 NHS M&O Prev. Maint.	X			2,215.6	1,604.4
002	NR FFY 00 CTP M&O Prev. Maint.	X			1,725.5	1,249.5
003	CE: FY 00 Central Region Crack Seal Crew	X			704.3	189.4
004	SE Non-NHS Pavement Rehab. (FFY00)	X			256.7	576.1
005	SE Road Surface Treatment (FFY00)	X			253.6	552.4
006	CE: Interstate Maint. & Bridge Repair FY00	X			260.4	139.3
007	Proj. #66740, Russian Mission AWOS Pad		X		47.2	
008	Proj. #66740, Russian Mission Airport Clearing		X		122.0	
009	CE: Bridge Maint./Repair Non-NHS FY 00	X			278.0	121.5
010	CE: Cascade Shop Reconstruction	X			82.0	230.0
011	SE Haines-Litak Rd. Storm Drain	X			207.0	
012	Cheforak Sanitation Boardwalk			X	262.2	1,117.8
013	CE: FY00 Non-NHS Fed. Crack Seal Pro.	X			580.6	227.8
014	SE Haines-Chilkat Lake Rd.	X			310.0	190.0
015	SE Skagway-Taiya River Erosion Control	X			90.0	
016	Married Man's Trail Lighting		X		40.6	22.1
017	St. Mary's Airport Rd. Rehab.	X			1,205.6	1,793.9
018	SE Wrangell Airport Control Reg. Shelter	X			11.9	
019	Nunapitchuk Sanitation Boardwalk			X	399.0	1,701.0
Totals					\$ 9,052.2	\$ 9,715.2

Total dollars committed to surface transportation funding for 2000 was \$ 463.8 million.

2000 FA work performed = 4.05 % of the total surface transportation program

\$ 18,767.4

2001

001	NR FFY 01 M&O Preventive Maintenance	X		7,150.0	
002	CE: FY 01 Non-NHS Fed. Crack Sealing Prog.	X		339.4	86.5
003	NR FFY 01 CTP Pavement Markings	X		7.3	43.3
004	South Naknek Airport Repairs		X	30.0	15.0
005	CE: Bridge Maint./Repair NHS FY 01	X		325.5	35.6
006	Kwigillingok Sanitation Road		X	764.2	2,235.8
007	Cordova Sidewalks Asbestos Removal	X		14.2	2.7
008	CE: Bridge Maint./Repair Non-NHS FY 01	X		373.6	74.0
009	CE: FY 02 NHS Crackseal IPM	X		701.1	210.6
010	CE: FY 02 Non-NHS Crackseal Program	X		670.6	185.6
Totals				\$ 10,375.9	\$ 2,889.1

Total dollars committed to surface transportation funding for 2001 was \$ 380.0 million.

2001 FA work performed = 3.49 % of the total surface transportation program

\$ 13,265.0

2002

001	NR FFY 02 M&O Preventative Maintenance	X		8,860.0	
002	SE Region Road Surface Treatment	X		527.0	
003	Dalton Hwy. Painted Traffic Markings	X		113.6	61.4
004	CR Bridge M& R. NHS FY '02	X		118.5	200.0
005	Soldotna: East Redoubt Ave., Improvements		X	633.0	
006	Statewide Emergency Sign & Traffic Signals	X	X	430.0	
007	Northern Region Winter Trail Marking		X	182.8	111.0
008	King Cove Lagoon Bridge		X		5.0
Totals				\$ 10,864.9	\$ 377.4

Total dollars committed to surface transportation funding for 2002 was \$ 505.0 million.

2002 FA work performed = 2.23 % of the total surface transportation program

\$ 11,242.3

The average of all FA work performed (1998 - 2002) = 2.68 %

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: SB40-DOT-CO-3-26-04
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: DOT&PF
Title Construction of highways by DOT&PF RDU Administration & Support
Component Commissioner's Office
Sponsor Cowdery
Requester Senate Finance Component No. 530

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Nona Wilson Phone 465-6973
Division Legislative Liaison Date/Time 3/26/04 9:54 AM
Approved by: John MacKinnon Date 3/26/2004
Agency Deputy Commissioner

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 40
(S) Publish Date: 3/20/03

Revision Date/Time (Note if correction): _____ Dept. Affected: DOT&PF
Title: Construction of Highways by DOT&PF BRU: Construction and CIP Support
Component: All Regional Components
Sponsor: Cowdery
Requester: STRA Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

If approved, SB 40 would prohibit the department from using state forces to construct (Force Account Construction or FAC) highway projects if the value of the project was greater than \$250,000. The majority of projects that are considered for force account construction are federally funded. Federal provisions require that prior to approval of a force account project, the state must determine that this method will result in cost savings.

Since it is not possible to determine which projects will be considered for FAC over the next six years, we will base the projected savings on Calendar Year 2002. The estimated savings on 2002 force account projects (greater than \$250,000) was \$4,267,700. Assuming the amount of force account projects remains constant over the next six years, the lost savings would total \$25,606,200.

Prepared by: Dennis R. Poshard Phone 465-3904
Division: Special Assistant to Commissioner Date/Time 2/18/03 11:40 AM
Approved by: Acting Commissioner Mike Barton Date 2/18/2003
Agency: Alaska Department of Transportation and Public Facilities

re: SB 40 alternatives:

Is DELIVERY ORDER CONTRACTING an alternative?

- DOC is used by, and was developed by, the Department of Defense (it's called JOC by the Army, SABER by the Air Force) and is being increasingly used by local governments and educational facilities.
- DOC is a competitively bid, fixed price, indefinite quantity, indefinite delivery (IDIQ), general construction contract.
- The contract typically has a base year with 2 to 4 option years.
- The contract sets parameters such as location of work, type of work to be done, design criteria, etc.
- A DOC contract uses unit price guides (UPG) and/or a unit-price book (UPB) to establish a price for a multitude of line items of work. A typical UPB has about 40,000 line items in order to cover just about every imaginable task. Items that are not in the book are then negotiated, priced, and added to the UPB. A UPG uses computer cost databases, etc.
- The contractor bids a coefficient that is a markup or a markdown to the UPB items, rather than a dollar price.

What you get with a Delivery Order Contract:

- On-call general contractor where prices for line items of work are predetermined.
- A contract that is easy to manage.
- A contract that puts more money into "hard construction" instead of soft upfront costs.

Need
CS
Final

23-LS1879\D
Bullock
3/31/04

CS FOR SENATE BILL NO. 382(TRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE SENATE TRANSPORTATION COMMITTEE

Offered:

Referred:

Sponsor(s): SENATE TRANSPORTATION COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to replat approval; relating to the platting of right-of-way acquired**
2 **through eminent domain proceedings; and providing for an effective date."**

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

4 *** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
5 to read:

6 **PURPOSE AND INTENT.** (a) The purpose of this Act is to confirm the municipal
7 role in eminent domain proceedings while at the same time clarifying that that role is not
8 intended to require the same substantive review or procedures for review of replats for the
9 acquisition of property by the state or a municipality as required in replats for private
10 landowner subdivisions or zoning reviews. Regulations adopted by the Department of
11 Transportation and Public Facilities shall be the primary and governing authority for these
12 replat approval proceedings.

13 (b) It is the intent of the legislature to

14 (1) confirm the authority of an agency of the state or a municipality to conduct

1 condemnation proceedings so long as the agency of the state or municipality obtains
2 preliminary replat approval as provided for in this Act, notwithstanding challenges to
3 particular municipal replat ordinances, review standards, procedures, or applications; and

4 (2) apply secs. 1 and 2 of this Act retrospectively to July 1, 1999, and to
5 existing litigation such as State of Alaska v. Hartman, 3AN-03-13875 CI and State of Alaska
6 v. Hinkel, 3AN-04-4768 CI.

