Stevens Village Ground Lease draft dated June 1, 1998

Comments from Right of Way dated June 10, 1998

Preamble - We need to know who we are dealing with. Is this lease being consummated with the Section 16 IRA Entity?
The Section 17 IRA Corporation?
Some "sub" entity of the Section 16 group?

We would like to see the Memorandum of Understanding to know what facts and circumstances accompany this lease.

Item No. 1

We request that the subsurface estate issues referenced here will be more clearly defined. Only a small part of this facility is owned in fee by the Council. As written, the Lessor is required to obtain a subsurface interest (see Item 1 and Item 3) DOT&PF will acquire the subsurface interest directly from Doyon, Limited. We know what were getting when we handle it ourselves.

There needs to be more separation of the rights granted. In the portion of Item No. 1 following the legal description reference-- the quality of title conveyed, the payment for materials within these boundaries and non-interference language all in one sentence does not clearly define the conveyance. If there is ever a dispute regarding the lease-- clarity is the key to survival in court.

Item No. 3

Paragraph 3 is too long. There are a number of important items in the warrants. Make each clause a subparagraph or phrase.

Asking Stevens Village to assume some burden about environmental documentation on State land is not reasonable. Please delete this statement.

The indemnity portion of the paragraph should be separate for the environmental issues and title issues. Again, simply style, but keep it clear and express.

Item No. 4 and 5

The only suggestion would be to include the sublessees improvements and structures within the language of these paragraphs.

Item No. 8

Hold Over clause. It is doubtful anyone is going to renew or holdover a lease for 1/55th of the original price paid 55years earlier. Bargaining points are important, but how about referencing the content and intent of the lease remain static instead of price?

Delete the reference to "in the last five years". There will be times when we need to renew long before 5 years of expiration. We need 20 years of interest to support federal funding....delete any time frame reference. We need to renew anytime during the term of the lease, our guidelines from the federal government could well change at any time and we need the latitude.

In the last sentence, regardless of when the improvements were placed, the Lessor should not be entitled to rent, etc. Do not qualify, simply say no. Again, the improvements referenced should include any placed by sublessees.

"Even" should read "event" see attached draft

Item No. 9

3rd line—"enforce" should read "in force".

Ending of paragraph 9----".....or sex will not be permitted as affects the use or operation of an airport on the premises." Delete the remaining....again unnecessary and unclear.....

Item No. 10

Again, some clarification would help. FAA grant assurances obligate the DOT. There are no obligations that run between the FAA and Lessor. Somehow clarify that there can be no cause of taken by the Lessor against DOT if we are in violate of those assurances. Good coverage, just needs a little clarification.

Item No. 12

Add the word "holdover" to the first sentence to cover all scenarios.

Item No. 14

It appears the intent of Paragraph 4 is to condemn a leasehold interest. What does the MOU say about condemnation? Do the two conflict in language or intent? Will it mean DOT can condemn for an additional 55 years or for the remainder of the term?

Item No. 15

Well written. There are a few minor suggested clarifications for the paragraph in the attached draft. They suggest including "operation, use and maintenance of the airport" as the specific issue. There is concern that in the case of Stevens Village, the waiver should be specific enough to be constitutionally allowable, yet broad enough to cover potential problems.

The inclusion of "any other person " is excellent. It should be one point we defend to the last. We would also recommend inclusion of the certified election by members allowing this specific waiver to be granted.

Item No. 17

The effective date should be date it is signed by the State.
Item No. 19

Both the MOU and the Lease should be referenced here as in the preamble.

Item No. 18

Attach and reference the MOU and the election certification.

Item No. 24

Caution should be exercised in dismissing the need the BIA approval. Stevens Village lands are not all previously owned Corporation lands as in Venetie. The federal townsite that was conveyed directly to the tribe may or may not have some federal trust attached. Native American Rights Fund Legal Staff is currently working on a case now to determine if these federal townsites conveyed directly to tribes in Alaska are in fact Indian Country.

The statement may be factual as referenced, however, do obtain the signature and approval. It can only be to our benefit later should something unforeseen happen. Stevens Village has no authority to waive the Secretary's jurisdiction and/or trust responsibilities.

Thank you for the opportunity to comment.

TO: TONY
FROM: MARK
RE: DISCUSSIONS W/BO.

GROUND LEASE

_____ AIRPORT

THIS **LEASE** is entered into this ___ day of_____, _____, by and between the _____ (**"LESSOR"**), and the **STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES** (**"STATE"**), being responsible for construction, operation and maintenance of state airports, based upon the facts and circumstances recited in the Memorandum of Understanding between **LESSOR** and **STATE** executed in connection with this LEASE.

1. In consideration of the [nominal] lump sum rent to be paid and the mutual agreements and covenants contained in this LEASE, the sufficiency of which is hereby acknowledged, **LESSOR** grants and leases to the **STATE** for a term of fifty-five (55) years from the effective date of this LEASE, the following described property:

> That certain real property described by the metes and bounds description attached as Exhibit A and depicted on the property plan attached as Exhibit B, both of which exhibits are incorporated into this LEASE by this reference;

aggregating _____ **acres,** more or less, and including both the surface estate and such interest in the **subsurface** estate necessary and sufficient for construction and operation of a public airport without interference, disruption or additional cost or payment to any person or entity for materials located there or for any other reason (the "Premises"). The **STATE** is granted during the initial term of this LEASE and any holdover, extension or renewal period, the right of exclusive possession and control of the Premises, the right to construct and maintain on the Premises any buildings and other improvements the **STATE**, in its sole discretion, deems appropriate for a public airport, and the right to operate a public airport on the Premises. The **STATE's** right of possession and control shall include the right, in its sole discretion, to sublease to any person or entity any portion of the Premises as airport property in a manner consistent with the provisions of **17 AAC 40, *et seq.***, and any amendments to or substitutions for those regulations.

2. For and in consideration of the foregoing, the **STATE** agrees:

a. To maintain, equip and operate a public airport on the Premises in accordance with State standards for airports of the same class and with the requirements of the Federal Aviation Administration ("FAA"). The **STATE** shall, in its sole discretion, determine and/or modify the class of airport to be maintained, the nature and scope of services to be offered and the improvements to be constructed and maintained on the Premises. This provision is without limitation of the **STATE's** right to abandon the airport and reconvey the rights under this LEASE pursuant to paragraph 7, below.

b. To pay to **LESSOR** the lump sum of _____**/00 Dollars ($**) as rental payment in full for the entire term of this LEASE.

c. To provide all utilities, services and maintenance (including snow removal) for the **STATE's** use of the Premises at no cost to **LESSOR**. The **STATE**, in its sole discretion, will determine the appropriate level of utilities, services and maintenance offered or provided on the Premises.

3. **LESSOR** represents and warrants that it holds unencumbered title to the Premises surface estate, and that it has obtained and will maintain an interest in or covenant with respect to the Premises subsurface estate sufficient to ensure the effectiveness of the LEASE grant stated in paragraph 1, above. A conformed copy of the recorded document by which **LESSOR** holds title to the Premises surface estate is attached hereto as Exhibit C. A conformed copy of the recorded document by which **LESSOR** holds an interest in or covenant with respect to the Premises subsurface estate is attached hereto as Exhibit D. **LESSOR** represents and warrants that it has complete authority and has obtained all consents and approvals necessary to enter into this LEASE, to bind itself to and to perform each of its obligations under it. A copy of **LESSOR's** authorizing resolution is attached hereto as Exhibit E. **LESSOR** also represents and warrants that all portions of the Premises that have not prior to this LEASE been within the boundary of the Airport are free of any environmental contamination that would require any kind of response or remediation under any applicable law or regulation. **LESSOR** does not warrant that any portion of the Premises that prior to this LEASE has been within the boundary of the Airport is free of environmental contamination, but does represent and warrant that it is not aware of any environmental contamination on those portions of the Premises except as otherwise disclosed by **LESSOR** in writing to the **STATE**. **LESSOR** agrees to indemnify, defend and hold the **STATE** harmless with respect to any third-party claims to the Premises, including, without limitation, any claims arising under Section 14(c) of the Alaska Native Claims Settlement Act, and with respect to any losses, costs, damages or third-party claims relating to environmental contamination of the Premises in existence on the effective date of this LEASE, except to the extent of any obligation or liability of the **STATE** independent of the **STATE's** tenancy under this LEASE.

Delete

4. **LESSOR** does not enter into this LEASE in reliance on or expectation of economic benefit in the form of a reversionary interest in existing or future improvements to the Premises. Rather, this LEASE is granted by **LESSOR** based on **LESSOR**'s recognition by the FAA as a "public agency" under 14 C.F.R. § 152.3, and is for the purpose of making the Premises available for provision of a public transportation facility that will greatly benefit **LESSOR** and its members, as well as the general public.

5. **LESSOR** acknowledges that the **STATE** is the owner of all improvements that the **STATE** or its predecessor airport operator placed on the Premises at any time prior to the effective date of this LEASE; **LESSOR** disclaims any and all present interest in such improvements. The **STATE** shall, in addition, have and retain ownership of all improvements on the Premises constructed by or on behalf of the **STATE** during the term of the LEASE, or any holdover, extension or renewal period, and shall retain such ownership at the expiration of termination of the LEASE except as otherwise provided in this LEASE or subsequently agreed to in writing by the **STATE**. **LESSOR** shall have no present, future, contingent or reversionary interest in improvements placed on or made to the Premises at any time prior to or during this LEASE, or during any holdover, extension or renewal period. Any hope or expectancy of **LESSOR** that the **STATE** may in the future abandon

improvements to **LESSOR** shall be and remain subordinate to the interest of the **STATE** unless otherwise agreed to in writing by the **STATE**.

6. This LEASE may be terminated by the mutual written consent of both parties. Nothing in this lease shall be construed as limiting the discretion of the **STATE** unilaterally to abandon the airport pursuant to paragraph 7 of this LEASE and applicable provisions of Alaska Statutes and/or the Administrative Code.

7. The **STATE** reserves the unilateral right, in its sole discretion, formally to abandon the airport, in writing, pursuant to or consistent with any applicable provisions of Alaska Statutes and/or the Alaska Administrative Code, and federal law, and to terminate this LEASE. Within one year after the date of formal abandonment, expiration without holdover, or other termination, the **STATE** may, but need not, remove any and all improvements constructed or placed by the **STATE** on the Premises, and shall, until the expiration of that period, or such earlier date as the **STATE** provides **LESSOR** with written notice of complete vacation, retain exclusive control of the Premises. The **STATE** may also render the runway or other airport improvements incapable of use if, in its sole discretion, the **STATE** deems that action necessary or desirable in the interest of public safety. Sublessees of the **STATE** shall have the period of time permitted by their sublease agreements - but not more than one year after formal abandonment or other termination - in which to remove improvements constructed or placed by the sublessees on the Premises. Title to any improvements or other property not removed from the Premises within one year following abandonment of the airport or other termination, will vest in **LESSOR** or its successor, subject to any applicable FAA ASSURANCE, as further described in paragraph 10, below. At the request of **LESSOR** , the **STATE** shall, after expiration of the one-year period described above, quitclaim or otherwise release to **LESSOR,** all the rights granted to the **STATE** by this LEASE.

8. In the event that the **STATE** holds over at or after the end of the term of this LEASE, the **STATE's** tenancy shall be deemed a year-to-year tenancy commencing on the first day of the hold-over period. In the event of a hold-over, the **STATE** shall pay to **LESSOR** one fifty-fifth (1/55) of the amount stated in paragraph 2(b), above, for each year of such hold-over. The **STATE** may, at its option, at any time during the final five (5) years prior to the expiration of this LEASE, or during any period of hold-over under this paragraph, renew this LEASE on substantially the same terms provided for the initial lease period. In the event such guaranteed renewal right is determined by final and unappealable court decision to be unenforceable, **LESSOR** agrees that it shall, nevertheless, at the request of the **STATE**, negotiate in good faith for renewal on substantially the same terms provided herein. In no event shall **LESSOR** be entitled to be paid rent or any other compensation for any improvement placed upon the Premises at any time, whether prior to the effective date of this LEASE or during the term of this lease or any hold-over period, unless the same was constructed or installed by **LESSOR** for its own use and benefit with the **STATE's** consent.

9. At no expense to **LESSOR**, the **STATE** will conduct all activities authorized by this LEASE in compliance with all applicable Federal and State laws and regulations now or hereinafter enforced , including, but not limited to those relating to use, care, operation, maintenance, and protection of the airport, and to matters of health, safety, sanitation, and pollution. The acquisition of any necessary licenses or permits, will be the responsibility of the **STATE** or its sublessees and not that of **LESSOR** or any successor. The **STATE** covenants and agrees and **LESSOR** acknowledges,

the use or operation of an airport on the Premises"

that discrimination on the grounds of race, color, religion, national origin, ancestry, age, marital status, or sex will not be permitted as affects these Premises ~~in any manner against any patron, employee, applicant for employment or other person or group of persons in any manner prohibited by Federal or State law.~~ delete

10. **LESSOR** is familiar with the Assurances Airport Sponsors (_____) **[insert date of most recent version]** promulgated by the FAA, a copy of which are attached hereto as Exhibit F ("Assurances"), and acknowledges that the **STATE** is or may become obligated under a grant agreement with the FAA to comply with those Assurances, or with amended or additional Assurances that may be promulgated by the FAA. **LESSOR** agrees that it will cooperate fully to enable the **STATE** to fulfill the Assurances and any amendments to or substitutions for them, and will not participate in or aid any conduct or activity in violation of them or interfering with the **STATE**'s enforcement of them, provided that nothing in this LEASE obligates the **STATE** to **LESSOR** with respect to the Assurances, nor shall **LESSOR** be deemed an intended third-party beneficiary for any purpose with respect to any grant agreement between the **STATE** and the FAA.

