

MEMORANDUM

State of Alaska

Department of Law

TO: Shirley Horn
Right-Of-Way Agent,
Northern Region, DOT&PF

DATE: May 28, 1992

FILE NO: 665-92-0331

Rick Smith, Manager
Northern Region Office
DNR

TEL. NO.: 451-2811

FROM: *Paul R. Lyle*
Paul R. Lyle
Assistant Attorney General

SUBJECT: Interagency Land
Management Agreement
Stipulations

Douglas L. Blankenship
Douglas L. Blankenship
Assistant Attorney General

CONFIDENTIAL: ATTORNEY-CLIENT COMMUNICATION

DOT&PF requested this office to review the attached proposed Interagency Land Management Agreement ("ILMA") stipulations to determine if the stipulations are consistent with federal and state law and regulations governing airport operations. The draft stipulations were prepared at DNR's northern regional office by staff. The purpose of the draft was to provide a beginning point for discussions between the agencies about provisions to be included in the airport related ILMA's. Our legal analysis is set out below.

1. Necessity for ILMA's. ILMA's are not required for all airports. Whether an ILMA is required depends upon how title to the lands on which the airport was established was first acquired. ILMA's are authorized under AS 38.05.027(a). AS 38.05.030(b) exempts DOT&PF from the provisions of the Alaska Lands Act, AS 38.05, for,

any power, duty or authority now or in the future granted to [DOT&PF] in the name of the state, to acquire, use, lease, dispose of, or exchange real property, or any interest in real property. Lands assigned by the Division of Lands to [DOT&PF] shall be returned to the management of the division when it is no longer needed for the purposes assigned.

AS 38.05.027(a) provides the DNR Commissioner may enter into cooperative resource management agreements with state agencies that are in the best interest of the public. Under this section DNR also has the authority to establish specific guidelines in the ILMA "to protect the state and the public interest."

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With one exception, we interpret the applicable statutes as granting DOT&PF the authority to manage all airport property without an ILMA. The one exception is where airports are established on existing state land without use of a condemnation action. In that circumstance we believe the statutes require the two departments to execute an ILMA.

2. Section 1a.

This section limits the ILMA to a period of 25 years. As stated above, ILMA's are authorized by AS 38.05.027(a). Section 4 recites that DOT&PF will issue leases under 17 AAC 40.300 -- 17 AAC 40.330. Under 17 AAC 40.330(a) the term of an airport lease may be for any period allowed by law. However, section 4 of the ILMA states that leases and permits do not survive the expiration or cancellation of the ILMA. This will require DOT&PF to limit lease terms to 25 years or the time remaining under the ILMA at the time the lease is entered, whichever is less.¹ Nothing in AS 38.05.027 limits ILMA's to any particular period. All the law requires is that land managed under ILMA's be included in DNR's inventory and reviewed "at regular intervals to analyze current and proposed uses" AS 38.04.060(b). We suggest that the 25 year term be eliminated and suggest that an appropriate term for the ILMA is "as long as the property is used for airport purposes." Such a lease term is consistent with the second sentence of AS 38.05.027(a) which requires that management of the lands assigned shall be returned to the Division of Lands when it is no longer needed for the purposes assigned.

3. Section 2a.

The reference in the second sentence to federal airport regulations should read "14 C.F.R. Part 152."

The last sentence of Section 2a provides that the assignment is subject to cancellation by DNR on 60 days written notice. This provision conflicts with 14 C.F.R. §§ 152.3 &

¹ Under AS 02.15.090(a) DOT&PF has authority to enter into airport leases of state for a term of up to 55 years.

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152.103(a)(4)(ii). In order to be eligible for a federal airport grant DOT&PF, the project sponsor,² must have:

Satisfactory property interests in the lands to be developed or used as part of, or in connection with, the airport as it will be after the project is completed.

14 C.F.R. 152.103(a)(4)(ii). A "satisfactory property interest" is defined, in part, as follows:

(1) Title free and clear of any reversionary interest, lien, easement, lease, or other encumbrance that, in the opinion of the Administrator would --

(i) Create an undue risk that it might deprive the sponsor **of possession or control;**

. . .