7 * Sec. 2. AS 09.55.275 is repealed and reenacted to read:

8 **Sec. 09.55.275. Replat approval.** An agency of the state or municipality
9 acquiring property in fee that results in a boundary change located within a
10 municipality exercising the powers conferred by AS 29.35.180 or 29.35.260(c) shall
11 conform to this section and AS 44.42.085 by obtaining preliminary approval of a
12 replat showing clearly the location of the proposed public street or other acquisition of
13 property. The platting authority may establish applicable review procedures and
14 standards, consistent with AS 44.42.085 and regulations adopted under that section,
15 for a replat made for the purpose of a right-of-way acquisition or condemnation. If no
16 municipal standards and procedures are in effect, then the provision of AS 44.42.085
17 and the regulations adopted under that section shall apply. Final approval of replat
18 shall also be obtained. However, if a state agency clearly demonstrates an overriding
19 state interest, a waiver of the municipal approval requirements in this section may be
20 granted by the governor.

21 * Sec. 3. AS 44.42 is amended by adding a new section to read:

22 **Sec. 44.42.085. Platting of right of way acquired through eminent domain**
23 **proceedings.** (a) Except as provided in (c) of this section, the department shall
24 comply with AS 09.55.275 when exercising eminent domain powers in municipalities
25 that exercise the powers conferred by AS 29.35.180 or 29.35.260, ..

26 (b) The department shall adopt regulations providing for uniform procedures
27 and standards for replatting required by (a) of this section. The regulations

28 (1) must be consistent with AS 09.55.240 - 09.55.460, AS 34.60 010 -
29 34.60.150, and 42 U.S.C. 4601 - 4655 (Uniform Relocation Assistance and Real
30 Property Acquisition Policies Act of 1970), as amended;

31 (2) must provide for a review by the platting authority of the

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municipality in which the property subject to the eminent domain proceeding is located; and

(3) may allow the municipal authority to elect to provide preliminary and final replat approval.

(c) The department is exempt from municipal platting requirements that are in conflict with this section and the regulations adopted by the department under (b) of this section.

(d) Neither the adequacy of the municipal replat process or standards, if any, nor the failure of a municipality to follow its own replat process and standards, shall deprive the state of the authority to exercise its power of eminent domain.

* Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to read:

RETROACTIVITY. Sections 1 and 2 of the Act are retroactive to July 1, 1999.

* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).



Alaska State Legislature

Senate Majority Web: <http://www.akrepublicans.org>

Sponsor: Senator John J. Cowdery
Current Version: CSSB40 (FIN)
Contact: Richard F. Schmitz

Fact Sheet for: SB40

Short Title: Construction of Highways by DOT-PF

Summary:

1. SB40 addresses the use of force account spending for construction projects by the Department of Transportation (AkDOT-PF)
2. Construction projects paid for by force accounts do not go through the competitive bid process and use state employees instead of private sector contractors.
3. SB40 limits the use of force accounts to projects under \$250,000.

Benefits:

1. SB40 insures that public construction projects go through a competitive bid process, while allowing DOT-PF employees to take care of minor or routine maintenance.
2. SB40 insures transparency in the spending of public funds, and will help insure private sector Bacon-Davis wages are paid to as many construction workers as possible.
3. SB40 brings DOT-PF in line with state statute, which requires that public spending on construction projects be done by private sector contractors on a competitive bid basis.

Background:

In 1999, a \$4 million road project in Saint Mary's was completed by force account, and not by competitive bid. State law has no cap on the amount that can be spent by force account on a construction project.

The aim of SB40 is to place a \$250,000 cap on force account spending, while insuring that Alaska's contractors will have the opportunity to bid on projects above that figure.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 40
 (S) Publish Date: 3/20/03

Revision Date/Time (Note if correction): _____ Dept. Affected: DOT&PF
 Title Construction of Highways by DOT&PF BRU Construction and CIP Support
 Component All Regional Components
 Sponsor Cowdery
 Requester S TRA Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

If approved, SB 40 would prohibit the department from using state forces to construct (Force Account Construction or FAC) highway projects if the value of the project was greater than \$250,000. The majority of projects that are considered for force account construction are federally funded. Federal provisions require that prior to approval of a force account project, the state must determine that this method will result in cost savings.

Since it is not possible to determine which projects will be considered for FAC over the next six years, we will base the projected savings on Calendar Year 2002. The estimated savings on 2002 force account projects (greater than \$250,000) was \$4,267,700. Assuming the amount of force account projects remains constant over the next six years, the lost savings would total \$25,606,200.

Prepared by: Dennis R. Poshard Phone 465-3904
 Division Special Assistant to Commissioner Date/Time 2/18/03 11:40 AM
 Approved by: Acting Commissioner Mike Barton Date 2/18/2003
 Agency Alaska Department of Transportation and Public Facilities

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSSB 40(FIN)
 (S) Publish Date: 3/31/04

Revision Date/Time (Note if correction): _____ Dept. Affected: DOT&PF
 Title Construction of highways by DOT&PF RDU Administration & Support
 Component Commissioner's Office
 Sponsor Cowdery
 Requester Senate Finance Component No. 530

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Nona Wilson Phone 465-6973
 Division: Legislative Liaison Date/Time 3/26/04 9:54 AM
 Approved by: John MacKinnon Date 3/26/2004
 Agency: Deputy Commissioner



Alaska State Legislature

Senate Majority Web: <http://www.akrepublicans.org>

Sponsor: Senator John Cowdery
Current Version: CSSB 40 (FIN)
Contact: Richard Schmitz, 465-4921
Date: April 5, 2004

CSSB 40
(FIN)
(Ad S)

Fact Sheet for: Senate Bill 40

Short Title: Construction of Highways By DOT-PF

Summary:

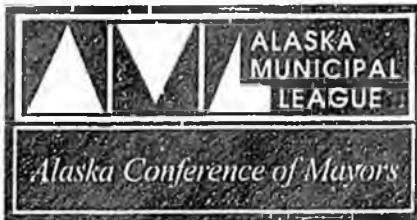
- Limits the use of force account spending for construction projects by the Alaska Department of Transportation & Public Facilities to projects under \$250,000 when it is in the best interest of the State.
- Sunsets in 2008.

Benefits:

- Ensures that large public construction projects go through a competitive bid process, while allowing DOT-PF employees to take care of minor or routine maintenance.
- Ensures transparency in the spending of public funds, and helps ensure private sector Davis-Bacon wages are paid to as many construction workers as possible.
- Brings DOT-PF in line with state statute, which requires that public spending on construction projects be done by private sector contractors on a competitive bid basis.

Background:

Construction projects paid for by force accounts do not go through the competitive bid process and use state employees instead of private sector contractors. In 1999, a \$4 million road project in Saint Mary's was completed by force account, and not by competitive bid. State law has no cap on the amount that can be spent by force account on a construction project. The aim of SB 40 is to place a \$250,000 cap on force account spending, while ensuring that Alaska's contractors will have the opportunity to bid on projects above that figure.



217 Second Street, Suite 200 • Juneau, Alaska 99801
Tel (907) 586-1325 • Fax (907) 463-5480 • www.akml.org

RECEIVED BY

FEB 18 2003

February 18, 2003

Senator Cowdery, Chair
Transportation Committee
State Capitol, Room 101
Juneau, AK 99801

Re: SB 40

Dear Senator Cowdery,

The AML Public Works and Infrastructure Subcommittee reviewed SB 40 and recommends against its adoption.