11. To the extent permitted by law, and subject to specific appropriation when necessary, the **STATE** shall indemnify, hold harmless, and defend **LESSOR** from any and all claims or actions for injuries or damages sustained by any person or property arising directly from any negligence of the **STATE,** or of its employees or agents in the design, construction, operation or maintenance of the airport on the Premises; however the **STATE** shall not be required to indemnify, hold harmless or defend **LESSOR** for a claim of, or liability for, any act, omission or negligence of **LESSOR,** or of its officers, employees or agents. **LESSOR** shall indemnify, hold harmless, and defend the **STATE** from any and all claims or actions for injuries or damages sustained by any person or property, or for grant reimbursement, arising from any act, omission or failure to fulfill any LEASE obligation, by **LESSOR** or by its officers, employees or agents. If there is a claim of, or liability for, joint negligence of the **STATE** and **LESSOR,** the indemnification and hold harmless and defense obligations of the parties shall be apportioned on a comparative fault basis.

12. So long as the **STATE** operates a public airport on the Premises, the **STATE**'s right to retain exclusive possession and control of the Premises shall continue inviolate and without interference from the **LESSOR** for the entire term, and any renewal, holdover or extension, of this LEASE, without regard to any alleged or proven breach of this Lease by the **STATE,** unless and until the **LESSOR** either:

a. pays to the **STATE** the full cost-basis value of all improvements to the Premises, regardless of when constructed; or

b. assumes, in a manner and form satisfactory to the FAA and any other relevant funding entity, all obligations of the **STATE** under all grant agreements with the FAA or other respective agency with respect to the Premises and the improvements thereon, including, but not limited to all grant repayment liabilities and all obligations under Assurances, and the **STATE** has received written confirmation from the FAA and any other relevant funding entity of the **LESSOR**'s assumption of, and the **STATE**'s release from, all such obligations.

13. In order to protect the **STATE**'s anticipated long-term investment in the Premises, **LESSOR** agrees that, absent satisfaction of 12(a) or (b), so long as the **STATE** operates a public airport on the Premises, the **LESSOR**'s sole remedy for breach shall be limited to either an order for specific performance or for payment of monetary damages, and shall not extend to cancellation, termination or other divestiture of the **STATE**'s right to exclusive possession and control of the Premise, which remedies the **LESSOR** expressly waives and relinquishes.

14. In addition to all other remedies available to the **STATE** under this agreement, at law or in equity, the **STATE** shall have an irrevocable right to compel specific performance of this LEASE by the **LESSOR.** With respect to an action to compel specific performance, the **LESSOR** expressly waives all defenses relating to sovereign immunity or otherwise protecting **LESSOR**'s real property from being taken without its consent, which consent is given by this LEASE to the limited extent of all rights, interests and privileges given, leased and conveyed to the **STATE** under this LEASE.

15. **LESSOR** expressly and irrevocably waives any sovereign immunity that it may possess, and consents to suit against itself and against its officials in the courts of the State of Alaska, as to any and all causes of action, whether by the State of Alaska or any other person, arising out of or in connection with this LEASE. With respect to any order or judgment rendered against it by any court of the State of Alaska, **LESSOR** consents to enforcement and to execution against any and all real and personal property interests of **LESSOR**, however held. **LESSOR** also consents to and waives any immunity from informal or administrative action by the State of Alaska with respect to any interest in land or other asset which is the subject of this LEASE, and to any improvements or other property that may at any time be placed upon the Premises. **LESSOR** expressly agrees that venue for any judicial or administrative proceeding is proper in the _____ Judicial District at _____ with respect to any claim relating to or arising from this LEASE.

16. The parties agree to notify each other promptly of any claim, demand, or lawsuit arising out of or affecting the **STATE's** occupation or use of the Premises. Both parties will fully cooperate in the investigation and litigation of any claim, demand or lawsuit affecting the Premises. Notices to be given pursuant to this LEASE will be deemed valid only when hand-delivered or sent by registered or certified mail to the respective party at its address listed below. Each party must notify the other in writing of any change in its notice address:

LESSOR:

STATE: Regional Director
State of Alaska, Department of Transportation & Public Facilities
P.O. Box 196900
Anchorage, AK 99519-6900

17. The effective date of this LEASE is the date it is signed by last signing party.

18. The following attached document copies are part of this LEASE:

Exhibit A: Metes and Bounds Description of Premises
Exhibit B: Airport Property Plan
Exhibit C: LESSOR's Surface Estate Title Document
Exhibit D: LESSOR's Subsurface Estate Interest Document
Exhibit E: LESSOR's Resolution of Approval
Exhibit F: FAA Airport Assurances

19. This LEASE sets forth all the terms, conditions, and agreements of the parties and supersedes any previous understanding or agreements regarding the Premises whether oral or written. No modification or amendment of this LEASE is valid unless it is in writing and signed by both parties.

20. All covenants and provisions in this LEASE extend to and bind the legal representatives, successors, sublessees, and assigns of the parties. **LESSOR** agrees not to convey its interest in the Premises or otherwise assign its interest in this LEASE without the consent of the **STATE,** except to a municipality encompassing the Premises and legally incorporated under Title 29 of the Alaska Statutes and which agrees to abide by and honor every provision of this lease. Any successor in interest to **LESSOR** shall have no right, power or authority to enforce any provision of this LEASE unless it first irrevocably waives any sovereign immunity that it may posses, and otherwise agrees to assume, abide by and honor all provisions of this LEASE as fully as if it were the original **LESSOR.** The **STATE** agrees not to assign this LEASE without **LESSOR**'s consent other than to a legally constituted department or other entity of the State of Alaska, or a municipality legally incorporated under Title 29 of the Alaska Statutes.

21. If any provision or covenant of this LEASE is declared to be invalid by a court of competent jurisdiction, the remaining provisions and covenants will continue in full force and effect.

22. In the event of litigation in whole or in part to enforce any provision of this LEASE, the non- prevailing party shall pay the prevailing party its full reasonable attorney fees and costs.

23. The **STATE** enters into this LEASE to secure an interest in the subject property satisfactory to the FAA for use of Airport Improvement Program funds for construction or improvement of an airport on the Premises. The **STATE** relies exclusively upon the FAA's determination to deem **LESSOR** a qualifying lessor.

24. Neither **LESSOR** nor the **STATE** believe that 25 U.S.C. § 81 or § 177 is applicable to the **LESSOR**, the Premises or to this LEASE, or that the endorsement of the Secretary of the Interior is necessary to validate this lease, and **LESSOR** knowingly and voluntarily waives any defense to the enforceability of this LEASE based in whole or in part on those statutes.

GROUND LEASE
_____ AIRPORT

THIS **LEASE** is entered into this ___ day of_____, _____, by and between the _____ ("**LESSOR**"), and the **STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES** ("**STATE**"), being responsible for construction, operation and maintenance of state airports, based upon the facts and circumstances recited in the Memorandum of Understanding between **LESSOR** and **STATE** executed in connection with this LEASE.

1. In consideration of the [nominal] lump sum rent to be paid and the mutual agreements and covenants contained in this LEASE, the sufficiency of which is hereby acknowledged, **LESSOR** grants and leases to the **STATE** for a term of thirty (30) years from the effective date of this LEASE, the following described property:

> That certain real property described by the metes and bounds description attached as Exhibit A and depicted on the property plan attached as Exhibit B, both of which exhibits are incorporated into this LEASE by this reference;

aggregating ____ **acres,** more or less, (the "Premises"). The **STATE** is granted during the initial term of this LEASE and any holdover, extension or renewal period, the right of exclusive possession and control of the Premises, the right to construct and maintain on the Premises any buildings and other improvements the **STATE**, in its sole discretion, deems appropriate for a public airport, and the right to operate a public airport on the Premises. The **STATE's** right of possession and control shall include the right, in its sole discretion, to sublease any portion of the Premises as airport property in a manner consistent with the provisions of **17 AAC 40, *et seq.***, and any amendments to or substitutions for those regulations.

to any party

2. For and in consideration of the foregoing, the **STATE** agrees:

   a. To maintain, equip and operate a public airport on the Premises in accordance with State standards for airports of the same class and with the requirements of the Federal Aviation Administration ("FAA"). The **STATE** shall, in its sole discretion, determine and/or modify the class of airport to be maintained, the nature and scope of services to be offered and the improvements to be constructed and maintained on the Premises. This provision is without limitation of the **STATE's** right to abandon the airport and reconvey the rights under this LEASE pursuant to paragraph 7, below.

   b. To pay to **LESSOR** the lump sum of _____**/00 Dollars ($_____)** as rental payment in full for the entire term of this LEASE.

   c. To provide all utilities, services and maintenance (including snow removal) for the **STATE's** use of the Premises at no cost to **LESSOR**. The **STATE**, in its sole discretion, will determine the appropriate level of utilities, services and maintenance offered or provided on the Premises.

3. **LESSOR** represents and warrants that it holds unencumbered title to the Premises surface estate. A conformed copy of the recorded document by which **LESSOR** holds title to the Premises surface estate is attached hereto as Exhibit C. **LESSOR** represents and warrants that it has complete authority and has obtained all consents and approvals necessary to enter into this LEASE, to bind itself to and to perform each of its obligations under it. A copy of **LESSOR's** authorizing resolution is attached hereto as Exhibit D. **LESSOR** agrees to indemnify, defend and hold the **STATE** harmless with respect to any third-party claims to the Premises, including, without limitation, any claims arising under Section 14(c) of the Alaska Native Claims Settlement Act. **LESSOR** also represents and warrants that all portions of the Premises that have not prior to this LEASE been within the boundary of the Airport are free of any environmental contamination that would require any kind of response or remediation under any applicable law or regulation. **LESSOR** does not warrant that any portion of the Premises that prior to this LEASE has been within the boundary of the Airport is free of environmental contamination, but does represent and warrant that it is not aware of any environmental contamination on those portions of the Premises except as otherwise disclosed by **LESSOR** in writing to the **STATE**.

4. **LESSOR** does not enter into this LEASE in reliance on or expectation of economic benefit in the form of a reversionary interest in existing or future improvements to the Premises. Rather, this LEASE is granted by **LESSOR** based on **LESSOR**'s recognition by the FAA as a "public agency" under 14 C.F.R. § 152.3, and is for the purpose of making the Premises available for provision of a public transportation facility that will greatly benefit **LESSOR** and its members, as well as the general public.

5. **LESSOR** acknowledges that the **STATE** is the owner of all improvements that the **STATE** or its predecessor airport operator placed on the Premises at any time prior to the effective date of this LEASE; **LESSOR** disclaims any and all present interest in such improvements. The **STATE** shall, in addition, have and retain ownership of all improvements on the Premises constructed by or on behalf of the **STATE** during the term of the LEASE, or any holdover, extension or renewal period, and shall retain such ownership at the expiration of termination of the LEASE except as otherwise provided in this LEASE or subsequently agreed to in writing by the **STATE**. **LESSOR** shall have no present, future, contingent or reversionary interest in improvements placed on or made to the Premises at any time prior to or during this LEASE, or during any holdover, extension or renewal period. Any hope or expectancy of **LESSOR** that the **STATE** may in the future abandon improvements to **LESSOR** shall be and remain subordinate to the interest of the **STATE** unless otherwise agreed to in writing by the **STATE**.

6. This LEASE may be terminated by the mutual written consent of both parties. Nothing in this lease shall be construed as limiting the discretion of the **STATE** unilaterally to abandon the airport pursuant to paragraph 7 of this LEASE and applicable provisions of Alaska Statutes and/or the Administrative Code.

7. The **STATE** reserves the unilateral right, in its sole discretion, formally to abandon the airport, in writing, pursuant to or consistent with any applicable provisions of Alaska Statutes and/or the Alaska Administrative Code, and federal law, and to terminate this LEASE. Within one year after the date of formal abandonment, the **STATE** may, but need not, remove any and all improvements constructed or placed by the **STATE** on the Premises, and shall, until the expiration of that period, or

such earlier date as the **STATE** provides **LESSOR** with written notice of complete vacation, retain exclusive control of the Premises. The **STATE** may also render the runway or other airport improvements incapable of use if, in its sole discretion, the **STATE** deems that action necessary or desirable in the interest of public safety. Sublessees of the **STATE** shall have the period of time permitted by their sublease agreements - but not more than one year after formal abandonment - in which to remove improvements constructed or placed by the sublessees on the Premises. Title to any improvements or other property not removed from the Premises within one year following the abandonment of the airport will vest in **LESSOR** or its successor, subject to any applicable FAA ASSURANCE, as further described in paragraph 10, below. At the request of **LESSOR** , the **STATE** shall, after expiration of the one-year post-abandonment period described above, quitclaim or otherwise release to **LESSOR,** all the rights granted to the **STATE** by this LEASE.