(2) Unless a shorter term is authorized by the Administrator, a lease of not less than 20 years from another public agency granted to the sponsor by another public agency . . . on terms the Administrator considers satisfactory;

(Emphasis Added). If DNR unilaterally cancels an ILMA then DOT&PF, as the project sponsor, will lose possession and control over the property and the term is potentially less than 20 years. This office could not certify the state's title to FAA under the ILMA as presently drafted.

Section 2a is vague and potentially internally inconsistent. The second sentence of Section 2a states that the review:

will not conflict with DOT/PF responsibilities as the facility operator, or deprive DOT/PF of any assurance in the . . . Federal Airport Regulations

² DOT&PF is the state agency appointed as sponsor for all federal-aid airport projects. AS 02.15.020(b) Municipalities wishing to sponsor federal-aid airport projects must obtain permission from DOT&PF prior to applying for federal funds. AS 02.15.150.

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As stated above, the cancellation provision prevents DOT&PF from obtaining a satisfactory property interest and eliminates DOT&PF's eligibility for federal funding of airport construction projects.

Section 2a also violates 17 AAC 40.210. This regulation authorizes the commissioner of DOT&PF to abandon an airport after notice and public hearing. DNR has no authority to make airport abandonment determinations under this regulation. As long as the property is an "airport" under AS 02.15.260(5) DOT&PF is the agency that will decide when and if the property should be abandoned. If there is a dispute between the agencies on the issue of an abandonment of all or a portion of an "airport", the agencies should initially attempt to resolve the issue between themselves with the appropriate input from the Department of Law.

In the event of an abandonment dispute, a factor that must be taken into consideration is what lands the FAA considers to be the "airport." Generally, FAA considers the "airport" to be the boundaries shown on the airport property plan which accompanies the state's title opinion in support of FAA grant applications. DOT&PF is required to have "possession and control" of all lands within the airport boundaries as shown on the property plan. DOT&PF's title cannot be encumbered by any condition that, in FAA's opinion, "creates an undue risk" that DOT&PF might be deprived of title.

4. Section 4.

This section impinges on DOT&PF's operational authority over state airports. DOT&PF has broad authority over state-owned airports. AS 02.15.060 provides:

The department may plan, establish, construct, enlarge, improve, maintain, equip, **operate, regulate, protect, and police** airports and air navigation facilities within the state.

DOT&PF's operational authority to enter into leases and permits on state airports is not derived from DNR's title to the land. AS 02.15.090(a) provides, in part:

In operating an airport or air navigation facility owned or controlled **by the state**, [DOT&PF] may enter into contracts, leases, and other arrangements . . .

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(Emphasis Added). Thus, AS 02.15.090 grants operational authority to DOT&PF over **all** state airports regardless of how the airport lands were acquired and regardless of which agency technically holds title to airport lands. In fact, AS 02.15.090(b) authorizes DOT&PF to enter into agreements with third parties to act as its agent in operating airports. DOT&PF's operational authority over airports is granted directly to DOT&PF in AS 02.15.090 and is exercised pursuant to regulations administered and enforced by DOT&PF and its commissioner. See e.g., AS 02.15.090(a); AS 02.15.102; 17 AAC 40.300, 40.320(3), 40.390(3), 40.390(4), and 17 AAC 15.012.

The responsibility for planning, designing and constructing state airports lies solely with DOT&PF. AS 02.15.060. DNR has no statutory authority to oversee or approve airport construction plans, surveys or to approve airport development plans after the airport is initially constructed.

In our opinion, DNR has no statutory authority over operational aspects of state airports. That authority resides solely within DOT&PF. However, DNR does have specific statutory authority to include specific guidelines in the ILMA to protect the state and public interest.

In discussing the stipulations with our respective clients it has become apparent that DNR and DOT&PF disagree on the breadth of DOT&PF's operational authority. DNR takes the position that DOT&PF has no authority to lease to non-aviation function enterprises on state airports. DOT&PF takes the position that its authority is established under AS 02.15.090, that its regulations permitting non-aviation function leases are valid, and that loss of control over non-aviation function leases on state airports would threaten FAA funding.