This summer a number of public and private organizations worked on a compromise that took into consideration all of the aspects of this complex issue. The result is Administrative Order 199. I believe that all of the public and private groups involved in the discussions support working with new procedures.

Sincerely

Kevin Ritchie

Executive Director

SENATOR
JOHN J. COWDERY
Anchorage



Committees
Chair: Rules
Chair: Transportation
Chair: World Trade &
State/Federal Relations
Legislative Council

Senate

January - May:
State Capitol, Suite 101
Juneau, Alaska 99801-1182
Tel: 907-465-3879
Toll Free: 888-269-3879
Fax: 907-465-2069

May - December:
716 W. 4th Avenue
Anchorage, Alaska 99501
Tel: 907-269-0222
Fax: 907-269-0223

Senator_John_Cowdery@legis.state.ak.us

SPONSOR STATEMENT FOR SB40

"An Act relating to the construction of highways by the Department of Transportation and Public Facilities."

In order to maintain transparency and to make certain public funds are spent efficiently, statute requires construction and maintenance contracts be awarded on the basis of a competitive bid. In the case of small projects or repairs, however, the law allows the state, for the purpose of efficiency, to fund a project in-house through what's termed a "force account."

The purpose of SB40 is to reserve the competitive bid process for projects costing more than \$250,000, while continuing to allow the use of force accounts to fund smaller, local projects at the discretion of the (most often) Department of Transportation (DOT-PF).

To date, force account spending by DOT-PF has been consistently used to fund projects costing considerably more than \$250,000. In each case, the check-and-balance protection of a competitive bid has been lost. This can result in the state paying more for a project, while wages paid on an in-house project may be substantially lower than those paid by a private-sector contractor.

Specifically, contractors generally pay "Davis-Bacon" wages, while force account workers are often lower-paid temporary state employees.

Contractors employ skilled managers and maintain an inventory of specialized equipment. Therefore, construction work done in the public sector requires similar staffing as well as inventory, thus resulting in increased cost to the ratepayer.

SB40 also allows the use of force accounts on projects above the \$250,000 threshold when there is no responsive bidder.

**SENATE COMMITTEE REPORT
First Committee of Referral**

DATE: 1/29/03

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 3/18/03

Transportation Committee considered SENATE BILL NO. 40

SB 40 CONSTRUCTION OF HIGHWAYS BY DOTPF

"An Act relating to construction of highways by the Department of Transportation and Public Facilities."

and recommends:

be replaced with _____ CS _____ (_____)

adopt previous _____ CS _____ (_____)

attached amendment(s)

adopt Letter of Intent by _____ Committee

further referral to _____ Committee

Senate Bill:

same title

new title

House Bill:

same title

technical title

new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
DOTPF	2/18		<input checked="" type="checkbox"/>	

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>Donald C. Collier</i>		<input checked="" type="checkbox"/>		
<i>Gene Hepinault</i>			<input checked="" type="checkbox"/>	
<i>Thomas H. Wagoner</i>			<input checked="" type="checkbox"/>	
<i>Debra J. ...</i>		<input checked="" type="checkbox"/>		
CHAIR: <i>John J. ...</i>	<input checked="" type="checkbox"/>			

About ABC

Associated Builders and Contractors, Inc. (ABC) is a national construction trade association dedicated to advancing the free enterprise system. We strive to improve the environment in which our members operate and provide our members with a competitive advantage in the industry.

ABC is the largest merit construction trade association in the world and has grown to more than 23,000 members with over 80 chapters throughout the United States. Representing general contractors, specialty contractors, suppliers and associate members equally, ABC is considered to be one of the most influential lobbying groups in Washington.

Founded in early 1997, ABC of Alaska was chartered as a full service chapter in May of 2000. The chapter has been built around a belief in the merit philosophy, which states:

A project should be awarded to the most responsive bidder, based on safety, quality and price; whether workers choose to be union or open-shop.

This idea may occasionally put ABC and labor unions on opposite sides of legal and legislative issues, but to say ABC is anti-union is inaccurate. In fact, merit shop is often best described as union and non-union crafts working side by side to complete a project on time and under budget.

ABC Supports Free Enterprise: We believe in the right to do business free from outside interference and in the freedom to compete openly and fairly. We are advocates for our members.

ABC Brings You New Business: People prefer to do business with those they know. ABC provides many opportunities to make new connections and increase your bottom line through networking with other contractors. Many members have expanded their business relationships by attending ABC functions.

ABC Keeps You Informed: Members receive timely information year-round on local and national political issues and changes in the construction industry environment. Information is provided in targeted communications (faxes and email), in ABC national's *Construction Executive* monthly magazine, ABC of Alaska's *Network* bi-monthly newsletter, and other literature.



Legislative Positions

March 15, 2004

Alaska Chapter

SB 276 / HB 403 – Alaska Insurance Guaranty Association Assessments

ABC of Alaska has a significant concern about the impact of this legislation on the construction industry. While we have identified no reluctance on the part of the industry to support an increase in assessments to cover shortfall in the Alaska Insurance Guaranty Association pool, the timing of implementation on any assessment increase will be critical.

Contractors are now bidding their work for the prime construction season which will run from spring through the end of the year. Bids consider existing Worker's Compensation rates to be static until each employer's renewal. If rates increase in the midst of an insurance year, contractor margins, already slim, will be significantly impacted.

In the construction industry, Worker's Compensation costs can be averaged from 10% to 12% of payroll costs. Last year's construction payroll was \$881 million and the Alaska Department of Labor Research & Analysis Division estimates a 3-5% increase this year. If we estimate a 4% increase, we are looking at total construction payroll of \$916 million in 2004. At 10%, the total worker's compensation rate for the industry can be estimated at \$91.6 million for 2004. A two percent increase will be \$1.8 million for the year. If we assume that by June the balance of the season's work has been awarded and contracted, then the industry will absorb up to a \$900,000 dollar hit on projects already bid and contracted for the year. Where in a normal environment costs are shared with construction buyers, in this scenario, the full brunt of the cost increase will be born by the industry.

The simple way to avoid this impact is to ensure that the change to the Worker's Compensation fee structure is a "new and renewal change" rather than an "in force" change. If increases are incorporated in Worker's Compensation fees at renewal, the contractor is already looking ahead to increases or adjustments in that expense as he or she is bidding.

SB 360 / HB 497 – Safety Code Commission

While ABC of Alaska generally supports a re-structuring of the system for approving building and life safety codes, we have significant concerns over the proposed structure of a Building and Life Safety Code Commission. The current composition relies heavily on contractors and slights the contributions that can be made by designers. Designers provide the technical background on the scientific and engineering basis for code provisions and the contractors provide the necessary knowledge of how buildings and their systems are constructed. Both are essential and any Code Commission must achieve a balance between these two groups.

To provide the necessary balance, we suggest that the Commission be comprised of a civil engineer who specializes in structural engineering, a mechanical engineer, an electrical engineer, a general contractor, three specialty contractors, an architect and either a fire marshal, building official or general industry representative. The total Commission structure would be nine, evenly balanced between the design and construction communities. Unless this balance is achieved, we cannot support this legislation.

A proposed amendment to implement this recommendation may be obtained by contacting Colin Maynard, PE (907-274-2236, cmaynard@bbfm.com).