8. In the event that the **STATE** holds over at or after the end of the term of this LEASE, the **STATE's** tenancy shall be deemed a year-to-year tenancy commencing on the first day of the hold-over period. In the event of a hold-over, the **STATE** shall pay to **LESSOR** one thirtieth (1/30) of the amount stated in paragraph 2(b), above, for each year of such hold-over. The **STATE** may, at its option, at any time during the final five (5) years prior to the expiration of this LEASE, or during any period of hold-over under this paragraph, renew this LEASE on substantially the same terms provided for the initial lease period. In the event such guaranteed renewal right is determined by final and unappealable court decision to be unenforceable, **LESSOR** agrees that it shall, nevertheless, at the request of the **STATE**, negotiate in good faith for renewal on substantially the same terms provided herein. In no even shall **LESSOR** be entitled to be paid rent or any other compensation for any improvement placed upon the Premises at any time, whether prior to the effective date of this LEASE or during the term of this lease or any hold-over period, unless the same was constructed or installed by **LESSOR** for its own use and benefit with the **STATE's** consent.

9. At no expense to **LESSOR**, the **STATE** will conduct all activities authorized by this LEASE in compliance with all applicable Federal and State laws and regulations now or hereinafter enforced , including, but not limited to those relating to use, care, operation, maintenance, and protection of the airport, and to matters of health, safety, sanitation, and pollution. The acquisition of any necessary licenses or permits, will be the responsibility of the **STATE** or its sublessees and not that of **LESSOR** or any successor. The **STATE** covenants and agrees and **LESSOR** acknowledges, that discrimination on the grounds of race, color, religion, national origin, ancestry, age, marital status, or sex will not be permitted as affects these Premises in any manner against any patron, employee, applicant for employment or other person or group of persons in any manner prohibited by Federal or State law.

10. **LESSOR** is familiar with the Assurances Airport Sponsors (_____) **[insert date of most recent version]** promulgated by the FAA, a copy of which are attached hereto as Exhibit D ("Assurances"), and acknowledges that the **STATE** is or may become obligated under a grant agreement with the FAA to comply with those Assurances, or with amended or additional Assurances that may be promulgated by the FAA. **LESSOR** agrees that it will cooperate fully to enable the **STATE** to fulfill the Assurances and any amendments to or substitutions for them, and will not participate in or aid any conduct or activity in violation of them or interfering with the **STATE**'s enforcement of them, provided that nothing in this LEASE obligates the **STATE** to **LESSOR** with

respect to the Assurances, nor shall **LESSOR** be deemed an intended third-party beneficiary for any purpose with respect to any grant agreement between the **STATE** and the FAA.

11. The **STATE** will, to the extent that the Alaska Legislature may appropriate funds for that purpose, indemnify, defend and hold **LESSOR** harmless from any liability, action, claim, suit, loss, property damage, or personal injury of whatever kind resulting directly from any non-discretionary act of commission or omission by the **STATE**, or its employees acting within the scope of their employment, with respect to the design, construction, operation or maintenance of the airport on the Premises, except to the extent such costs, loss, injury or damage is caused by the acts or omissions of **LESSOR** or its representatives, agents or employees. In the event the **STATE** would be obligated to fulfill this indemnity duty if funds were appropriated for that purpose, the **STATE** agrees to make application to the Alaska Legislature and to seek such appropriation.

12. So long as the **STATE** operates a public airport on the Premises, the **STATE**'s right to retain exclusive possession and control of the Premises shall continue inviolate and without interference from the **LESSOR** for the entire term, and any renewal or extension, of this LEASE, without regard to any alleged or proven breach of this Lease by the **STATE**, unless and until the **LESSOR** either:

CLARIFY THAT THIS INCL. ALL COSTS TO PROVIDE FACILITY THAT'S THERE.

PROTECTION, NOT AN OFFSET

a. pays to the **STATE** the full cost-basis value of all improvements to the Premises, regardless of when constructed; or

b. assumes, in a manner and form satisfactory to the FAA and any other relevant funding entity, all obligations of the **STATE** under all grant agreements with the FAA or other respective agency with respect to the Premises and the improvements thereon, including, but not limited to all grant repayment liabilities and all obligations under Assurances, and the **STATE** has received written confirmation from the FAA and any other relevant funding entity of the **LESSOR**'s assumption of, and the **STATE**'s release from, all such obligations.

THIRD PARTY CLAIMS TO USE OF AIRPORT

13. In order to protect the **STATE**'s anticipated long-term investment in the Premises, **LESSOR** agrees that, absent satisfaction of 12(a) or (b), so long as the **STATE** operates a public airport on the Premises, the **LESSOR**'s sole remedy for breach shall be limited to either an order for specific performance or for payment of monetary damages, and shall not extend to cancellation, termination or other divestiture of the **STATE**'s right to exclusive possession and control of the Premise, which remedies the **LESSOR** expressly waives and relinquishes.

14. The **STATE** shall have an irrevocable right to compel specific performance of this Lease by the **LESSOR.** With respect to an action to compel specific performance, the **LESSOR** expressly waives all defenses relating to sovereign immunity or otherwise protecting LESSOR's real property from being taken without its consent, which consent is given by this LEASE to the limited extent of all rights, interests and privileges given, leased and conveyed to the **STATE** under this LEASE.

15. **LESSOR** expressly and irrevocably waives any sovereign immunity that it may possess, and consents to suit against itself and against its officials in the courts of the State of Alaska, as to any and all causes of action, whether by the State of Alaska or any other person, arising out of or in

connection with this LEASE. With respect to any order or judgment rendered against it by any court of the State of Alaska, **LESSOR** consents to enforcement and to execution against any and all real and personal property interests of **LESSOR**, however held. **LESSOR** also consents to and waives any immunity from informal or administrative action by the State of Alaska with respect to any interest in land or other asset which is the subject of this LEASE, and to any improvements or other property that may at any time be placed upon the Premises. **LESSOR** expressly agrees that venue for any judicial or administrative proceeding is proper in the _____ Judicial District at _____ with respect to any claim relating to or arising from this LEASE.

16. The parties agree to notify each other promptly of any claim, demand, or lawsuit arising out of or affecting the **STATE's** occupation or use of the Premises. Both parties will fully cooperate in the investigation and litigation of any claim, demand or lawsuit affecting the Premises. Notices to be given pursuant to this LEASE will be deemed valid only when hand-delivered or sent by registered or certified mail to the respective party at its address listed below. Each party must notify the other in writing of any change in its notice address:

LESSOR:

STATE: Regional Director
State of Alaska, Department of Transportation & Public Facilities
P.O. Box 196900
Anchorage, AK 99519-6900

17. The effective date of this LEASE is the date it is signed by last signing party.

18. The following attached document copies are part of this LEASE:

Exhibit A: Metes and Bounds Description of Premises
Exhibit B: Airport Property Plan
Exhibit C: LESSOR's Title Document
Exhibit D: LESSOR's Resolution of Approval
Exhibit E: FAA Airport Assurances

19. This LEASE sets forth all the terms, conditions, and agreements of the parties and supersedes any previous understanding or agreements regarding the Premises whether oral or written. No modification or amendment of this LEASE is valid unless it is in writing and signed by both parties.

20. All covenants and provisions in this LEASE extend to and bind the legal representatives, successors, sublessees, and assigns of the parties. **LESSOR** agrees not to convey its interest in the Premises or otherwise assign this LEASE without the consent of the **STATE,** except to a municipality encompassing the Premises and legally incorporated under Title 29 of the Alaska Statutes. The **STATE** agrees not to assign this LEASE without **LESSOR**'s consent other than to a legally

constituted department or other entity of the State of Alaska, or a municipality legally incorporated under Title 29 of the Alaska Statutes.

21. If any provision or covenant of this LEASE is declared to be invalid by a court of competent jurisdiction, the remaining provisions and covenants will continue in full force and effect.

22. In the event of litigation in whole or in part to enforce any provision of this LEASE, the non-prevailing party shall pay the prevailing party its full reasonable attorney fees and costs.

23. The **STATE** enters into this LEASE to secure an interest in the subject property satisfactory to the FAA for use of Airport Improvement Program funds for construction or improvement of an airport on the Premises. The **STATE** relies exclusively upon the FAA's determination to deem **LESSOR** a qualifying lessor.

IT PROB. IS IF THEY WANT IT TO BE

24. Neither **LESSOR** nor the **STATE** believe that 25 U.S.C. § 81 or § 177 is applicable to the **LESSOR**, the Premises or to this LEASE, or that the endorsement of the Secretary of the Interior is necessary to validate this lease, and **LESSOR** knowingly and voluntarily waives any defense to the enforceability of this LEASE based in whole or in part on those statutes.

IN WITNESS WHEREOF the parties hereto have executed this Instrument as of the date first hereinabove set forth.

NATIVE VILLAGE OF_____
[TRADITIONAL][IRA] VILLAGE CC

DATED: _____

By:_____
Name:

STATE OF ALASKA, DEPARTMENT
TRANSPORTATION AND PUBLIC FA

DATED: _____

By:
John Jensen
Chief Right of Way Agent
Central Region

ACKNOWLEDGMENTS

STATE OF ALASKA)
)ss
SECOND JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on the ___ day of _____, _____, the foregoing Instrument was acknowledged before me by _____, the _____ of the **NATIVE VILLAGE OF , [TRADITIONAL] [IRA] VILLAGE COUNCIL** , on behalf of said Council and the **NATIVE VILLAGE OF**_____.

Notary Public in and for Alaska
My Commission expires:

STATE OF ALASKA)
)ss
FOURTH JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on the ___ day of _____, _____ the foregoing Instrument was acknowledged before me by _____, the_____ of STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, on behalf of the STATE of Alaska and said department.

Notary Public in and for Alaska
My Commission expires:

THIS IS MERELY AN ATTEMPT TO SOMEHOW MAKE OUR UNENFORCEABLE CONTRACT ENFORCEABLE

MEMORANDUM OF UNDERSTANDING CONCERNING THE GROUND LEASE FOR THE _____ AIRPORT

THIS **Memorandum of Understanding** is entered into this ___ day of_____, _____, in support of that certain **LEASE** by and between the _____ ("**LESSOR**"), and the **STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES** (hereinafter "**STATE**"), as the agency responsible for the construction, operation and maintenance of state airports in Alaska. The LEASE that the parties enter into on this date is based upon the following mutually understood and acknowledged circumstances:

1. LESSOR desires that the State improve, reconstruct or relocate the _____ Airport (hereinafter Airport), which is the primary local public airport that serves LESSOR's members;

2. The State also desires to improve, reconstruct or relocate the Airport for the benefit of the people of Alaska and the public in general, including LESSOR's members;

3. In order to pay for airport work desired by LESSOR and the State, the State would typically, and intends to, use grant funds administered by the Federal Aviation Administration (FAA);

4. The State would not be eligible to receive FAA grant funds to improve the Airport unless it certifies that it has sufficient title to the airport property to retain exclusive possession and control of the property, and to enforce FAA Grant Assurances on the property, for not less than 20 years, and with respect to some grant Assurances, for the life of the FAA grant-funded improvements;

5. If the State were to accept FAA grant funds to improve the Airport, but fail to secure and retain exclusive possession and control of the property, or to ensure compliance with FAA Grant Assurances for at least 20 years, or in some case for the life of the improvements, the State could become liable to repay to the FAA the full amount of the grant funds, plus interest;

6. The State does not believe it could make the required title certification, nor properly undertake the Grant Assurance duties and financial obligations on behalf of the people of Alaska without achieving certainty that it could retain possession and control of the airport; LESSOR respects the State's public policy judgment;

7. The State's general practice is to secure fee title to property underlying state airports, or at least to retain the right to take fee title to such land by eminent domain;

8. LESSOR has obtained fee title to the surface estate underlying some or all of the present or proposed site for the Airport, is unwilling to sell that fee title to the State, or to waive the possibility that LESSOR may be immune from having its fee title taken by eminent domain; although the State does not concede that LESSOR is so immune, the State respects LESSOR's policy judgment;

9. LESSOR desires, however, to lease to the State so much of its surface estate that underlies any portion of the present or proposed site for the Airport in a manner that gives the State the maximum possible control over the property during the term of the lease, short of conveying fee title, to enable the State to accept FAA grant funds for Airport improvements or relocation consistent with the State's public policy judgment;

10. The State has concluded that as a matter of sound public policy, it may, and it intends to, undertake the obligations imposed by an FAA grant for the Airport, in great reliance upon the enforceability of the LEASE, especially including those terms affording the State irrevocable possession and control of the Airport site, because there is some question that the State could otherwise secure the property to improve the Airport for the benefit of the people of Alaska, and the general public.

THERE DOESN'T HAVE TO BE ANY QUESTION.

11. The parties agree that they have both had the advice of competent counsel in the negotiation of this document and the accompanying LEASE, that neither side had undue bargaining power, and that the LEASE should be interpreted in furtherance of its central goal: the improvement, operation and maintenance of the Airport in a without imposing special burdens the State does not typically face at other state airports of comparable class in Alaska.

NATIVE VILLAGE OF _____,
TRADITIONAL VILLAGE COUNCIL

DATED: _____ By:_____
Name:

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

DATED: _____ By:
John Jensen / Miller
Chief Right of Way Agent
_____ Region

ACKNOWLEDGEMENTS

STATE OF ALASKA)
)ss
SECOND JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on the ___ day of _____, _____, the foregoing Instrument was acknowledged before me by _____, the _____ of the **NATIVE VILLAGE OF** _____, **TRADITIONAL VILLAGE COUNCIL** l, on behalf of said Council and the **NATIVE VILLAGE OF**_____.

Notary Public in and for Alaska
My Commission expires:

STATE OF ALASKA)
)ss
FOURTH JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on the ___ day of _____, _____ the foregoing Instrument was acknowledged before me by _____, the of STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, on behalf of the State of Alaska and said department.