Before an opinion can be rendered on this issue a formal request for advice should be forwarded to the Attorney General. This issue is one of state-wide significance and will have an impact on the agencies' authority and relationship for some time to come. We would prefer that the two agencies attempt to resolve this issue as a matter of policy at the commissioner or other appropriate level.

5. Section 14.

This indemnity clause is overly broad and again seeks to control the terms under which operational and construction

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activities on state airports are undertaken. DOT&PF already includes an indemnity provision in all construction contracts, leases and permits. It is DOT&PF's responsibility to insure that the state is properly indemnified since it is charged with the responsibility of constructing and operating the airport. This provision should be deleted.

6. Conclusion.

DNR holds title in the name of the state to all state land. Responsibility for planning, design, construction, operation, and regulatory control of state-owned airports is granted to DOT&PF under AS 02.15. To the extent that the ILMA seeks to establish oversight for these activities in DNR, it impermissibly impinges on the authority granted by statute to DOT&PF. However, it is proper for DNR to include specific guidelines in the ILMA that reasonably address protection of the state's and the public's interest in the state lands DNR will receive when management authority is transferred back to DNR from DOT&PF.

Issues concerning the breadth of DOT&PF's operational authority should be resolved at the commissioner's level as a matter of policy. If the agencies need a legal opinion to resolve the issue, one should be requested from the Attorney General.

PRL:DLB/arp

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Statewide Leasing/Property Management

TO: Bob Bartholomew
Director
Administrative Services
Headquarters

DATE: April 30, 1992

TELEPHONE NO: 266-1661

RECEIVED R/W
MAY 04 1992

FROM: Steve Pavish
Statewide Leasing
Coordinator

SUBJECT: Rural Airports
DNR Interference

Northern Region DOT & PF

Attached is a copy of my 4/13/92 memo to Shirley Horn of Northern Region Right of Way regarding language changes recently proposed by DNR for Interagency Land Management Assignments (ILMA) to be issued to DOT&PF for rural airports. Also attached is a copy of the proposed ILMA revisions with some of my comments in the margins. ILMA's are the vehicle by which DOT&PF obtains from DNR state land needed for airports and other facilities.

In my memo to Ms. Horn, I expressed my opinion that it is time to once and for all deal with the whole issue of DNR's interference with DOT&PF's airport land management. For over 20 years that I know of, DNR has frequently injected itself into DOT&PF's management of airport lands. Their interference has cost both agencies dearly in wasted time and money, and produced nothing positive for the public. Here are just a few of the many incidents that have occurred:

- On two separate occasions, DNR attempted to take over all non-aviation leases at AIA. They asserted that DOT&PF only had authority to lease for direct aviation purposes and, therefore, all non-aviation leases should be transferred to DNR. (Their position was clearly contrary to DOT&PF's authority in AS 02 and 17 AAC 40.)
- At the Willow Airport, DNR tried to bar DOT&PF from allowing airport tenants to excavate gravel from an airport source for use in developing their lease lots on the airport. DNR asserted that only they could sell gravel, even though our land title gave us authority to use gravel for any airport related purpose (besides, we weren't selling the gravel!). A whole construction season was lost for our tenants as a result of DNR's interference.
- At the King Salmon, Deadhorse, Gustavus, and Willow airports, DNR attempted to take land away from the airport that they determined was surplus to our needs. DNR people know little or nothing about airports, so approach clear zones, runway safety areas, future expansion space, etc., all look "vacant" to them. In three of the four cases, DNR wanted the airport land to satisfy the land selection demands of a borough or school district. We successfully resisted two of the take-over attempts, negotiated a compromise in one, and lost

valuable floatplane space in the fourth. These controversies consumed literally thousands of man-hours in both agencies.