SB 323 – Project Owner's Liability for Worker's Compensation

ABC Supports SB 323. Current law governing project owner liability for contracted work has been interpreted by the courts to extend liability to the owner so long as the owner retains any control over the contractor work, including any required submission of project safety plans. With this broad interpretation of liability by the courts, the only method a project owner has to protect him or herself from liability is to completely step away from an active role in running a safe project. Providing any disincentive for an owner to engage in project safety is a disservice to Alaska's workers. It is important to bring the project owner into clear responsibility for workers' safety and that responsibility is rightly the workers' compensation system. With that responsibility comes the protection of exclusivity, ensuring that those who are responsible for providing workers' compensation are not at additional at risk of tort liability.

The Alaska Workers' Compensation Act is intended to provide injured workers with reasonable compensation for their work related injuries without regard to fault or the cause of the injury. If the current benefits are not adequate to fully compensate injured workers, then the amount and type of recoverable benefits should be reviewed. Leaving project owners on the hook for tort liability is not a solution that protects worker's interests. Extending the exclusivity protection of workers' compensation to project owners brings those owners fully into the arena of worker protection as those protections and rights are established by state law. This protection also eliminates a circumstance where construction contractors have been at double risk regarding worker injury.

The courts interpretation of project owner liability has encouraged owners to shift liability risk back to their contractors through indemnity provisions in contracts. In the event an injured worker is successful in filing suit against an owner and prevails in court, the owner simply turns to the contractor's indemnification clause for compensation. The workers' compensation exclusion is then effectively waived for the contractor. In short, this legislation addresses significant loopholes in existing workers' compensation law.

HB 268 – Limiting specialty contractor exemption from design requirements

This legislation effectively narrows the specialty contractor exemption from architecturally licensed design for work within the contractor's specialty. This legislation is an example of an attempt to modify underlying statute to resolve a problem occurring out of lack of enforcement.

Current regulations require that any specialty contractor on commercial work will operate under the direction of a general contractor. The general contractor is responsible for obtaining a safety code review of project plans by the Dept. of Public Safety. This requirement, if enforced, ensures that the public health, safety and welfare is met.

Enforcement of existing statute and regulation is a much cleaner solution than developing new legislation that will require full architectural drawings on any commercial project, no matter how small. Envision a regulation that requires full architectural drawings for every tenant improvement project that might require a fence to be installed, a non-structural partition to be moved or installed, an outlet or fixture to be added or any other non-structural modification. ABC of Alaska opposes this legislation and supports enforcement of existing statute and regulation to ensure the safety of Alaska's citizens.

SB 253 – Exempts the Gasline Authority from State Procurement Code

The protections inherent in the state procurement code are the foundation of a competitive environment in governmental procurement. We believe any deviation from this code must be extremely limited in scope and have requested that SB 253 be amended to limit the scope of any Gasline Authority exemption from the code.

Other Legislation

ABC Supports: SB 311 / HB 450 – Structural overhaul of the Worker's Compensation system.

ABC Supports: HB 350 – Limits damages for a defect in design, construction and remodeling of certain dwellings.



Regulatory Review Priorities

March 15, 2004

Alaska Chapter

Contractor Licensing

Contractor Licensing requirements are not enforced throughout the state. Specifically, outside of the major metropolitan areas there is no inspection system for enforcing licensing requirements. In some areas, handyman licenses are available to individuals who perform repair and construction. There is anecdotal evidence that these provisional license holders are bidding commercial work. This lack of enforcement allows some businesses to operate outside of regulatory requirements, placing compliant companies at a competitive disadvantage.

Effective enforcement of regulations requires real consequences for failure to comply. If there is no consequence for a failure to comply, then the individual or company who is least committed to quality and public safety may easily opt out of the regulatory requirement and achieve a competitive advantage over the contractor committed to compliance. The long-term effects of this behavior are costs to the state in safety, potential legal costs and, most often, tighter regulations that are also not enforced, creating a greater disparity in the industry ad infinitum.

Electrical & Mechanical Trainee Card Requirements

The regulation established by the Department of Labor requiring that all entrants into the electrical and plumbing trades are enrolled into a registered apprenticeship program is not enforceable as to its intent. Presumably the regulatory intent is to require training for these trades that includes related instruction as well as on-the-job training. Unfortunately, as it currently exists the regulation does not impose any requirement that an individual actually receive training. It is perfectly feasible that an individual might enroll in an apprenticeship program, obtain a trainee certificate from the state and never complete a day's worth of school.

In order to achieve the objective of training, the regulation must require that an individual be successful in apprenticeship in order to receive a renewal certificate and to complete an apprenticeship in order to obtain a journeyman card. If the state cannot impose this type of performance requirement, then the regulation should revert to its original form, establishing on-the-job training as an acceptable training environment for new entrants to the trades.

Prevailing Wage Surveys and Wage Classifications

Regulatory implementation of prevailing wage statute has effectively become simply a methodology for imposing union work rules and job classifications on the entire industry without review. Recently, changes have been made to the Laborers and Mechanics Minimum Rates of Pay that have significantly expanded the scope of job classifications with no apparent public comment process. Additionally, wages are established by union wage rates without a survey process, even though survey statistics are, apparently, collected by the state.



Public Policy Positions

March 15, 2004

Alaska Chapter

Open Competition

ABC – Associated Builders & Contractors – of Alaska, Inc. envisions a future where all construction projects are awarded based on safety, quality and price without regard for political or labor affiliation. It is this philosophy that drives every effort of the association and its participating members. Fair and open competition in government procurement ensures the best material, labor and management resources are available for each and every project. Our goal is to promote fair and open competition in the construction industry.

Responsible Regulation

ABC believes that responsible regulation is important to the construction industry and to safe construction in Alaska. It is imperative, however, that each regulation put in place be enforced consistently and equitably throughout the industry. There are numerous examples of un-enforced regulations in this industry, and we have prioritized them for administrative review, but the pertinent fact is that regulation without enforcement allows some businesses to operate outside of regulatory requirements, placing compliant companies at a competitive disadvantage. The long-term effects of this inequity are: costs to the state in safety; potential legal costs; and, most often, tighter regulations that are also not enforced, creating a greater disparity in the industry, ad infinitum.

To break the chain of increasingly unenforceable regulation, the legislature must review and evaluate enforcement of any existing regulation prior to modification of underlying statute. Simultaneously, the Administration must review existing regulations to evaluate the enforcement environment. Regulations that cannot be enforced should be repealed, if they are critical, they must be enforced.