Notary Public in and for Alaska
My Commission expires:

ADDENDUM TO FAA GRANT AGREEMENT: _____ AIRPORT

That's not what FAA Regs. say! They prohibit the use fr. Pvt. Owners!

The Federal Aviation Administration (FAA) acknowledges that the State of Alaska would prefer, as a matter of policy, to construct airport improvements on land that it owns in fee rather than on leased land. Ordinarily, except on land leased from the United States, the State would construct airport improvements on leased land only where the lessor does not possess, or has broadly waived, any defense grounded in sovereign immunity or other protection of its land, such that the State, if necessary, could take fee title through exercise of the State's power of eminent domain.

Under 14 C.F.R. § 152.3, however, the FAA has defined "satisfactory property interest" to support receipt of Airport Improvement Program (AIP) funds to include a lease of land from an "Indian tribe," inasmuch as an Indian tribe is included within the definition of a "public agency" from which a lease may be a satisfactory property interest. The FAA has determined that Alaska Native Villages that have been listed by the United States Department of the Interior, Bureau of Indian Affairs, as federally recognized tribes, are tribes under 14 C.F.R. § 152.3, such that a lease from an Alaska Native Village, on terms satisfactory to the Administrator, is satisfactory title to support AIP funding.

The FAA has reviewed the Lease by which the State has obtained the leasehold interest upon which it relies for the above-referenced AIP-funded project, and has found its terms satisfactory to the Administrator. The FAA acknowledges that State-tribal leases for airport land are without precedent in Alaska, and that as long as no such lease has been tested either in practice or in court, issues relating to such matters as, for example, claims of tribal sovereign immunity, tribal membership, delegation of authority and lease approval processes, and any claim that the Secretary of the Interior has a required supervisory role, preclude the State from guaranteeing any leasehold interest from an Alaska Native Village against all legal risks inherent in such a lease. Nevertheless, the FAA has affirmatively encouraged the State to avail itself of the acceptability of leases from Alaska Native Villages, to apply for AIP funding for airport improvements on land leased from Alaska Native Villages, and to rely on such leases as the State's property interest for AIP-funded construction of improvements to State airports.

The FAA, therefor, agrees and assures the State that the FAA will not hold the State financially or otherwise responsible if, despite the best efforts of the State to defend and enforce its leasehold interest, the State loses possession and control of land leased from an Alaska Native Village for the above airport for a reason relating to any invalidity or unenforceability of the State's lease due to the status or rights of the lessor as an Alaska Native Village.

Who pays the litigation cost?

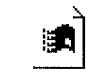
FEDERAL AVIATION ADMINISTRATION

DATE:_____ By:

Its:_____

John Miller

From: John Steiner [John_Steiner@law.state.ak.us]
Sent: Thursday, March 12, 1998 3:52 PM
To: Clyde_Stoltzfus@dot.state.ak.us
Cc: Barbara_Ritchie@law.state.ak.us; Paul_Lyle@law.state.ak.us
Subject: Draft Lease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Form2lse.wpd


Form2mou


Form2mou.wpd


Form-faa


Form2lse


Form-faa.doc


Form2mou.doc


Form2lse.doc

Attached are the draft lease, memorandum of understanding, and FAA addendum. They are each attached as MSWord, WordPerfect and ASCII text files. My cover memo, which I will give you in hard copy tomorrow, but have not copied to all the right-of-way people is set out below:

Accompanying this memorandum is a proposed draft master ground lease under which DOT&PF can obtain a leasehold interest in Alaska Native Village Land for use in FAA Airport Improvement Program-funded airport improvements. We believe the property interest in the accompanying lease should provide DOT&PF with a *satisfactory property interest* as that phrase is defined in 14 C.F.R. 152.3. Although the FAA has not reviewed the draft lease, we expect that the draft lease will meet that regulation*s further requirement that any lease be *on terms that the Administrator considers satisfactory.*

To strengthen both of those conclusions, we also propose that a Memorandum of Understanding be negotiated with and signed by the Native Village, setting out the circumstances under which the lease is signed. A master draft of such a memorandum also accompanies this cover memo. Finally, we also provide a proposed addendum that the FAA may be asked to sign in conjunction with any lease. The FAA may decline to agree to sign the accompanying draft, but it seems worthwhile to ask the FAA to bear some of the risk inherent in a property ownership structure it is advocating that DOT&PF use.

We have considered the advisability of including in the lease a waiver of the Village*s defenses against eminent domain as a *last resort* means by which the State could secure title to the leased land if lease management were to become intolerable or if lease enforcement provisions were found to be unenforceable. Such language might run as follows:

> If, and only if, the provisions of this LEASE affording the STATE an irrevocable right to specific performance and to exclusive possession and control, are determined to be unenforceable, and the STATE determines that its ability to fulfill applicable laws or Assurances are thereby compromised or impaired, then the STATE may acquire either limited duration or permanent fee title to the Premises, by any means authorized under AS 02.15.070, and LESSOR expressly waives all defenses relating to sovereign immunity or otherwise protecting LESSOR*s real property from being taken without its consent, which consent is, in those limited circumstances, given as to the Premises.

We have concluded that although such language would be prudent and desirable, it is not legally necessary to meet the minimum requirements of applicable law. At your request, the draft master lease does not include such language, but it is provided here for your consideration.

In considering the accompanying draft master lease, it is critical to remember that every Native Village will have a unique legal

structure, and every proposed airport site will have unique title issues, not the least of which may relate to the State*s ANCSA 14(c)(4) airport site entitlement, and any history of the land as including a Native Allotment. Each lease, therefor, will require very careful title and legal analysis and review before negotiating positions are locked-in.

CLYDE STOLTZUS, SHIRLEY HORN, JOHN SITTNER, [illegible], [illegible], S. PARISH, S. BACINO

1/

LEASES FROM TRIBES 3/13/98

(BO) - 3/2/98 "SUMMIT" @ A.G.'S OFF. ⇒ NO REQMT. TO HV. "IMM. DOM." MUST HAVE S.I. WAIVER

- DO IT RIGHT, NOT QUICKLY
- START WITH ORG. THAT WANTS IT & ARE ALREADY CLOSE
- KWIG SHOULD BE FIRST.
- CLYDE TO "BE IN MIDDLE" OF NEGOTIATIONS.
- DON'T INITIALLY OFFER GIVING UP IMM. DOM. CLAUSE.
- 1ST USE WILL BE A "MODEL" FOR OTHERS TO FOLLOW.

(J.S.) IMM. DOM. CLAUSE: QUESTION IS DO WE HAVE TO HAVE IT OR WHETHER IT'S JUST DESIREABLE.

- ALL WE NEED IS ABILITY TO SECURE PERFORMANCES TO ALLOW FULFILL GRANT ASSURANCES — WE DON'T NEED FEE (WHICH IS WHAT IMM. DOM. GIVES US). (SEE SECT. 12)

- 12. IS INTENDED TO BE A LAYER OF PROTECTION, NOT AN OFFER TO SUGGEST VILLAGE BUY IT.

- TERM SHOULD BE UP TO 55 YR.

(SAM.) - 15. MAY BE FOUND INVALID SINCE 12. OUTLINES SUCH SPECIFIC ENFORCEMENT

- WHAT ABOUT CHANGE OF ORGANIZATION (TRAD. COURT → IRA COURT) SUCCESSORS IN INTEREST HAVES NOT WAIVED S.I. !

C.S. — NO LEASES WITHOUT MEMORANDUM.

- WE'RE DRAFTER, BUT MEMO ATTEMPTS TO OVERRULE NORMAL RULES OF CONSTRUCTION

[illegible] — NEED TO SPEAK TO SUB-SURF.

C.S. — THIS LSE SHOULD BE MODIFIED TO REQUIRE LESSOR TO BRING TO TABLE NON-DEV. COVENANT FROM SUB-SURF. OWNER (e.g. WHEN WE LSE, WE ARE LEASING SURF. ESTATE (S) NON-DEV. COVENANT.

J.S. — PAYMENT FOR MATLS.; WE'RE NOT FACING MATLS. OFF THE SITE ⇒ OWNER STILL HAS EM TO SELL TO SOMEBODY IN FUTURE (THEY'RE EVEN EASIER TO GET AT).

FEB 24 1998

M&O DIRECTOR
J. WAGNER
J. ROMERSBERGER
D. OWEN
G. LEVASSEUR
P. LEWIS
J. PHIPPS
J. LITTLE
J. ADAMS
J. CRAFT
RETURN TO DIR
FILE

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

3132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

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

January 8, 1998

Northern Region DOT/PF	E-MAIL	COPY	ROUTE
REGIONAL DIRECTOR			X
M&O DIRECTOR			X
PLANNING/ADM. CHIEF			X
DESIGN			X
CONST.			
ROW			X
PROJECT CONTROL			
SAFETY OFFICER			
F.I.A. MANAGER			
RETURN TO REG.			
DIR. SEC.			
FILE			

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

Dear Mr. Lake:

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

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

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

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

CHIEF R/W AGENT	
PRE AUDIT	
ENGINEERING	
APPRAISALS	
✓ NEGOTIATIONS	
Information Proc. Mgmt.	
UTILITIES	
RETURN TO:	
✓ FILE	

25A-T34LH

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

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

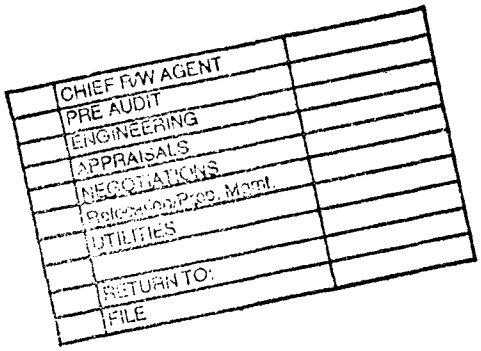
The department remains prepared to jointly draft a long term lease given assurances from the Village to waive sovereign immunity. We would further agree that such a waiver would relate solely to and prevail only during the term of the lease.

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

Sincerely,

Boyd J. Brownfield, P.E.
Deputy Commissioner

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



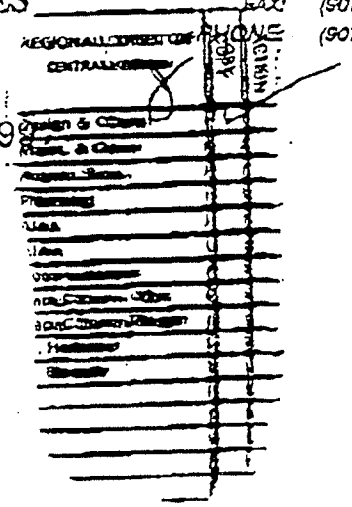
RECEIVED

To Tony Johansen for info re our discussion

TONY KNOWLES, GOVERNOR
3132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES
OFFICE OF THE COMMISSIONER

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



June 18, 19

Tommy J. Andrew
President
Native Village of Kwigillingok
PO Box 49
Kwigillingok AK 99622-0049

Dear Mr. Andrew:

Governor Knowles asked me to respond to your letter to him dated April 15, regarding last resort power of eminent domain for airport lands leased at the Village of Kwigillingok.

As you are well aware, the Department of Transportation and Public Facilities (DOT&PF) is responsible for a wide variety of transportation infrastructure throughout Alaska. You may know, as a policy matter, the DOT&PF prefers to own lands used to develop this public infrastructure. This policy preference was implemented to provide more consistency and certainty so that managing this diverse transportation system can be done efficiently over time.

However, we do recognize and respect the desire of the Native community to retain ownership of the land and have developed a policy that allows long-term leases, for this reason. However, leases are subject to interpretation and, as people move on, what may be clear between the original parties may become a source of disagreement in the future. Therefore, as a condition of the special leasing policy for Native lands, the department's policy requires the right to exercise eminent domain as a last resort to assure continued operation of the transportation system, should disputes arise under the lease.

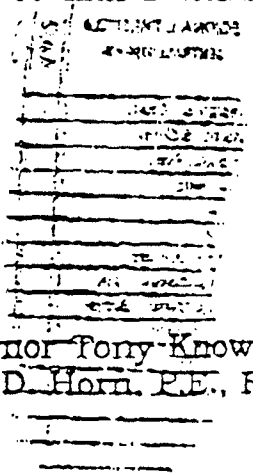
Given the overwhelming demand to provide transportation infrastructure throughout the state, it is our goal to avoid undertaking greater risks, creating more complex administrative situations and undertaking costly management obligations in individual situations. In this situation, we have offered an alternative that, I believe, reasonably balances the responsibilities of the department with the goals of the Native community.

Post-It™ brand fax transmittal memo 7671 | # of pages ▸ 2

To John Miller	From Sam Bacino
Co.	Co.
Dept.	Phone #
Fax #	Fax #

25A-TJ4LM

I believe we both have a sincere concern for the welfare and safety of all air travelers. Consequently, I hope we can move this project forward as quickly as possible so that better service can be provided at Kwigillingok.



Sincerely,

Joseph L. Perkins, P.E.
Commissioner

cc: Governor Tony Knowles
John D. Horn, P.E., Regional Director

TRACK #8788

TANANA CHIEFS CONFERENCE, INC.
122 FIRST AVENUE, SUITE 600
FAIRBANKS, ALASKA 99701-4897
PHONE 907/452-8251 • FAX 907/459-3850

November 11, 1997

DEC 5 1997

Joseph Perkins, Sr., Commissioner
State of Alaska
Department Of Transportation & Public Facilities
3132 Channel Drive
Juneau, AK 99801-7898

Dear Commissioner Perkins:

On behalf of Stevens Village Chief, Randy Mayo, and other interested parties, I am writing you concerning the ongoing negotiations of the Stevens Village Airport Project. As I am sure you may be aware, the condition of this airport is poor shape and poses an extreme safety hazard. It is with utmost importance that we meet with your staff to resolve these issues. It is my understanding that your Deputy Commissioner, Boyd J. Brownfield, has been making great strides in the area of negotiations with some of the Tribes. It is our desire to meet with you and Mr. Brownfield regarding the Stevens Village Airport Project.