- DNR attempted to take back tidelands at the Petersburg Ramp and Turnaround because they determined it was being developed for non-aviation purposes. We leased the area for a boat lift and boat storage facility. We leased the property to generate revenue and obtain a breakwater to be built by the lessee. The breakwater was needed to eventually develop a seaplane base at the site. DNR asserted their perennial argument that DOT&PF can't lease land for non-aviation purposes at airports. It took a Cabinet level meeting to finally resolve the issue (in our favor). Again a lot of time and money was wasted for no public gain.
- Recently, DNR has begun beating the non-aviation leasing drum again. This time, their focus seems to be the take over of the industrial lease lots on the Deadhorse Airport. The revenue generated by those lots is responsible for the airport's positive cash flow for the last 10 years. If DNR were to succeed in taking back the industrial lease area, the Deadhorse Airport would fall back into deficit operations.
- Several times in the last 15 years DNR has modified the provisions of their ILMA forms, each time increasing their authority to intervene in DOT&PF's airport land management. This last proposed revision is classic DNR interventionism. It would clearly increase the volume of interagency bureaucracy to the detriment of airport development (by DOT&PF and airport tenants) and airport services.

As I stated in my 4/13/92 memo to Ms. Horn, I think it is past time for a Cabinet level meeting to end all this DNR silliness. Both DNR and DOT&PF have enough to do without meddling in each other's business. Part of this interagency conflict is the result of an interventionist mentality within DNR and part, is due to some elements of the existing law that deal with DNR land transfers. Recognizing that, we should aggressively pursue the following actions:

1. At the Commissioner level, obtain a written interim agreement whereby DNR will take no action that would adversely impact DOT&PF's land title or management, regardless of the title instrument involved (deed, ILMA, patent, etc.). Basically, this would be a kind of interagency non-aggression pact.
2. Work with the Governor's office to introduce legislation giving DOT&PF full management authority for all state airport lands and allowing DNR to convey the equivalent of fee title to state lands needed by DOT&PF for airport purposes in the future.

Considering the current state budget realities, we should be striving to reduce interagency bureaucracy. The proposed ILMA language

revisions indicate that DNR's thinking is going in the other direction. Getting DNR disconnected from airport land matters would be consistent with the Governor's goal of reducing state operating costs.

Please give me a call if you need more information.

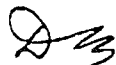
/gks

Attachment

cc: Daniel W. Beardsley, SR/WA, Chief, Right of Way, Central Region
Lorena Hegdal, Chief, Leasing & Prop. Mgmt., Northern Region
Shirley Horn, Arpts. Acquis. Spvr., Right of Way, Northern Region
Linda Keikkala, Chief, Leasing & Prop. Mgmt., Southeast Region
Murph O'Brien, Chief, Leasing & Prop. Mgmt., Central Region

CENTRAL REGION
DEPARTMENT OF TRANSPORTATION and PUBLIC FACILITIES

MEMORANDUM**STATE OF ALASKA**

TO:	JOHN MILLER Chief Right of Way Agent Northern Region	DATE:	April 28, 1992
		FILE NO:	
		TELEPHONE NO:	266-1621
FROM:	 DANIEL W. BEARDSLEY, SR/WA Chief Right of Way Agent	SUBJECT:	Proposed DNR ILMA Conditions

Shirley Horn requested I provide my comments on the Interagency Land Management Agreement Stipulations proposed by the Northern Region of the Department of Natural Resources.

In general, the Department of Transportation and Public Facilities has sufficient management authority granted under Title 2 of the Alaska Statutes to administer and manage state lands. That authority should be sufficient for a direct transfer of management authority to DOTPF from DNR without any stipulations or provisions.

I advocate that such transfer should be in fee simple, primarily on the basis that the Department's investment and development of publicly owned and operated infrastructure mandate a transportation agency management oversight rather than a multi-disciplined land management agency.

From a management perspective airports tend to become isolated pockets of state land in those locations where a local municipal government selects state lands under their municipal entitlements. Consequently the airport, and often material sites or other facilities, either become an independent island of state ownership or in the worst case, owned by the local government and subject to their role as land manager. In several instances in this region our ability to use ILMAs or ILMTs has been precluded or severely limited once the local government assumed management authority based on the review or other management provisions initially reserved by DNR.

My specific comments relating to the specifications provided are as follows:

- 1a. My reading of AS 38.04.060(b) gives the DNR Director authority to review the current and proposed uses of the ILMA and possibly authorize other uses of the ILMA if he or she finds that other alternative uses are allowable. This is a severe curtailment of DOTPF's management authority under AS Title 2.