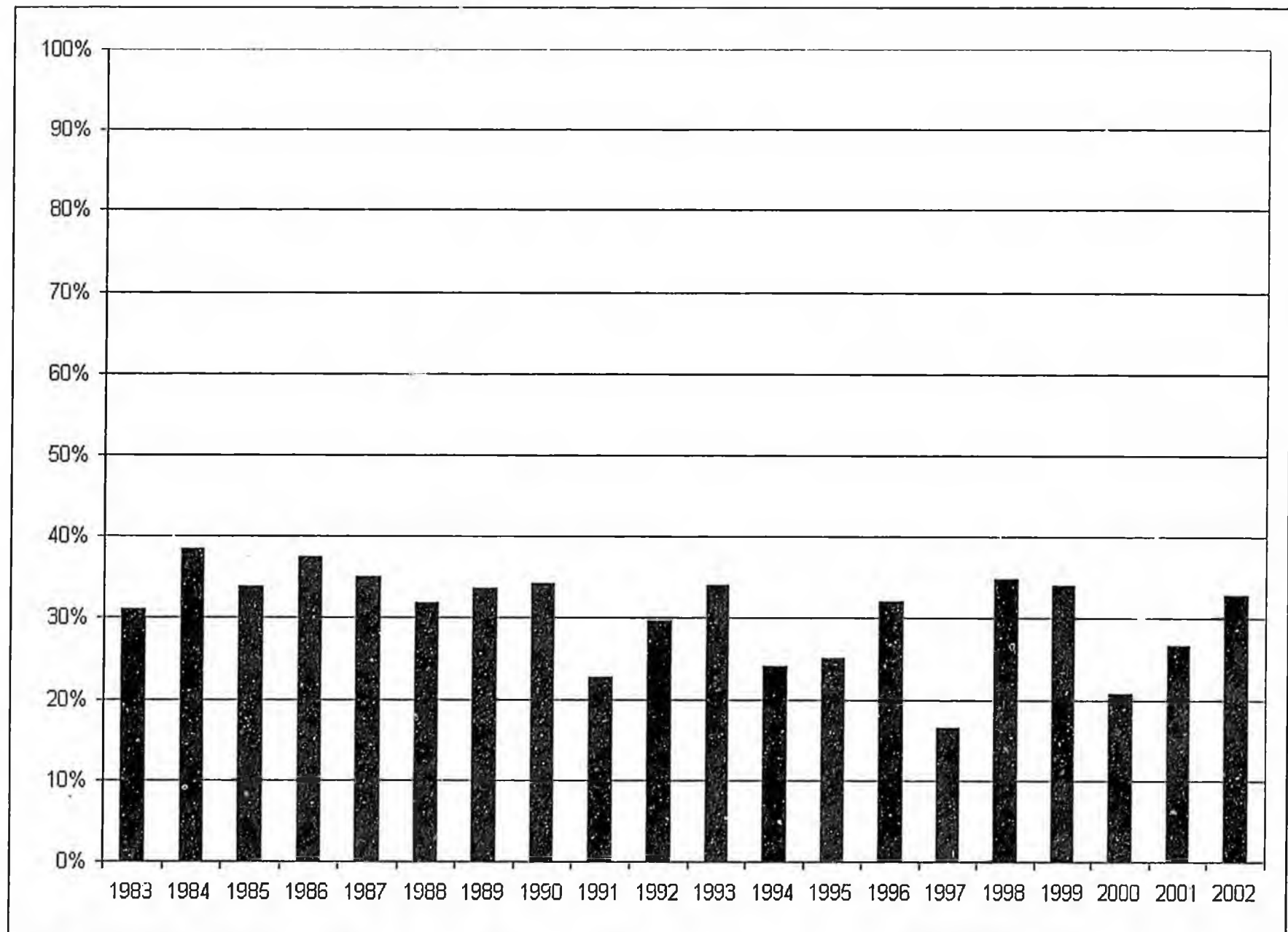
The Gas Pipeline – Alaskan jobs for Alaskan Workers

The need to provide quality employment and career advancement opportunities to Alaska's workers is a priority for all Alaskans. With this in mind, ABC of Alaska proposes that all construction entities, regardless of whether they are union, non-union, large corporations, or sole proprietors, work together to ensure opportunity for all Alaskans on the Gas Pipeline project. We are confident that, with strong leadership, these groups can work together and provide a cohesive construction team for the benefit of all of Alaska's workers.

While ABC of Alaska consistently promotes open and competitive bidding as the procurement methodology of choice, we understand the state of Alaska is intent on pursuing a project labor agreement in some form on the Alaska Gas Pipeline. Unfortunately, the standard project labor agreement effectively excludes the non-union worker from opportunity on a project. According to the US DOL, 70% of Alaska's construction industry is non-union – it is extremely important, therefore, that any Gas Pipeline agreement provide fair and equal access to employment for the majority of Alaska's construction workers, the open shop (non-union) sector of the industry.

A Project Agreement of Fair Employment and Work Stabilization would meet the expressed needs of the state, standardize training and benefits for all workers on the project and provide opportunity for both union and open shop workers and contractors to participate. With an open and competitive agreement of this type, the project will have access to the broadest base of Alaska workers and the industry will work side by side to complete the project on time and on budget. We welcome the opportunity to work with all concerned parties to develop an agreement for this project that will protect the interests of Alaska's workers.

Union Density in Construction Industry Alaska – 1983-2002



Data Source: Current Population Survey
Chart prepared by Public Service Research Foundation

PROJECT AGREEMENT OF FAIR
EMPLOYMENT AND WORK STABILIZATION
FOR

(NAME OF PROJECT)

Drafted By

THE COALITION FOR FAIR EMPLOYMENT
IN CONSTRUCTION

12/18/00

PROJECT AGREEMENT OF FAIR EMPLOYMENT AND WORK STABILIZATION

The **Coalition for Fair Employment in Construction (CFEC)** has prepared this document to assist owners, contractors and unions in drafting a project labor agreement or labor stabilization agreement that is fair to all workers and respects their freedom of association. The format and content of this document has been substantially based upon the "Project Agreement of Fair Employment and Work Stabilization for Denver International Airport."

This document is in no way intended to be a complete and finished product. It is assumed that the reader may want to delete, modify, or add text in order to fit the Owner's specific local needs. It is recommended that the reader obtain legal counsel in the final drafting of any agreement.

The law firm of Cook, Brown & Prager, LLP helped CFEC develop this document. For the reader who wants additional insight into this document, Cook, Brown & Prager can be retained for additional advice by contacting Dennis B. Cook or Jessavel Y. Delumen at (916) 442-3100.

At the back of this document, a list of "unfair" clauses in project labor agreements or labor stabilization agreements has been attached in order to alert the reader to the restrictions in such agreements that prevent non-union workers and contractors from working on a project.

**PROJECT AGREEMENT OF FAIR EMPLOYMENT
AND WORK STABILIZATION FOR
(Name of Project)**

THIS PROJECT AGREEMENT OF FAIR EMPLOYMENT AND WORK STABILIZATION (hereinafter referred to as "Agreement") is made and entered into this ___ day of _____, 2000, by and between the (Name of Owner), (hereinafter referred to as "Owner") together with the contractors who perform construction work at the (Name of the Project) (hereinafter referred to as "Contractors") and the (Name of organized labor's organizations) and the local unions affiliated therewith. The term "Union" or "Unions" as used in this Agreement shall refer to all of the unions listed on the signature page(s) of this Agreement and the (Name of Organized Labor's Council) collectively, while the term "Council" shall apply to the (Name of Organized Labor's Council).

Intent and Purpose

WHEREAS, it is essential that the construction work required to build the (Name of the Project) be done in an efficient and economical manner so as to secure optimum productivity and to eliminate delays in the construction operations, thus ensuring timely completion in the work undertaken by the contractors, and

WHEREAS, the Owner has concluded that the adoption of certain requirements for, and uniformity in, wages, hours, and working conditions for work on the Project, as reflected in this Agreement, will promote stability, efficiency, and economy of performance, and

WHEREAS, all parties have as their goal the optimization of opportunities for minority and women employees as well as for Disadvantaged Business Enterprises including Minority, Women, and Disabled Veterans Owned Business Enterprises, and

WHEREAS, it is the intent and purpose of this Agreement to provide, establish and put into practice effective methods for the settlement of labor disputes which may arise on the Project described herein without strike, lockout, work stoppage, or slowdown, to the end that the Project shall be assured of continuity of operations, and

WHEREAS, it is the intent and purpose of this Agreement to provide fair employment and work stabilization without discrimination in any manner, either for or against Union or non-Union contractors, and nothing in this Agreement shall be construed to require any contractor to become signatory to a collective bargaining agreement, or any employee to become a member of any Union,

NOW, THEREFORE, in consideration of these premises, it is agreed as follows:

ARTICLE I
Definitions

- 1.1 "Project" shall be defined as the construction of the (Name of the Project), which construction as presently planned shall consist of (Description of the Project), scheduled for initial completion in (Year), consisting of all work done by Contractors under contract to the Owner, and their subcontractors, at the (Name of the Project) site.
- 1.2 "Owner" shall be defined as (Name of the Owner).
- 1.3 "Contractor" or "Contractors" shall be defined as all companies or entities performing construction work under contract with the Owner for the Project, and employing any construction workers. However, this Agreement shall not apply to any contract, the total cost of which is less than (Dollar Amount).
- 1.4 "Subcontractor" or "Subcontractors" shall be defined as all companies or entities performing construction work under a subcontract at any tier which work is also covered under a contract between a Contractor and the Owner for the Project.
- 1.5 "Manager" shall be defined as the Manager of Public Works for the Owner or his or her designated representative.
- 1.6 "Union" or "Unions" shall be defined as all of the Unions listed on the signature page(s) of this Agreement and the (Name of Organized Labor's Council).
- 1.7 "Signatory Contractors" shall be defined as those contractors working on the Project who are signatory to any collective bargaining agreement or agreements (excluding project only agreements) with any of the Unions.
- 1.8 "Nonsignatory Contractors" shall be defined as all contractors working on the Project who are not signatory to any collective bargaining agreements (excluding project only agreements) with any of the Unions.
- 1.9 "Employer" or "Employers" shall be defined as any Contractor or Subcontractor who employs employees to perform work at the Project.

ARTICLE II
Scope of Agreement

- 2.1 This Agreement shall apply and is limited to the recognized and accepted definition of construction work under the direction of the Employers at the site of the Project. The Owner, Unions, and Contractors agree to abide by the terms and conditions contained in this Agreement with respect to the administration of construction work at the Project during the duration of the Contract's work at the Project. This Agreement represents the complete understanding of the parties with

respect to the issues covered hereunder and any Contractors and Subcontractors at any tier shall not, by virtue of this Agreement, be required to sign any agreement with the Unions or any other Union insofar as work on the Project is concerned. With regard to Signatory Contractors and Subcontractors, the provisions of this Agreement shall control the construction of this Project and take precedence over the provisions of local or national agreements, which may conflict, with the terms of this Agreement.

- 2.2 This Agreement shall be limited to work historically recognized as construction work, and nothing contained herein shall be construed to prohibit, restrict or interfere with the performance of any other operation, work or function which may occur at the site of the Project or be associated with the development of the Project.
- 2.3 Contractors obligated under this Agreement shall be required to incorporate the Agreement into all subcontracts of whatever tier.
- 2.4 Nothing in the Agreement shall be construed to limit the rights of the Contractor to select any qualified person for employment, except as provided in applicable Collective Bargaining Agreements for those who are Signatory Contractors.
- 2.5 Nothing in this Agreement shall be construed to limit the Owner's right to select the lowest responsive bidder pursuant to state contract statutes for the purposes of awarding construction contracts.
- 2.6 Nothing in this Agreement shall be construed to require any individual to be or to become a member of any union except as provided for in applicable collective bargaining agreements. The parties agree that all employees shall have the right to decide whether they want to join a union or refrain from joining a union.
- 2.7 Nothing in this Agreement shall in any way interfere with MBE/WBE or DVBE programs applicable to the Project.
- 2.8 Any Non-signatory Contractor of any tier shall be bound to all of the terms and conditions of this Agreement except those specifically noted as applying to Signatory Contractors only.
- 2.9 Items specifically excluded from the scope of this Agreement include but are not limited to the following:
 - a. Work of non-manual employees, including but not limited to superintendents, supervisors (except foremen and general foremen), engineers, inspectors, quality control personnel, quality assurance personnel, timekeepers, mail carriers, clerks, office workers, janitors, messengers, guards, emergency medical and first-

aid technicians, and other professional, engineering, administrative, and management employees;

- b. All deliveries to and from the Project site and all work performed off the Project site except as otherwise provided for in Prevailing Wage or Public Works Determinations and regulations issued pursuant thereto;
- c. Equipment and machinery in the care, custody and control of companies other than Contractors, or Subcontractors;
- d. The removal of scrap, surplus, spoilage, and waste materials from a common scrap location to a location off the Project site except as otherwise provided for in the Prevailing Wage Determinations and regulations issued pursuant thereto;
- e. Any work performed on or near or leading to or into the Project site by state, county, city (other than the (Name of the Owner) or similar governmental bodies or their contractors, and/or utilities or railroads or other similar organizations or their contractors; and
- f. Work that is not within the recognized jurisdiction of the Unions.

- 2.10 As items, areas and systems of the Project are inspected and construction tested by the Contractor and finally accepted by the Owner, this Agreement will not have further force or effect on such items, areas, or systems except when the Contractor is directed by the Owner to engage in repairs, modifications, checkout and warranty functions required by its contract. Warranty work by the manufacturer of the equipment shall be at the Owner's discretion.
- 2.11 Delivery of equipment, apparatus, machinery and construction materials to the site shall not be within the scope of this Agreement until in the possession and control of the Owner or a Contractor except as otherwise provided for in the Prevailing Wage Determinations and regulations issued pursuant thereto.
- 2.12 The (Name of Owner) will prominently indicate on bid documents and bid announcements that this Project is covered under the terms of a Project Agreement for Fair Employment and Work Stabilization between the (Name of Owner) and the (Name of Organized Labor's Council).

ARTICLE III
Management Rights

- 3.1 The Employer retains full and exclusive authority for the management of its operations. The Employer shall direct its working forces at its prerogative, including but not limited to hiring, promotion, transfer and layoff. No rules, customs or practices shall be permitted to be observed which limit or restrict production, or limit or restrict the working efforts of employees. Suspension or discharge of employees will be subject to just cause.
- 3.2 The designation or determination of the number of foremen or general foremen is the sole responsibility of the Employers. However, Signatory Contractors will be subject to any applicable collective bargaining provisions relating to the designation and determination of foremen or general foremen.
- 3.3 The Employer, in its sole discretion, shall schedule work and shall determine when overtime will be worked.
- 3.4 The foregoing enumeration of management rights shall not be deemed to exclude other functions not specifically set forth. The Employer retains all management rights not specifically limited by the terms of this Agreement.
- 3.5 The Employer may utilize any method or technique of construction, tools or other labor-saving devices, and there shall be no limitation or restriction regardless of source or location on the use of machinery, pre-cast, tools or other labor-saving devices, nor shall there be any limitation upon choice of materials, design, or source of materials, provided that the installation, fabrication, assembly, or application of materials at the site of the Project shall be performed by labor or mechanic classifications traditionally and customarily having jurisdiction over such work.
- 3.6 The Employer shall have the right to terminate any employee who fails to satisfactorily, competently, and diligently perform his/her assigned work. Unless otherwise required by law, all grievances, complaints, disputes or controversies involving the termination of an employee performing work at the site of the Project shall be resolved pursuant to Section 11.3 of this Agreement.

ARTICLE IV
Craft Training

- 4.1 This Agreement recognizes the need to maintain continuing support of programs designed to develop adequate numbers of competent workers in the construction industry. Employers may employ apprentices of the respective crafts to perform such work as is within their capabilities and which is customarily performed by the craft in which they are registered, and subject to any limitations imposed by the

US Department of Labor, Office of Apprenticeship Training Employer and Labor Services.

- 4.2 Employers must comply with applicable apprenticeship statutes and regulations and may employ registered apprentices within all apprenticeable crafts on this Project. Employers will be required to comply with all applicable rules and regulations on the use of apprentices. Employers must provide documentation of compliance with this requirement to the (Name of Owner) prior to the start of work.