One of the issues for the people of Stevens Village is that of Local Hire. Stevens Village has expressed their desire for their people to be hired for this project, yet, ADOT&PF has maintained that they cannot legally recognize the Tribal Employment Rights Ordinance (TERO) due to Alaska's Constitution. This community has an extremely high unemployment rate. These jobs are needed in this community, *for the people of this community*. TCC staff recently met with Dave Lacey, Dinyee Corporation; Ron Simpson, Sharon DeBoin and Matt Freeman of the FAA; Tim Sharp, Laborers and Scott Vaughn, Operating Engineers, and Randy Mayo, Chief, Stevens Village via phone. We discussed the possibility of using a Project Labor Agreement with the Stevens Village Airport Project. This would satisfy the tribe's desire for local hire, and is an avenue that could be acceptable to ADOT&PF.

The other issue for Stevens Village is the land lease concern. The Northern Region ADOT&PF has continually put demands on the lease for this project. History has shown that once negotiations are about to be finalized, another requirement is added. One of the requirements is "last resort power of eminent domain." There appears to be no law, statute or regulation for such a lease requirement. However, Northern Region DOT&PF is adamant that this be a part of the lease. It is our belief that this requirement is not being used in good faith. If there is no reason to have this in the lease (i.e., law, statute, or regulation), it should be removed.

Additionally, the requirement that the Tribe "irrevocably waives any sovereign immunity" is unacceptable. Until there comes a time when the relationship with Northern Region DOT&PF is on better terms, it is felt that this clause could be used at the discretion of the State.

X FILE 47	D&C DIR.	PRJ CTRL	ROW	CONSTR.			CONTRACTS	GEOTECH	ENVIRMNT	TRAFFIC	AIP/PF	HWY 1	AIRPORT

TRACK #8788
Due: 12/5/97

I have said we will set up a meeting for Joe & Bo for the

We would like to set up a meeting as soon as practical with you and Mr. Brownfield to discuss these issues. Please let us know when you would be available to meet. We will coordinate with the other interested parties.

We are hopeful that we can find a mutually agreeable solution to the Stevens Village Airport Project. Thank you for your cooperation in this matter.

Sincerely,
TANANA CHIEFS CONFERENCE, INC.

Perry Ahsogeak, Director
Community & Natural Resources

cc: Mr. Boyd J. Brownfield, Deputy Commissioner, ADOT&PF
Mr. Randy Mayo, Chief, Stevens Village
Mr. Dave Lacey, Dinyee Corporation
Mr. Ron Simpson, Airport Division Manager, FAA
Mr. Tim Sharp, Laborers Local 942
Mr. Scott Vaughn, Operating Engineers
Mr. Mike Walleri, Legal, TCC
Ms. Charlene Marth, E&T Coordinator/TERO Officer, TCC

The unequal bargaining position of the tribes and the recognition of the trust relationship have led to the development of canons of construction designed to rectify the inequality. Although many treaty rights are clearly expressed in Indian treaties, others are not. The courts have been liberal in recognizing the existence of Indian treaty rights in those instances when they are not clearly stated in the treaty. Three primary rules have been developed: ambiguous expressions must be resolved in favor of the Indian parties concerned;[76] Indian treaties must be interpreted as the Indians themselves would have understood them;[77] and Indian treaties must be liberally construed in favor of the Indians.[78] Thus the construction of Indian treaties is akin to the construction of adhesion contracts, in that Indian treaties, like adhesion contracts, are liberally construed in favor of the weaker party, and their terms are given the meaning attached to them by laymen unversed in the law. The goal is to achieve the reasonable expectations of the weaker party. Many principles of trust law are also applicable.

The courts have put teeth into these rules of construction. For example, the Supreme Court concluded that the treaty phrase "to be held as Indian lands are held" also reserved hunting and fishing rights to the Indians. In construing treaty language reserving to the Indians the right to fish at " 'usual and accustomed places' " on lands relinquished to the United States, it held that the language included an easement to cross over these lands to reach traditional fishing grounds, even after they had become privately settled by whites. Recently, the Court found that general provisions in the Navajo Treaty of 1868, which set aside the reservation " 'for the use and occupation of the Navajo tribe of Indians' " and provided for the exclusion of non-Navajos from the reservation, must be construed as excluding the operation of state laws, including state tax laws, upon Indians living on the reservation.

In the area of water rights, the Court has developed the so-called *Winters* doctrine which provides that implicit in Indian treaties is the reservation of sufficient waters, from streams on and bordering reservations, to fulfill the purposes of establishing the reservation, including irrigation for agriculture. Furthermore, the doctrine provides that Indian water rights date from the establishment of the reservation and are prior and paramount to any other rights subsequently established pursuant to state law. The *Winters* doctrine is essential to the protection of tribal water rights in Western "prior appropriation" states because it establishes an early appropriation date (the date on which

76. See, e.g., McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576–77 (1908).

77. See, e.g., Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Starr v. Long Jim, 227 U.S. 613, 622–23 (1913); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

78. See, e.g., Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943); Tulee v. Washington, 315 U.S. 681, 684–85 (1942); United States v. Walker River Irrig. Dist., 104 F.2d 334, 337 (9th Cir.1939).

FEDERAL INDIAN LAW

CASES AND MATERIALS

Second Edition

David H. Getches
Charles F. Wilkinson

American Casebook Series

WEST PUBLISHING CO.

I. ANY LEASE WITH A TRIBE MUST CONTAIN A WAIVER OF SOVEREIGN IMMUNITY BECAUSE:

A. As tribes, village councils have an inherent sovereign immunity from legal enforcement of their contractual obligations.

-- The District Court in the Venetie case ruled that village councils are tribes. The State did not appeal that portion of the Venetie decision. Therefore, the State no longer opposes the tribal status of village councils.

-- The State, by statute, has waived its immunity as to breach of contract actions brought against it. Therefore, the village council can enforce the lease against the State by filing a breach of contract action against the State in court. However, because the village council is an immune tribe, the State can not enforce the lease against the council in court, UNLESS the council waives its sovereign immunity.

B. State courts have no jurisdiction over the assets of an IRA council, even if the council is not immune from suit. If we do not have a waiver of immunity with regard to execution against the village assets, then any money judgment we get following a lease dispute would be meaningless.

II. THE PROBLEMS WITH SOVEREIGN IMMUNITY WAIVERS ARISE FROM THE ABOVE-STATED RULES OF IMMUNITY AND THE INTERPRETATION PLACED UPON THEM BY THE COURTS.

A. RULES OF INTERPRETATION

1. Waivers must be clear and unequivocally expressed.

2. The scope of a waiver is strictly construed against the non-tribal party.

B. PROBLEMS WITH WAIVERS

1. The scope of a waiver may be interpreted as too narrow to apply to the dispute at hand. Waivers as to one issue have been interpreted as inapplicable to other issues even though the issues arise out of the same underlying set of facts.

2. Therefore, a waiver must explicitly state that the village waives sovereign immunity with respect to all matters and disputes related to or which could arise under the lease AND the lease must waive immunity with regard to execution against assets of the village. This is called a "broad-form waiver."

C. PARTICULAR PROBLEMS WITH STEVENS VILLAGE WAIVERS

1. A broad-form waiver will not work for a lease with Stevens Village because broad-form waivers are prohibited by Article X, section 5 of Stevens Village's 1990 Constitution. In addition, the same section requires the waiver to be specific as to which court has jurisdiction over any dispute. The constitution also prohibits broad-form levy or encumbrance on village assets for execution purposes.

2. Stevens Village's constitution authorizes waivers of immunity only by a prior vote of the village members.

-- This may present a problem for the State if the validity of a village referendum approving a waiver is successfully challenged by a village member after the lease containing the waiver is signed. It is not clear whether the village council, the federal courts or the BIA would have to decide such a challenge. In the mean time, the validity of the waiver will be in question. In the worse case scenario, the waiver may even be nullified by a successful challenge to the referendum, leaving the state with no way of enforcing the lease terms.

III. SECTION 81 APPROVAL MAY BE REQUIRED (25 USC SEC. 81)

A. 25 U.S. Code section 81 requires all contracts "relative to" Indian lands to be approved by the Secretary of the Interior.

B. Contracts are void and unenforceable if section 81 applies to them and the Secretary's approval is not obtained. As a result, if secretarial approval of the lease is required, any waiver of immunity in an unapproved lease would be void, as would the lease itself. Thus, the State would be left with no recourse against the tribe for breach of contract.

C. Even if the BIA decides that a contract does not need approval, that does not stop the tribe from arguing that approval was, in fact, required if a contract dispute goes to court. If the court agrees with the tribe, then the contract is unenforceable even though the BIA issued a written determination that approval was not required.

-- Therefore, leases should probably be submitted to the BIA for approval.

IV. IMPACT OF UNENFORCEABLE LEASE ON FAA GRANT ASSURANCES

A. Under FAA's regulations that State must have a "satisfactory property interest" in airport property. A property interest is not satisfactory if, in the opinion of the FAA, it contains a condition that creates "an undue risk that might deprive the sponsor of possession or control" of the airport. 14 CFR § 152.3.

B. The State would be in violation of its grant assurances if the State could not enforce the lease. This may occur if:

(1) section 81 approval is not been obtained and is subsequently determined to be required, or

(2) the immunity waiver is invalidated by a successful challenge to the village election approving it, or

(3) a court finds the waiver's scope is not broad enough to cover a particular dispute.

C. If the lease is declared unenforceable, the State would have an insufficient title interest in the airport. As a result, the State would be in violation of its grant assurances to the FAA.

-- The usual method of handling such title problems is to file a condemnation action to acquire title. However, as a tribal entity, the village is likely to be claim immunity from such a suit. In the event the tribe were to be successful on that claim, the State would be left without a means to acquire an adequate title interest short of purchasing an interest in the land at a price set solely by the village.

V. SIGNING THE LEASE MAY BE CONSTRUED AS AN IMPLIED RECOGNITION OF INDIAN COUNTRY IN AND AROUND STEVENS VILLAGE.

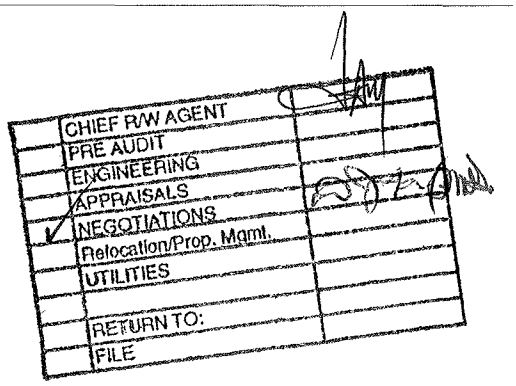
A. The 9th circuit's Venetie decision held that one of the relevant factors in determining whether there is Indian country is how the government has related to the geographical area in the past.

B. FAA leases are permissible with Indian tribes because a tribe is a "public agency" under the FAA regulations. If the State accepts a lease from a Native village and certifies that the lease gives the State a sufficient property interest under the FAA's regulations, then a court may find that the State treated the village council as a public agency with governmental power over its lands, just like a municipality organized under the laws of the State. Together with other factors, the court may conclude that Stevens Village and its environs is Indian country.

-- It may be better for the State to wait until the Venetie case is decided by the U.S. Supreme Court before deciding whether to accept leases with village councils as an adequate title interest.

John Miller

From: Sam Bacino [Sam_Bacino@dot.state.ak.us]
Sent: Wednesday, July 23, 1997 3:32 PM
To: John Miller
Subject: Re: Community Airport Land Interests



Johnnie: I'm sitting at Sam's desk reading this E-mail (below) and thought that you might find it interesting. Maybe you already have a copy. Huggs, JJ

_____ Forward Header _____
Subject: Re: Community Airport Land Interests
Author: Roger Maggard at ANCAV1
Date: 7/23/97 10:54 AM

fyi

_____ Forward Header _____
Subject: Re: Community Airport Land Interests
Author: Clyde Stoltzfus at JNUHQ1
Date: 7/22/97 11:01 AM

Roger, It appears to me that the draft policy is a major reversal of department policy. As you know, the department has been a long-time advocate for leasing as an alternative to fee simple acquisition at rural airports. This policy has been grounded in a recognition of the cultural values of the Native communities predominate in rural Alaska.

After reading your draft memorandum, I reviewed my file on adequate title interest to better understand the history of this issue. The earliest correspondence I found is a letter sent by Commissioner Dick Knapp to the FAA on July 17, 1986 specifically requesting 20 year leases with Native corporations in recognition of the Native values related to land ownership. Although that request was denied because the Native corporation where deemed to be private entities, the department continued to argue 20 year leases with Native corporations should be eligible under the AIP program and requested a wavier of the FAA rules.

Now it appears the FAA and DOTPF have reversed positions. As I read your memo, it appears that Native tribal entities are considered public entities by the FAA and would be eligible for a 20 year lease under current FAA rules. However, the suggested policy now reverses the department's position that 20 year leases are adequate title interest for rural airport lands and instead requires a perpetual lease (read fee simple).