AS 38.05.030(b) ostensibly gives DOTPF full authority to manage the ILMA without condition by DNR, essentially a recognition of our Title 2 authority. Arguably we are waiving our authority when we accept such limitations or conditions in the ILMAs.

John Miller

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April 28, 1992

The last sentence of AS 38.05.030(b) requires DOTPF to return any ILMA or ILMT lands back to DNR when our use is completed. Returning the ILMA or ILMT lands back to DNR is not objectionable except in those cases where DNR no longer has the adjacent lands due to sales or municipal entitlements. What will happen then is DNR will have an "island" to manage or dispose of; DOTPF could do the same and place any disposal funds into the airport program.

While on the subject of AS 38.05.030, subsection (d) is totally repugnant to DOTPF's authority under Title 2. This provision requires DOTPF to excess any airport land acquired by DOTPF (other than ILMAs or ILMTs) through DNR. This has frustrated several attempts by DOTPF to respond to local community needs, added a layer of bureacracy to disposal, and deprived DOTPF of putting the disposal funds back into the airport program.

- 1b. No comment as I have vented my spleen above.
- 2a. This clause would be redundant if DOTPF exercises full management authority under AS Title 2, or obtains fee simple title to the airport lands. The same arguements as for AS 38.04.030(b) above apply here.

If the clause remains in effect the termination for non-use should be stricken. Abandonment is a more appropriate termination criteria. Abandonment or release by DOTPF should be the only grounds for termination. If an airport is damaged to the extent that it cannot be returned to operation without major capital funding, non-use may occur for more than six months, but the DOTPF would have no intent to abandon the airport, consequently there would be no termination.

DOTPF is the airport transportation management authority for the State. DNR should not have oversight of our development/layout plans, especially without a full understanding of the FAA obligations and requirments.

- 2b. The comments for 2a are pertinent as to DOTPF.
3. No comment.
4. DOTPF should have full management authority under AS Title 2. Any and all assignments should be at the discretion of DOTPF. There should be no limitation on non-aviation uses as the revenues from all airport leases should be returned first to the airport program, then the legislature for any excess revenues. Non aviation uses further good public policy in encouraging business and the airport infrastructure may be the catalyst for economic development. An additional layer of bureaucratic approval does not appear to be in the best interest of the State.

John Miller

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April 28, 1992

If there are viable non-aviation businesses in operation at the time DOTPF no longer operates and airport and the ILMA is terminated, there should be provisions to allow such viable business to continue.

- 5a. Along with 5b, this provision is not inappropriate as written. AS 38.95.160 does require a plat when state lands are segregated for various uses or improvements in excess of \$100,000 are made. Unfortunately DNR interprets this statutory provision to require a plat of the land interest as well as a subsequent as-built survey. DOTPF should only be required to prepare the recorded plat and provide a certification after construction of the project that all improvements are located within the boundary of the surveyed area.

Separate
A ~~section~~ issue is the conflict between local platting authority requirements and DNR's Alaska State Land Survey (ASLS) requirements. When an ILMA is within an area with local platting authority, that platting authority should set the standard under AS Title 29.

- 5b. This appears to be a similar provision to 5a except that it takes place in areas not within local platting authorities.
6. This provision is repugnant to DOTPF's airport management authority and again DOTPF's management expertise should not be reduced or hampered by DNR. Any activities on-site that would create an impact to adjacent DNR lands should be subject to their review and resolution of any mitigation.
7. No comment.
8. Due to airport security provisions or FAA requirements this provision should be replaced by one that DOTPF will agree to develop alternate public access for trails and waterways.
9. DOTPF should be allowed to use materials from the ILMA area for construction of improvements on-site and off-site that are necessary for the development and use of the airport. This clause has also been used to preclude use of gravel or other materials by non-aviation users on the ILMA. Use of materials should be allowed for all lessees if the value of the materials used is accounted for in the lease rate.
10. If the timber on the ILMA is merchantible at the initiation of the ILMA, DNR should be provided the opportunity to offer the timber in a sale. Once the airport is constructed, DOTPF should have the authority to determine all disposal requirements.
11. See comments for 5a.
12. No comment.