ARTICLE V
Wages and Benefits

- 5.1 Minimum wage rates and fringe benefit contributions paid on behalf of employees on the Project shall be paid in accordance with the provisions of the State Prevailing Wage law.
- 5.2 Employers shall provide fringe benefits to their employees, which, as a minimum, shall include the following benefits for each employee covered by this Agreement:
1. Health and welfare, and
 2. Pension.

The health and welfare benefit shall not be paid as wages unless the employee already has health and welfare coverage through their spouse, domestic partner or another employer.

- 5.3 The Owner has the obligation to initiate and carry out reasonable and appropriate procedures to enforce compliance with Article V of this Agreement. The Owner reserves the right to require the Contractor and every Subcontractor to provide certified payroll reports and any other documentation necessary to verify compliance with this Agreement.
- 5.4 In the event the Owner has reasonable cause to believe that any Contractor or Subcontractor has failed to or is failing to comply with prevailing wage obligations, the Owner shall notify the Contractor to correct the error. If the failure to comply is not corrected within 15 days, the State of California and the Contractor's bonding company shall be notified.
- 5.5 The Owner may take any other appropriate action provided for by local, state, or federal law relating to the payment of minimum wages and fringe benefits.

ARTICLE VI
Safety, Health, & Sanitation

- 6.1 Employees must use diligent care to perform their work in a safe manner and protect themselves and the property of the Employer and the Owner. Failure to do so may result in immediate termination.
- 6.2 In order to protect the safety and health of employees, all parties agree to comply with the applicable provisions of state and federal laws and regulations relating to job safety, health and safe work practices, as well as those specific Project safety rules enacted by the Employers and the Owner in its overall Safety Program.
- 6.3 All employees will use required safety equipment and protective clothing. Willful failure or refusal by an employee to use such protective equipment or clothing is cause for termination.
- 6.4 Substance abuse: The possession of alcohol or illegal drugs or being under the influence of alcohol or illegal drugs on the site is subject to discipline up to and including termination. Any employee who reports for work under the influence of alcoholic beverages or illegal drugs, or who drinks alcoholic beverages or uses illegal drugs on the job site, or who reports to the job site with alcoholic beverages or illegal drugs in his/her possession, shall be subject to discipline up to and including termination. All Contractors shall have a drug testing program in effect that includes pre-hire drug screening, random drug testing, post accident drug screening and "for cause" drug testing, and a provision requiring the Employer to reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the Employer. Nothing in this Article shall be construed to prohibit an Employer from refusing to hire, or discharging an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her duties, or cannot perform the duties in a manner which would not endanger his or her health or safety or the health or safety to others.

ARTICLE VII

No Discrimination

- 7.1 The Contractors agree to engage in active recruitment of minority and female applicants and to make every effort to employ sufficient numbers of minority and female applicants to assist in meeting employment goals pursuant to this Agreement.

7.2 The following employment goals are a part of this Agreement:

- A.) African American _____%
- B.) Hispanic _____%
- C.) Asian _____%
- D.) Female _____%
- E.) American Indian _____%

7.3 No party to this Agreement shall discriminate against any employee or applicant for employment because of religion, marital status, veteran status, disabled status, race, creed, color, sex, age, national origin, sexual orientation, or union or non-union affiliation. In addition, the parties hereto agree to take positive affirmative action to ensure full compliance with the rules of all applicable equal employment opportunity statutes, ordinances, and regulations.

ARTICLE VIII
Local Hiring

8.1 The Owner has every desire to maximize the use of local residents as employees on this Project. "Local" shall mean any resident or business located within the Owner's jurisdiction. As a minimum, the following minimum goals are to be established relative to local hire on this Project:

- A.) Journeypersons (hours) _____%
- B.) Apprentices (hours) _____%

8.2 To the extent permitted by law, at least one (1) local apprentice shall be employed in each apprenticeable craft used on this Project.

8.3 It is the goal under this Agreement that at least _____(%) of all subcontracted work should be subcontracted to local businesses.

ARTICLE IX
Working Conditions

9.1 The Employer shall be the sole judge as to the numbers of foremen and general foremen to be employed, as well as the number of employees to be assigned to any crew, operation or piece of equipment subject to this Agreement and, for Signatory Contractors, subject to applicable Collective Bargaining Agreements.

9.2 There shall be no limit on production by workers nor restrictions on the full use of tools and/or equipment. There shall be no restriction, other than that which may be required by safety regulations or state Prevailing Wage determination, on the number of employees assigned to any crew or to any service, except as provided for in applicable Collective Bargaining Agreements for Signatory Contractors.

- 9.3 Procedures for the control of tools, equipment and materials shall be established by the Contractors and shall be observed by all employees in accordance with applicable jurisdictional standards contained in Article XIII.
- 9.4 The Employer shall use clock or other accountability systems for all employees checking in or out of the Project on a daily basis. All employees shall be at their designated reporting place for work at the starting time and shall return to their designated reporting place at quitting time. Special consideration may be given to unusual conditions. All employees will be at their work places at the conclusion of the lunch break and authorized rest period.
- 9.5 Employees shall be allowed ten minutes prior to the end of each shift to put up their tools and leave their place of work. Clean-up time shall be as specified in applicable Collective Bargaining Agreements for Signatory Contractors. Employees shall not stop work prior to the times designated herein for putting up tools or cleaning-up, or prior to the commencement of the lunch period, without the consent of their employers, except that employees may take authorized rest periods scheduled by the Employer. Repeated infractions of this rule, after appropriate warnings, shall be grounds for termination.
- 9.6 Each employee is expected to give a full day's work for a full day's pay and any violation of the work starting and stopping times will be grounds for termination.
- 9.7 If an employee is unable to report for work as scheduled, he/she is expected to notify the Employer's job office; failure to do so without good reason will be cause for discharge. Automatic termination will take place after three (3) days of unexcused failure to report to work or failure to notify the Employer's job office, unless such failure was caused by circumstances beyond the control of the employee. If an employee is late for work, the time will be deducted from his/her pay.
- 9.8 Chronic absenteeism and tardiness without sufficient verified reason is a cause for termination. The Employer shall be the sole judge of whether there is good reason for a worker's absenteeism or tardiness.
- 9.9 Slow-downs, stand-by crews and featherbedding practices will not be permitted. Neither the Unions nor the Owner will impose conditions, which require the Employer to employ more individuals than the Employer deems necessary to perform the work.
- 9.10 Vendors and suppliers will deliver supplies, equipment, tools, and materials to points on the Project site as designated by the Contractor. There shall be no interferences with vendor and/or supply deliveries to the Project.
- 9.11 A mutually agreeable procedure will be established whereby upon the completion of the installation of any equipment including construction component testing and

prior to system operation testing, the equipment may be tagged as being turned over to the Owner. The determination of completion shall be by the Owner. All work subsequent to the tagging of the equipment may be performed at the discretion of the Owner with personnel of its choice; provided, however, that the employees performing construction work shall not test nor operate equipment, apparatus or machinery unless specifically requested to do so by the Owner or an Employer or a representative of the manufacturer, or some other management technician authorized to give such work order. Persons of its choice shall perform all inspection by the Owner or by the Employer of incoming shipments of equipment, apparatus, machinery, and construction materials of every kind, at the sole discretion of the Owner or the Employer. Such inspection personnel shall perform no repair, alteration, assembly, disassembly or installation of said equipment or materials, unless such personnel are covered by this Agreement.