As I'm sure you are aware, as recent as June 18, 1997 the Commissioner offered our original policy alternative to the Village of Kwigillingok, a tribal government, with the requirement for the authority to exercise eminent domain should management disputes arise. I am also aware that the leasing alternative has been offered recently to other Native villages and communities. If this long-term policy is to be reversed one month later despite our ability to exercise it under FAA rules, I would suggest that a much stronger argument needs to be developed than is presented in the draft policy. At the very least, that it is a reversal of department policy should be acknowledged, the reasons for the reversal should be documented and the affects of this reversal on the rationale for the original policy should be analyzed.

Roger, thanks for the opportunity to comment. I know you are stuck with a very difficult issue and I appreciate your hard work on it. Prehaps it would be helpful to break down the underlying issues that seem to be driving the policy change (which are not explicitly stated) to see if there is a clear

understanding of this administration's policy. I'd be happy to help as you see fit. Clyde

---

Subject: Community Airport Land Interests
From: Roger Maggard at ANCAV1
Date: 7/8/97 10:55 AM

Attached is a draft memorandum specifying policy recommendations relating to the acquisition of property interests at the department's Community class airports. The policy recommendations resulted from the July 1 meeting on this matter. Please review the memo and let me know if you have any comments by July 11.

MEMORANDUM

STATE OF ALASKA

Department of Transportation and Public Facilities
STATEWIDE AVIATION

TO: Distribution

DATE: July 8, 1997

FAX NO.: 269-0489

PHONE NO.: 269-0724

FROM: Paul Bowers, AAE
Director
Statewide Aviation

SUBJECT: DRAFT Community Class Airport Land Acquisition & Leasing Policy

Rec

Below is the proposed text of an Airport Development Land Acquisition memorandum that will be sent to Commissioner Perkins, through Deputy Commissioner Parkan. It is being circulated to all July 1 meeting participants and the cc list for comment prior to such submittal. Please review and comment back to Statewide Aviation by 4:00 PM, Friday, July 11. A memorandum reflecting revisions will then be forwarded to the Commissioner's office as recommended policy.

----------Proposed Text Follows----------

A DOT&PF-FAA meeting was held on July 1, 1997, to discuss Community class airport development issues and develop policy recommendations for the acquisition of minimum land interest at Community class airports. The attendees at this meeting included representatives from the Regional Planning, Right-of-Way and Leasing Sections; Statewide Aviation; Headquarters Civil Rights as well as the FAA Airports Division. An attendance list is attached.

The following policy recommendations resulting from that meeting reflect the preferences of DOT&PF staff. A draft memorandum was circulated among all participants; comments were compiled by Statewide Aviation. These policy recommendations apply only to those Community class airports where the department is acquiring a property interest:

Definition of Minimum Land Interest for Airport Development, Maintenance

and Operations

Policy Recommendation:

The department's policy is to acquire *fee simple interest*, if possible. If fee simple acquisition is not possible, a *lease in perpetuity with a federal agency or an entity subject to state law* is acceptable. All leases must be enforceable in state court.

Discussion: lse from fed or an entity subj. to state law.

Essentially, the FAA's *minimum* interest requirements for all AIP grants associated with landing areas and building areas is *a 20 year lease from the grant date with any public agency*. The FAA considers a federally recognized tribe to be a public agency. It is unclear if a tribe could be considered a 'public agency' under state law.

Specifically, a copy of the current FAA Advisory Circular 150/1500-17, Appendix 4, Guidelines for Sponsor Certification of Title is attached. This Advisory Circular provides policy guidance supporting fee simple acquisition, especially if there is a risk that leasehold interest may not be sufficient to effectively control, maintain and operate the airport to serve the public. This advisory circular states, in part:

"a. To meet the requirement that the airport sponsor hold "good title," the sponsor's title must be free and clear of any reversionary interest, lien, easement, lease, or other encumbrance that would create undue risk that might deprive the sponsor of control or possession, interfere with its use for public airport purposes, or make it impossible for the sponsor to carry out the obligations and covenants in the grant agreements."

"b. 3) Lease of Aeronautical Land. In those instances where the public ? Something missing

(a) If the landing area is leased, the lessor must be a public agency;

(b) The sponsor has a long-term lease (minimum of 20 years from the date of the grant) to all landing areas and building areas;

c) The lease contains no provisions which prevents the sponsor from

assuming any of the obligations of the grant agreement;"

"c. (a) Runway Protection Zone. The sponsor is encouraged to acquire fee title to all land within the runway protection zone, with first priority given to land within the Object Free Area....."

For these very reasons, state staff recommends first, fee simple land interest, or failing that, a perpetual lease.

Leases for limited time periods incur greater costs and risks for the state. The cost of a 20 year lease is approximately the same as the cost of fee simple property acquisition. From a financial standpoint, without a perpetual lease, the state may incur significant additional cost each time the lease is extended or otherwise modified.

As noted, the FAA requires a minimum of a twenty year lease for landing and building areas on AIP projects. Many airport development projects, however, will require resurfacing and/or other improvements prior to end of the original lease period. If an airport's remaining lease period is not at least 20 years at the time of the next AIP grant (project), the lease would need to be extended to certify adequate title for each additional project, assuming the property owner is willing to extend the lease. If for any reason the property owner is not willing to extend the lease, the development of a new AIP project or the continued operation of the airport could be precluded or significantly impacted.

Examples of the type of additional state costs associated with lease extensions at Community class airports are the numerous airport leases the department acquired from the Federal government during the 1960s and 70s, which the Federal Government subsequently transferred to Native organizations. Most of these leases have expired or are nearing expiration.

The department has obtained title to some of these airports through paying fair market value for fee simple property interest or negotiating title transfer through ANCSA Section 14c(3) or 14c(4). On some of the airports with expired leases, the department has been unable to acquire an additional long term lease or fee simple interest due to the property owners objections. This has resulted in the delay of needed improvements to these airports and substantial public expenditures by the department through undertaking a to date unsuccessful property negotiation process.

Another example is the Kodiak Airport, which is a Regional class airport operated by the department under a license from the Coast Guard. Substantial amounts of staff time are required to renegotiate the Kodiak airport license from the Coast Guard each time an extension is required in the license period, for the purpose of developing a new AIP funded project.

Inclusion of a Reverter Clause in a Fee Simple Title Airport Property Acquisition:

Policy Recommendation:

In a fee title acquisition, the inclusion of a reverter clause in the event the property is no longer needed for airport purposes should be considered to be a negotiable item.

Discussion:

Public funds will be used to pay the property owner fair market value for the fee simple property title. If the property is no longer needed for airport purposes in the future, it may be needed for some other public purpose, such as a school site, or for trade for the new airport site to-be-acquired. The department should give due consideration to the potential conversion of any property which is no longer needed for airport purposes to another public use without automatically transferring the property back to the original owner. This may prevent a situation where the public must pay again to reacquire property for a public purpose after it has reverted to its original owner.

Acquisition of Subsurface Rights:

Policy Recommendation: No policy recommendation at this time.

Discussion: The FAA has a national policy and will provide interim direction.

Minimum Lease Lot Size for Land Acquisition / Development:

Policy Recommendation:

Every airport should include some land suitable for leasing for aviation purposes. DOT&PF should acquire sufficient land at a Community class airport to provide adequate space for apron frontage aviation lease lots and road access for the lots. The minimum area to be acquired is 150 feet behind the Building Restriction Line (BRL) by the full width of the apron to be constructed. The 150 foot depth is intended to accommodate lots 100 feet deep (behind the BRL) and a 50-foot wide road right-of-way along the back of the lot area for access.

Discussion:

The recommended 100 foot lease area depth behind the BRL is adequate to accommodate both the historic and projected future development and use of aviation lease lots at Community class airports. The recommended additional 50 feet would provide road right-of-way space behind the lease area to provide safe pedestrian and vehicular access. Apron size is at least partially related to anticipated traffic levels and aviation lease lot demand is related to traffic levels. Therefore, linking the lease area width to apron width provides a simple method of establishing an adequate amount of lease space at each airport.

The FAA has no absolute minimums for lease area land acquisition and indicated they might accept a land acquisition plan that excluded lease lots.

Allowable Aviation Leasing Activities

Policy Recommendation:

DOT&PF should retain the ability to lease land at a Community class airport for any aviation purpose (as defined by Title 17) that is compatible with the design of the airport.

Discussion:

Alaska Statutes (AS 02.15.120, AS 02.15.090, and others) require DOT&PF to operate all airports as public airports. The department may not deprive the public of its "rightful, equal, and uniform use" of an airport. The statutes also require DOT&PF to lease airport property under terms and conditions that are "reasonable and uniform for the same class" of lease. DOT&PF has leased aviation use land at other Community class airports for passenger air carrier

operations, commercial and private hangars, aviation fuel tanks, air cargo operations, fish hauling, and aircraft maintenance. In short, at Community class airports, the department leases for any aviation purpose that is compatible with the design of the airport. To comply with the requirements of state statute, the department needs to do the same at all airports in a given class.

The FAA indicated a willingness to accept a DOT&PF acquisition of a deed or lease that would limit leasing to a core group of essential aviation services defined by minimum standards.

Nonaviation Leasing Restrictions

Policy Recommendations:

DOT&PF should not acquire property for nonaviation uses at Community class airports. However, DOT&PF should not be restricted from issuing nonaviation leases on lots designed for aviation uses so long as the leases are for temporary uses on land that is not needed for aviation purposes.

Discussion:

At Community class airports there is generally no financial or other justification for acquiring land to support nonaviation leasing activities. However, any airport land interest acquired should allow the department to lease it temporarily for nonaviation purposes. There are many occasions, especially during the summer season, when there is a legitimate need to accommodate short term, nonaviation leases on this type of airport. Staging of construction materials, surveying equipment, and oil spill clean-up equipment are a few examples of potential need. The FAA indicated they agree with this policy recommendation.

Attachments:

FAA Advisory Circular, Guidelines for Sponsor Certification of Title
Meeting Attendance List

cc/with attachments:

Tom Brigham, Director, Statewide Planning
Barry Bergdoll, P.E., Acting Regional Director, Southeast Region
John Horn, P.E., Regional Director, Central Region
Tony Johansen, P.E., Regional Director, Northern Region

Clyde Stoltzfus, Special Assistant to the Commissioner

----------End of Proposed Text----------

Distribution:

Copy to attendees of the July 1 meeting and the above cc list.

h:/roger/rur-apt.prp

****
*** ACTIVITY REPORT ***
****

TRANSMISSION OK

TX/RX NO.	3343
CONNECTION TEL	94512985
CONNECTION ID	
START TIME	07/11 10:29
USAGE TIME	03'43
PAGES	5
RESULT	OK

****
*** ACTIVITY REPORT ***
****

TRANSMISSION OK

TX/RX NO.	3344
CONNECTION TEL	94512985
CONNECTION ID	
START TIME	07/11 10:34
USAGE TIME	02'46
PAGES	4
RESULT	OK

STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION
AND
PUBLIC FACILITIES
RIGHT OF WAY

FACSIMILE TRANSMITTAL FORM

RECEIVER:	**Paul Lyle**
LOCATION:	**Attorney General's Office**
FAX PHONE NO:	**451-2985**

SENDER:	**John Miller**
LOCATION:	**ADOT/PF Right of Way**
FAX PHONE NO:	**451-5423**

NUMBER OF PAGES: 7 PLUS TRANSMITTAL PAGE

CONTACT: _____ AT 451-5400 IF THERE ARE ANY PROBLEMS WITH TRANSMITTAL OF DOCUMENTS.

MESSAGE: Paul, this may be of interest. See also my e-mail of this date to Paul Bowers (I sent you cc). Thanks.

****
*** ACTIVITY REPORT ***
****

TRANSMISSION OK

TX/RX NO.	3454
CONNECTION TEL	94512846
CONNECTION ID	
START TIME	07/16 14:41
USAGE TIME	05'48
PAGES	8
RESULT	OK

DEPARTMENT OF TRANSPORTATION
AND
PUBLIC FACILITIES
RIGHT OF WAY

FACSIMILE TRANSMITTAL FORM

RECEIVER:	(To Whom?) Paul Lyle
LOCATION:	AGO
FAX PHONE NO:	

SENDER:	(From Whom?) John Miller
LOCATION:	ADOT/PF Right of Way
FAX PHONE NO:	451-5411

NUMBER OF PAGES: 7 PLUS TRANSMITTAL PAGE

CONTACT: _____ AT 451-5 _____ IF THERE ARE ANY PROBLEMS WITH TRANSMITTAL OF DOCUMENTS.

MESSAGE: _____

(7/31 ldr)

BOWERS, SJ, JAM, MCCANN, LOTSA CENTRAL REC.
~~PLANNERS~~, (SHARON DABOM, CARLA POLICH) PAVISH
MAGGARD.

1/

AIRPORT LANDS : 7/1/91

- PREVENT FUTURE ENCROACHMENT
- GRANT ASSURANCES ARE (MINIMUM) FOR SECURING FED. $ BUT (NOT) NECESSARILY THE APPROPRIATE STANDARDS.
- WHAT IF ECO-NAZIS DECIDE THEY WANT TO EXCLUDE CROP DUSTERS ?

II PROPOSED STATE "MIN LAND INT" :

- ~~FEE~~ OR
- PERPETUAL LSE WITH AN ENTITY SUBJ. TO STATE LAW, OR FED. AGENCY.