John Miller

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April 28, 1992

13. No comment.

14. DOTPF's limits set for indemnification and insurance provisions should supercede this provision.

The following numbers are duplicates of numbers used above, but apply to different provisions:

10. This provision should be limited to the requirements for such facilities as set by DEC.

11. DOTPF has standard specifications for erosion control. A standard specification agreed upon by DOTPF and DNR should then be used for all ILMAs.

12. No comment.

13. This provision should be deleted or refer to DOTPF plans and specifications addressing the problem.

14. Eliminate.

cc: Helvi Sandvik
Steve Pavish
Jeff Ottesen
John Jordan



U.S. Department
of Transportation
**Federal Aviation
Administration**

Alaskan Region

222 W. 7th Avenue #14
Anchorage, Alaska
99513-7587

APR 15 1992

RECEIVED PPM

APR 27 1992

Shirley R. Horn
Airport Acquisition Supervisor
600 University Avenue, Suite F
Fairbanks, Alaska 99709-3695

Northern Region DOT & PF

Dear Ms. Horn:

The Federal Aviation Administration (FAA) has reviewed the information submitted regarding the State of Alaska, Department of Natural Resources (DNR), proposed stipulations for the Interagency Land Management Assignment (ILMA). As requested, the examination showed several added conditions to the previous in-house DNR format. However, none appear to affect grant assurances or other Federal concerns.

Please contact Carla Follett if you have further questions.

Sincerely,

Floyd H. Pattison
Manager, Planning and Programming Branch
Airports Division

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Statewide Leasing/Property Management

TO: Shirley Horn
Airports Acquisition Supervisor
Right of Way
Northern Region

DATE: April 13, 1992

TELEPHONE NO: 266-1661

RECEIVED R/W
APR 14 1992

FROM: Steve Pavish
Statewide Leasing
Coordinator

SUBJECT: ILMA Revisions
Proposed by DNR

Northern Region DOT & PF

This is in response to your request for comments on DNR's proposed revisions to their Interagency Land Management Assignment (ILMA) form. From an airport point of view, the proposed document is completely unacceptable. It reflects the recurring urge within DNR to micro-manage land assigned to DOT&PF, which is required (by statute and grant assurances) to manage its land without outside interference. I have witnessed this problem grow throughout my 23-year career with the State. As far as I'm concerned, we should forget about giving DNR comments about this latest product of their bureaucratic authorship. It's time to take off the gloves and go on the offensive. My recommendation to Headquarters will be to raise this issue to the Governor's level, and get DNR's megalomaniac land managers throttled way back. For the time being, we need a "hands off" commitment from DNR to stay out of the management of all DOT&PF managed land regardless of the type of conveyance (ILMT, ILMA, Omnibus Act deed, etc.). Then, for the 1993 Legislature we need to have the Governor's office submit legislation to provide for "no strings attached" land transfers to DOT&PF.

I could give you a lengthy list of line-by-line comments on the draft ILMA language, but I think that would be a waste of time for all of us. The proposed language allows DNR to superintend DOT&PF's airport land management in spite of the fact that DNR has absolutely no airport expertise. DNR would have the right to cancel the ILMA on short notice, review and reject plans for construction by DOT&PF and airport tenants, etc. Some of the language is patently ridiculous! For example, Provision No. 2a infers that DNR's periodic reviews of DOT&PF's land use will not put DOT&PF in non-compliance with our grant assurances to the FAA, yet the same provision allows DNR to cancel the ILMA on 60 days notice. Loss of airport land title is a "capital offense" breach of the grant assurances that is guaranteed to draw the FAA's wrath.

In my opinion, the proposed language is completely unacceptable because it does not even come close to providing an adequate, secure title interest for a functional airport.

/gks

cc: Bob Bartholomew, Director, Administrative Services, Headquarters
Daniel W. Beardsley, SR/WA, Chief Right of Way Agent, C. Region
Lorena Hegdal, Chief, Leasing & Prop. Mgmt., Northern Region