- 9.12 Any employee who willfully damages the work of any other employee, or any material, equipment, apparatus, or machinery shall be subject to immediate termination.
- 9.13 Any termination of an employee or other personnel action shall be subject to the right of the employee or the Union on behalf of its members to initiate a grievance under the procedures established herein. As for Signatory Contractors, either the employee or the Union acting on behalf of its members may initiate a grievance under the procedures established herein.
- 9.14 Copies of Contractor and Project work rules will be posted in the appropriate locations at the Project site and provided to employees prior to the commencement of work on the Project. All employees will abide by these rules and the appropriate posted rules of respective Employers. Infractions of work rules may be grounds for termination.

ARTICLE X **No Strikes & Lockouts**

- 10.1 During the life of this Agreement, the Unions agree that they will not collectively or individually engage in or participate in any strike, work slowdown, work stoppage, sympathy strike, refusal to work or picketing against any Employer signatory to this Agreement.
- 10.2 The Owner and the Signatory Contractors agree that they will not lock out any of the employees working under this Agreement.
- 10.3 If any strike, work slowdown, work stoppage, sympathy strike, refusal to work or picketing against any employer working on the Project is not immediately resolved within twenty-four (24) hours of said strike, work slowdown, work stoppage, sympathy strike, refusal to work or picketing, the striking Unions, jointly and severally, and any Unions acting in concert with them, agree to pay Owner a sum

equal to one percent (1%) of the Prime Contract value for each day said strike, work slowdown, work stoppage, sympathy strike, refusal to work or picketing continues. Because the injury resulting from such a violation of this Agreement would be impractical or extremely difficult to ascertain or estimate, this sum is agreed upon as liquidated damages and is intended as compensation for this injury and not as a penalty. The liquidated damages provided by this Section shall be in addition to any other available remedy, and not in lieu thereof.

ARTICLE XI

Hours of Work, Overtime, Reporting Time Pay & Holidays

- 11.1 **Production Shifts:** The standard work day and work week for production crews shall consist of either five (5) consecutive days at eight (8) hours per shift Monday through Friday or, to the extent permitted by law, four (4) consecutive days at ten (10) hours per shift. Nothing herein shall be construed as guaranteeing any employee eight (8) or ten (10) hours of work per day or forty (40) hours of work per week. Regular work hours will be between 6:00 A.M. and 6:00 P.M. There shall be a 30-minute unpaid lunch period, which shall, insofar as practicable, be at the midpoint of the shift or within one-half hour before or one-half hour after the midpoint of the shift. There shall be required rest periods that shall be scheduled by the Employer.
- 11.2 **Make-up Day:** In the event the employer is unable to work forty (40) straight time hours during the scheduled work week due to inclement weather, Saturday may be utilized as a make-up day and all hours worked up to forty (40) in a work week shall be paid at the straight time rate of pay.
- 11.3 An effort will be made to keep overtime work to a minimum but where such work is judged necessary it will be worked at the direction and discretion of the Employer. The Employer will designate which employees will work over-time. If overtime is worked the Employer will make every effort to distribute overtime on an equitable basis wherever practicable and possible.
- 11.4 **Overtime:** All hours worked in excess of eight (8) hours per shift on the five (5) day eight (8) hour shift or in excess of ten (10) hours per shift for the four (4) day ten (10)-hour shift, shall be paid at a minimum of one and a half (1½) times the straight time rate. Hours worked on Holidays listed in paragraph 11.8 shall be paid at a minimum of one and a half (1½) times the basic straight time hourly wage rate. Hours worked in excess of twelve (12) hours in a day or in excess of eight (8) hours on any seventh consecutive day of work in a workweek shall be paid at double the employees' regular rate of pay.
- 11.5 **Service Shifts:** On operations including but not limited to dewatering, curing and protection of concrete, equipment servicing and maintenance, maintenance of climatic protective devices, and similar operations, the Employer may establish shifts with days off other than Saturdays and Sundays. On such operations, all

overtime hours shall be paid at a minimum of one and one-half (1½) times the basic straight time hourly wage rate.

11.6 Multiple Shifts: Multiple shifts may be established when considered necessary by the Employer. The Employer reserves the right to implement different shift schedules for different operations.

- 1) Signatory Contractors shall notify the Union of the starting and quitting time of all second or third shifts two (2) days before the initiation of said shifts.
- 2) If two (2) five (5) day, eight (8) hour shifts are utilized, employees in both shifts will work eight (8) hours for eight (8) hours' pay, exclusive of lunch and authorized rest periods.

3) On a three (3) shift operation, shift hours and rates will be as follows:

First Shift: 8 hours' work plus ½ hour for lunch for 8 hours' pay.

Second Shift: 7½ hours' work plus ½ hour for lunch for 8 hours' pay.

Third Shift: 7 hours' work plus ½ hour for lunch for 8 hours' pay.

On a three (3) shift operation eight (8) hours shall be credited as time worked for each shift for purposes of fringe benefit payments and overtime calculation.

All hours worked in excess of the established shifts shall be paid at a minimum of one and a half (1½) times the basic straight time hourly wage rate.

- 4) No additional shift premiums shall be required.
- 5) Shifts shall be established for a minimum of five (5) consecutive workdays.
- 6) Safety regulations for the Project may limit the number of hours worked by an individual within a specified time period.

11.7 Reporting Time Pay (applies to all shifts): Any employee who reports for work at a designated time and for whom no work is provided shall, unless notified as herein provided, receive two (2) hours' pay provided the employee remains available for work during the two (2) hour period. If after working two (2) hours the employee is prevented from working a full shift by other than inclement weather, the employee shall be paid for actual time worked but not less than four (4) hours' pay if more than two (2) hours are worked. In the case of inclement

weather shutdown, the employee will be paid for two (2) hours or actual time worked whichever is greater, provided that, at the discretion of the Employer the employee remains immediately available to work the job for the said two (2) hours. The Employer may implement a notification procedure to give prior notification of work cancellation. Notice given to the employee through the designed notification procedure at least two (2) hours prior to the beginning of the employee's shift shall be deemed as timely notice and no reporting time pay would then be required.

Any employee who leaves the job on his/her own accord will be paid for actual hours worked only. Any employee who reports to work in a condition unable to work will not be eligible for reporting time pay.

11.8 The recognized uniform non-paid holidays shall be as follows:

New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, the day after Thanksgiving, and Christmas Day. No employee shall be required to work on a holiday except in an emergency. In the event a holiday falls on Sunday, the following day, Monday, shall be observed as such holiday. In the event a holiday falls on Saturday, the preceding Friday will be a regular workday at straight time pay.

ARTICLE XII

Disputes & Grievances

- 12.1 All parties to this Agreement realize the importance of maintaining continuous and uninterrupted performance of the work on the Project, and agree to resolve disputes in accordance with this Article. Nothing in this Agreement shall restrict any remedies available to individual employees under applicable statutes.
- 12.2 **Grievance Procedure and Arbitration.** It is specifically agreed that in the event any disputes arise out of the interpretation or application of this Agreement, they shall be settled by means of binding arbitration. Any grievances, complaints, disputes and controversies of employees of Signatory Employers or the Unions against Signatory Employers on this Project shall be resolved in accordance with the grievance procedures set forth in their applicable Collective Bargaining Agreement. Any grievances, complaints, disputes and controversies of employees of Nonsignatory Employers or the Unions against Nonsignatory Employers on this Project shall be resolved by means of binding arbitration through the American Arbitration Association. Such arbitration shall be final, binding and conclusive and shall be conducted in accordance with the Construction Industry Dispute Resolution Procedures of the American Arbitration Association. in accordance with applicable statutes.