REVERTER CLAUSE:

SUBSURFACE RIGHTS: ~~- DEFINITION ?~~
FAA WILL PROVIDE INTERIM DIRECTION

- SEPERATELY NEGOTIATED (NOT AUTOMATICALLY INCLUDED)

MIN. LSE ~~LOT~~ AREA REQ'D: ~~DEVELOP~~ :

- MINIMAL LSE LOT REQ'D TO MEET POTENTIAL NEED.
(SUGGESTED 150' ~~WIDE~~ X WIDTH OF APRON).

III ALLOWABLE LEASING ACTIVITIES ("AVIATION"):

- LSE FOR ANY "AVIATION" PURPOSE COMPATIBLE W/ DESIGN OF AIRPORT
"AVIATION" AS IN TITLE 17.

ALLOWABLE LEASING ACTIVITIES (NON-AVIATION):

- NOT ACQUIRE ~~LAND~~ PROPERTY FOR NON-AVIATION USES. INTERIM LEASES FOR NON-AVIATION USES ON AVIATION PROPERTY IS ACCEPTABLE.

MSG. FROM BO/PARHAM VIA BOWERS: L/LE MEMO IS APP'D BY A.G. BUT IS NOT ADOPTED BY DOT.

(draft)

June 2 , 1997

Anton K. Johansen
Northern Regional Director
State of Alaska, DOT&PF
2301 Peger Road, Mail Stop 2553
Fairbanks, Alaska 99709-5399

Dear Mr. Johansen:

At this time, Alaska has several public laws that effect land and one, the Alaska Native Claims Settlement Act, defines some land as having different land owners for the surface and subsurface estate.

The Federal Aviation Administration wants to clarify our position regarding good title, surface and subsurface rights pertaining to acquisition of land for an airport grant, as follows:

> In order for a sponsor to hold "good title" to the areas of the airport used or intended to be used for the landing, taking off, or surface maneuvering of aircraft, the sponsor must show that its title, whether fee simple or a leasehold interest, is free and clear of any encumbrances which, in the opinion of the FAA, could interfere with the sponsor's use of the real property for its intended airport purpose or inhibit the sponsor's ability to comply with it's obligations under applicable AIP grant assurances.
>
> If the surface and subsurface estates are owned by different entities, the sponsor must obtain assurances from the subsurface owner, in a form acceptable for recordation of real property, that the subsurface owner will not limit or interfere in any manner with the sponsor's use or control of the surface estate for airport purposes for so long as the surface estate is used for airport purposes.

Please don't hesitate to contact Carla Follett at 271-5445, if you have any questions.

Sincerely,

Ronnie V. Simpson
Manager
Airports Division

cc:
John Horn, Central Region
Barry Bergdoll, Southeast Region

Author: Cheryl Jones at AAL000
Date: 6/23/97 4:58 PM
Priority: Normal
Receipt Requested
TO: Carla Follett at AAL600
CC: Timothy Titus
CC: Donald Borey
Subject: Rev of Paragraph re: good title to surface and subsurface

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

Carla,

Thank you for the opportunity to review the paragraph covering Airport's position regarding surface and subsurface rights pertaining to obtaining land for airport grant purposes.

A couple of thoughts crossed my mind in reading the proposed paragraph:

1) The stated Airport's policy should require the sponsor to obtain the requisite assurances from the subsurface owner that the sponsor's acquisition of the surface for public airports purposes will not be impaired. This is so whether or not the subsurface and surface owner are the same.

2) We want to make certain that the assurances are in a written form and acceptable for real property recordation so as to be enforceable and to give notice to any transferee. If the assurance is contractual, it should be for consideration. Deeds should comply with State law in that regard also.

We might want to advise the sponsors to resolve subsurface issues before anything else. If the sponsor were to purchase the surface first and pay quite a bit of money but still had to purchase the subsurface before FAA would find good title, the subsurface owner could up the price and the sponsor (and thus the FAA) would just have to pay.

3) Finally, please assure that the advice to the State is set out as policy from FAA's Airports Division. We do not legally advise the State; their own attorney's do that.

With those thoughts in mind, some suggested wording would be as follows:

In order for a sponsor to hold "good title" to the areas of the airport used or intended to be used for the landing, taking off, or surface maneuvering of aircraft, the sponsor must show that its title, whether fee simple or a leasehold interest, is free and clear of any encumbrance which, in the opinion the FAA, could interfere with the sponsor's use of the real property for its intended airport purpose or inhibit the sponsor's ability to comply with it's obligations under applicable AIP grant assurances.

If the surface and subsurface estates are owned by different entities, the sponsor must obtain assurances from the subsurface owner, in a form acceptable for recordation of real property, that the subsurface owner will not limit or interfere in any manner with the sponsor's use or control of the surface estate for airport purposes for so long as the surface estate is used for airport purposes.

If you have any questions, please do not hesitate to give me a call.

Cheryl

Author: Cheryl Jones at AAL000
Date: 6/24/97 9:25 AM
Priority: Normal
Receipt Requested
TO: Carla Follett at AAL600
CC: Donald Borey
CC: Timothy Titus
Subject: Additional thoughts

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

Carla,

A couple of additional thoughts:

1) For any agreement with a tribe that owns the subsurface or surface, FAA should require a waiver of tribal sovereignty. Without it, the State would not be able to sue the tribe to enforce the agreement should the tribe renege on the agreement.

2) With enforcement issues in mind, the FAA should require that the forum for Indian land be Federal.

Any question or comments, just give me a call.

Cheryl

Agenda
Rural Airports Property Acquisition/Leasing/Control Meeting
July 1, 1997

MEETING OBJECTIVES

1. Review the recently revised FAA sponsor assurances.

2. Define DOT&PF & FAA 'minimum' land interest criteria that meet grant requirements for AIP funding and define DOT&PF minimum criteria beyond the FAA AIP minimal threshold criteria (if any).

3. Define allowable leasing activities and restrictions on airport property, including acceptable/unacceptable lease covenants, relative to rural community airport maintenance and/or operational needs.

4. Define state and FAA policy regarding the establishment of airport services and revenue generation through inclusion of lease lots when developing an AIP project.

5. Review DOT&PF/community control over leasehold activities and community review/input procedures for existing and proposed leases/subleases.

6. Define a coordinated correspondence policy regarding these ROW/leasing issues.

AGENDA ITEMS:

I. Review the recently revised FAA sponsor assurances.

II. Define DOT&PF & FAA 'minimum' land interest criteria that meet grant requirements for AIP funding and define DOT&PF minimum criteria beyond the FAA AIP minimal threshold criteria (if any).

1. Establish satisfactory property interest through securing property **ownership** to:

A. Develop an AIP airfield improvement project (including interim improvements)

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

B. Develop an AIP building project

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

C. Develop an AIP equipment acquisition project

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

D. Operate and maintain the airport.

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

2. Establishing satisfactory property interest through securing property **leasehold interest**

A. Develop an AIP airfield improvement project (including interim improvements)

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

B. Develop an AIP building project

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

C. Develop an AIP equipment acquisition project

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

D. Operate and maintain the airport.

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

III. Allowable leasing activities and restrictions on airport property, including acceptable/unacceptable lease covenants, relative to rural community airport maintenance and/or operational needs.

A. Aviation activities

* Definition

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

B. Non-aviation activities

*Definition

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

C. Issues/requests for restrictions or covenants on allowable leasing activities.

IV. Define state and FAA policy regarding the establishment of airport services and revenue generation through inclusion of lease lots when developing an AIP project.

* FAA Regulations/Grant Assurances/Policies

* DOT&PF Regulations/Policies

V. DOT&PF/community control over leasehold activities and community review/input procedures for existing and proposed leases/subleases.

A. Regulatory requirements and DOT&PF discretion

B. DOT&PF leasing notification procedures.

C. Amount of weight given to community/city/village comments

* Regulatory requirements

* DOT&PF Policies

VI. Define a coordinated correspondence policy regarding these ROW/leasing

issues.

APPENDIX 4. GUIDELINES FOR SPONSOR CERTIFICATION OF TITLE

BACKGROUND. Section 47106(b)(1) of the Federal Aviation Administration Authorization Act of 1994 (the Act), provides that a Federally assisted airport project cannot be approved until good title is held, satisfactory to the Secretary of the Department of Transportation, for areas of airport use for the landing, taking off, or surface maneuvering of aircraft, or gives assurance, satisfactory to the Secretary, that good title will be acquired. All land acquired under the AIP for airport development, future development, or noise purposes must be acquired in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91.646), as amended.

Section 47105(d) of the Act provides that the Secretary is authorized to require certification from a sponsor regarding compliance with statutory and administrative requirements imposed on such sponsor in connection with an AIP project.

DISCUSSION.

a. To meet the requirement that the airport sponsor hold "good title," the sponsor's title must be free and clear of any reversionary interest, lien, easement, lease, or other encumbrance that would create undue risk that might deprive the sponsor of control or possession, interfere with its use for public airport purposes, or make it impossible for the sponsor to carry out the obligations and covenants in the grant agreements. The grant agreement Project Assurance, Number 4, specifically relates to the sponsor holding good title satisfactory to the Secretary of the Department of Transportation. Under FAA procedures, satisfactory evidence of good title includes a sponsor certification properly tied to an "Exhibit A", airport property map.

Any defects in the title requiring correction after acceptance by the FAA will be at the sponsor's expense.

b. FAA Order 5100.38A, paragraphs 611 and 612, provide:

1) General: Title with respect to land to be used for landing area or building area purposes can be either fee simple title (free and clear of any and all encumbrances), or title with certain rights excepted or reserved. An *encumbered title* must not deprive the sponsor of possession or control necessary to carry out all obligations under the grant. A deed containing a reversionary clause for "so long as the property is being used for airport purposes," does not negate good title, provided the other conditions are satisfied. Where rights excepted or reserved would prevent the sponsor from carrying out its obligations under the grant, such rights must be extinguished or subordinated prior to approval of the project.

2) Airport Property Subject to a Mortgage. The existence of a mortgage on acquired airport property, in and of itself, will not render such land ineligible. However, the sponsor's ability to meet the principal and interest payments on the mortgage must be satisfied prior to the approval of the project costs.

3) Lease of Aeronautical Land. Private airport sponsors must own the landing and building areas and may not be a lessee of land for aeronautical purposes. In those instances where the public sponsor's title consists of a long-term lease, such title is satisfactory provided the following conditions are met:

(a) If the landing area is leased, the lessor must be a public agency;

(b) The sponsor has a long-term lease (minimum of 20 years from the date of the grant) to all landing areas and building areas;

(c) The lease contains no provision which prevents the sponsor from assuming any of the obligations of the grant agreement;

(d) That consideration for the entire lease be paid in advance. However, this condition may be waived if the sponsor has adequate financial resources to assure future lease payments.

4) Title for Off-Airport Areas. Property interests required in off-airport areas must be sufficient to assure that the sponsor will not be deprived of its right to use and occupy, where necessary, such lands for the purposes intended.

c. Paragraph 602 of Order 5100.38A provides that the interests granted in the airport approach zones (including runway protection zone), horizontal, conical, and transitional zones at airports are required to contain the right of flight. This also includes the right to remove existing obstructions and to restrict the establishment of future obstructions. As used herein, zone means land lying under the appropriate Part 77 surface.

(a) Runway Protection Zone. The sponsor is encouraged to acquire fee title to all land within the runway protection zone, with first priority given to land within the Object Free Area. Structures or activities located on this land must be removed unless excepted by the Airports Division or otherwise needed for air navigation aids. If the fee title acquisition is impracticable, an avigation easement is required. This easement must convey the right of flight with inherent noise and vibration above the approach surface, the right to remove existing obstructions, the right of ingress and egress to enforce the restrictions, and a restriction against the establishment of future obstructions.

(b) Approach and Transitional Zones. The sponsor should acquire the land interest necessary to restrict the use of land in the approach and the transitional zones (the dimensions as cited in the applicable ACs) to activities and purposes compatible with normal airport operations as well as to meet current and anticipated development at the airport. Unless there is a need for future development, compatible use or noise purposes, sponsors are encouraged to acquire the minimum property interest necessary to ensure safe aeronautical use.

PROCEDURES

a. **TITLE** - The sponsor will investigate the quality of the title obtained and prepare a submission for land acquired under an AIP project consisting of a title evidence package or certification of title, or both, for each parcel or tract of land included in the grant agreement.

1) Title Evidence Package. The sponsor's attorney is to prepare, and maintain in the parcel file, title evidence consisting of the following:

a) A written title opinion that includes:
(1) A basis for the opinion. A title search or title insurance policy may be used at the discretion of the attorney. (Title insurance costs are not eligible for reimbursement, although that part of the cost relating directly to the title search, if identified, is eligible)
(2) A legal description of the parcel.
(3) A statement as to the quality of the title or other interests held.
(4) A statement concerning the defects and encumbrances.

b) Copies of:
(1) The grant deed for fee owned land.
(2) The easement deed for less than fee title interest.
(3) The lease for a long-term lease interest.
(4) The title insurance policy when the title opinion is based on such policy, or the name of the title company and policy number. However, as indicated, title insurance costs are ineligible for reimbursement.
(5) The final order or court decree when land is obtained by condemnation.
(6) Subordination agreements or letters to indicate clearing of encumbrances.

c) The sponsor's attorney should promptly inspect the land upon securing possession to determine any unrecorded easements or occupancy interests which may affect the title and would

interfere with the operation and use of the airport. Existing easements encumbering the property should also be noted during the inspection.

2. The title opinion and/or abstract examination is to determine the fee owner of the property and to identify any outstanding interests adverse to the fee. This not only includes encumbrances on the title, but will also identify "clouds on title."

3. Defects and Encumbrances.

a) Any defects in title or outstanding encumbrances such as leases, easements, mortgages, liens, mineral rights, etc., must be set forth in the certification to permit a determination by the FAA as to whether they will interfere with the accomplishment of the project and the use and operation of the airport. If there are outstanding easements which have not been exercised, state whether there is a likelihood of these being exercised. Reserved rights, deed restrictions and similar exceptions frequently require more than a statement.

A STATEMENT BY THE SPONSOR'S ATTORNEY TO THE EFFECT THAT THERE ARE NO OUTSTANDING EXCEPTIONS TO TITLE THAT WILL INTERFERE WITH THE AIRPORT IS NOT ACCEPTABLE WITHOUT EXPLANATION.

b) Some encumbrances have no significant impact on the airport, such as a drainage easement in a non-critical area, whereas other encumbrances have a potential for serious adverse impact, i.e., a power line in the approach. When it is determined and explained that a particular encumbrance will have no adverse effect, no corrective action is required. However, if the exercise of rights granted in an encumbrance could adversely affect the airport, the encumbrance must be extinguished, modified, or subordinated to airport use. A general Subordination Agreement (Exhibit B) and Subordination Agreement - Oil, Gas and Mineral Rights (Exhibit C) are attached as samples. For example, a utility easement granting the right to install power lines in an approach area could result in a hazardous obstruction. In such a case, the easement would have to be:

(1) Extinguished; or,

(2) Modified so that the height and location of the power line is restricted to the extent necessary for safety (possibly the line would have to be buried); or,

(3) Generally subordinated to airport use and development. That is, allowed to remain but no change or modification to the power line permitted without airport approval, as reflected in Exhibit B.

4) Delays in grants and grant payments can be avoided when defects and encumbrances are evaluated and necessary action completed at the time certification is submitted.

4. Certification of Title

a) The decision to require submittal of a certificate rests entirely with the FAA. Determinations concerning acceptability of certification of title is an FAA administrative determination. A certification that may be submitted should provide FAA with the information required to make such a determination.

b) Using the certification procedure, the sponsor will submit a letter of certification to the appropriate FAA office. The letter must be signed by the sponsor official authorized to sign the grant agreement and by the sponsor's attorney. A sample Certification of Title is provided following this section.

c) Acceptance of certification is based on the qualifications, record, and past performance of the sponsor in previous submittals of title documentation. Acceptance by the FAA is not mandatory and will be used with judgment depending on the factors involved.

d) Acceptance of certification does not relieve the sponsor of the requirement to obtain the necessary title documents as required by paragraph 5.a.2 above nor the clearing of encumbrances that may effect the use and operation of the airport.

e) The acceptance of a certification will be rescinded if it is determined by the FAA that the sponsor has not, in fact, complied with the requirements of the certification. If such determination is made after the grant agreement has been accepted, acceptance of the certification may be rescinded and the grant may be suspended.

Native Village of Kwigillingok
Kwigillingok I.R.A. Council
P.O. Box 49
Kwigillingok, Alaska 99622
(907) 588-8114/8212

November 14, 1996

Honorable Tony Knowles
Governor
State of Alaska
3rd Floor State Capitol
P.O. Box 110001
Juneau, Alaska 99811-0001

Dear Governor Knowles:

On behalf of the Native Village of Kwigillingok, it's tribal council and it's tribal membership, I, as President of the Native Village of Kwigillingok invite you to come to Kwigillingok to meet with the tribal council and it's membership in regards to an issue that is near and dear to our hearts, land.

The Native Village of Kwigillingok has been in a long and sometimes frustrating process of negotiating a tribal land lease with the Alaska Department of Transportation and Public Facilities (DOT/PF) for the **Kwigillingok Airport Reconstruction Project No. 60118** identified and approved for Kwigillingok. We have been able to negotiate, in good faith, the land lease document in its entirety, except for one (1) remaining issue, power of eminent domain (condemnation authority).

The Attorney General's Office in the Department of Law of the State of Alaska recognizes that lands held by 25 U.S.C., 476 I.R.A. tribal council raises doubt that DOT&PF would have condemnation authority absent tribal consent. It further goes on to explain why a last resort power of eminent domain is important to DOT&PF and that is that the Native Village of Kwigillingok wants DOT&PF to invest hundreds of thousands of federal and state dollars, which the state would remain accountable to the FAA, in a project for the primary benefit of the people of Kwigillingok. The last resort power of eminent domain, in their analysis, is an extremely limited power and that it would be so divisive, and expensive for DOT&PF to access the condemnation waiver, and it simply would never do so unless relations had deteriorated intolerably.

Regardless of all else, the Native Village of Kwigillingok has indicated that they are willing to lease lands for the airport reconstruction project for as long as DOT/PF requires land to operate and maintain an airport.

We believe that we can resolve our differences to the satisfaction of DOT/PF and the village through good faith efforts on both parties as the issue in regards to improvements to airports is the same, and that is to raise the level of expectations of all air travelers sense of security in traveling to and from Kwigillingok, regardless of who it is. We can accomplish this not by inconsistencies in policies, fear of working compatibly

with villages, especially tribal governments, but, with the same sense of commitment to safety and concern for all air travelers. The standardization of policies affecting all aspects of planning and implementation of air transportation projects throughout the State should be immediately enforced, especially where tribal lands are concerned.

The Native Village of Kwigillingok formally requests that you and key members of your cabinet and administration, specifically, Attorney General Bruce M. Botelho, Department of Transportation and Public Facilities Commissioner Joseph Perkins, Sr., Statewide Aviation Leasing Director Paul Bowers, come to Kwigillingok to meet with the Kwigillingok I.R.A. Council and the general public in order to work together to find a common resolution to this very important and vital issue of ours, land.

We have identified a time window between January 12th and January 25th that we request you to be here in Kwigillingok to meet with us. A day anytime between the dates identified is sufficient for us.

Please inform me of whether or not you will be able to come to Kwigillingok to meet directly with us. We would appreciate an immediate response to our request.

Sincerely:
NATIVE VILLAGE OF KWIGILLINGOK

Tommy J. Andrew
President

cc: Attorney General Bruce M. Botelho
Commissioner Joseph Perkins
Statewide Aviation Leasing Director Paul Bowers
FAA- Regional Administrator Andy Billick
FAA- Airport Division Chief Ronnie Simpson
FAA- Land Specialist Carla Follett
Senator Lyman Hoffman
Representative Ivan M. Ivan
AVCP President- Myron P. Naneng, Sr.
Calista President- Matthew Nicolai

Native Village of Kwigillingok

Kwigillingok I.R.A. Council
P.O. Box 49
Kwigillingok, Alaska 99622
(907) 588-8114/8212

December 26, 1996

Joseph Perkins, Sr.
Commissioner
Alaska Department of Transportation
and Public Facilities
3132 Channel Drive
Juneau, Alaska 99801-7898

TRACK #1634
Due: 1/28

Dear Commissioner Perkins:

The Native Village of Kwigillingok (tribe) is very concerned about developments recently discovered concerning the Kwigillingok Airport Reconstruction Project No. 60118 (project).

As you may be aware and as far as the tribe is aware, Kwigillingok was selected for airport improvements and funding was allocated for this project, if the tribe has erred on this assumption, please advise us.

Currently, the negotiations for the lease of tribal lands by Alaska Department of Transportation and Public Facilities (DOT) is at a standstill due to DOT's request for a last resort power of eminent domain (condemnation authority). The Attorney General's office has corresponded to the tribe regarding this issue and indicates that their request is extremely limited in power and that it would be so difficult, divisive, and expensive for DOT to access the condemnation authority that it would never do so unless relations had deteriorated intolerably.

During the annual Alaska Federation of Natives, Inc. (AFN) convention this past October in Anchorage, the Tribal Council President, Mr. Andrew Beaver attended a workshop co-sponsored by the Federal Aviation Administration (FAA) and DOT and asked poignant and pertinent questions regarding the status of the project. The following is an account of the line of questing of Mr. Beaver and responses by FAA and/or DOT:

1. Why is DOT taking so long to get the airport construction started?
   DOT responded stating that unresolved land matters and that the tribes attorney was too slow in responding to them.
2. Mr. Beaver explained to them that we initially requested only for runway lights after the community member's family raised the question of a life could have been saved if we had runway lights to transport a patient into Bethel at night instead of waiting for the morning when the patient was beyond

medical help. He asked if DOT is waiting for more fatalities to occur or aircraft accidents as proof of need?
DOT responded No.

3. DOT stated that they were looking at three (3) villages that started with the letter "K", for example; Kwigillingok, Kwethluk and Kasigluk for prioritizing projects. Mr. Beaver asked what he should report back to the tribe concerning the loss and/or transfer of funding for Kwigillingok's approved project.
DOT provided no other explanation other than restating the three (3) "K" villages.
4. Mr. Beaver questioned DOT's prioritizing methods where they decided to up grade Kwethluk's airport which is very to close to Bethel, the regional transportation hub, when Kwigillingok is seventy (70) air miles outside of Bethel and was previously approved.
DOT had no response.

Mr. Beaver then stated that it was very frustrating to try to work with DOT, especially in the beginning stages of the project, as DOT had all airport master plans in place without prior tribal consultation and that it was very hard to try to get master plans changed once DOT had completed their version of the airport master plans.

Based upon the above matters and issues, the tribe wants DOT to respond to the following:

1. When in the process did DOT decide to transfer funding approved for the Kwigillingok Airport Reconstruction Project No. 60118 to another project? If DOT has done this, provide the tribe with any documentation and justification for the transfer of funds and movement of Kwigillingok prioritized position by copies of any correspondence to the tribe by DOT apprising it of any changes.
2. When did DOT change it prioritizing methods to begin prioritizing with the first letters of a Village that start with the same letters? If so, provide the tribe with this information and justification and approvals/authorization to do so.
3. The tribe wants to know why the tribe was not informed of the changes made to the Kwigillingok Airport Reconstruction Project No. 60118 position in funding and priority?

It makes it difficult to negotiate in good faith with DOT on a tribal land lease for the project when DOT can arbitrarily make changes to the approved processes without prior notice to the tribe.

The tribe requests an immediate response to the above mentioned items. Should you

wish to discuss this matter, please contact Mr. Arthur J. Lake at (907) 588-8114, who has been charged with the task of negotiating with DOT for the tribal land lease agreement.

Sincerely:
NATIVE VILLAGE OF KWIGILLINGOK

Tommy J. Andrew
President

cc: Mr. Andy Billick, Administrator- FAA Alaskan Region
Mr. Ron Simpson, Manager- FAA Airports Division
Senator Lyman Hoffman
Representative Ivan M. Ivan
Mr. Fred K. Phillip, Chairman- Kwik, Inc.
Mr. Myron Naneng, Sr., President- AVCP, Inc.
Mr. Matthew Nicolai, President- Calista Corporation
file

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CENTRAL REGION -- DIVISION OF DESIGN AND CONSTRUCTION
RIGHT OF WAY BRANCH

4111 AVIATION AVENUE
P.O. BOX 196900
ANCHORAGE, ALASKA 99519-6900
(TEXT TELEPHONE 266-1442)
(FAX 248-9456) (907) 266-1621

February 4, 1997

Re: Kwigillingok Airport Reconstruction
Project No. 60118

Mr. Tommy J. Andrew
President
Kwigillingok I.R.A. Council
P.O. Box 49
Kwigillingok, Alaska 99662

Dear Mr. Andrew:

Thank you for your letter dated December 26, 1996 regarding the Kwigillingok Airport Reconstruction Project.

Please be assured that we do not assign priority to projects according to the name of the village. Projects are prioritized and selected based on need and ability to implement. Once a proposed project is identified, legislative authority is sought to receive federal FAA funding for that project. We received legislative authority for the Kwigillingok Airport project in 1995. However, before we can request FAA funding for construction, we must certify to FAA that we have adequate title interest in the airport land. For the past several years we have been working with your village to secure the required land interest, and until we receive that interest, construction of your project cannot move forward.

Attached is a copy of the letter dated December 26, 1995 from John Wahl to James Atti by which the Council was notified that the Kwigillingok Airport project was dropped from the 1996 program because the land acquisition was not complete.

In 1996, the Department established an Aviation Project Evaluation Board (APEB) to systematically review proposed projects. The APEB scores various projects statewide based on need, local contributions and other factors. Once again, however, no project is scheduled for construction until adequate title interest has been acquired, regardless of need. When title for a project has not been secured during a fiscal year, other projects that have no outstanding land issues move up to the detriment of those projects where such issues have not been resolved.

We anticipate that the Kwigillingok project will continue to score high because the reconstruction is badly needed. However, I reiterate that the project will continue to fall out of

our fiscal year spending plans until the land issue can be resolved.

I hope that I have provided some insight into the process we must follow into develop our airport projects. Please give me a call if you feel that I can answer any additional questions for you.

Sincerely,

Joseph L. Perkins, P.E.
Commissioner

RECEIVED

TONY KNOWLES, GOVERNOR
6132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES
OFFICE OF THE COMMISSIONER

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

June 18, 19

Tommy J. Andrew
President
Native Village of Kwigillingok
PO Box 49
Kwigillingok AK 99622-0049

Dear Mr. Andrew:

Governor Knowles asked me to respond to your letter to him dated April 15. regarding last resort power of eminent domain for airport lands leased at the Village of Kwigillingok.

As you are well aware, the Department of Transportation and Public Facilities (DOT&PF) is responsible for a wide variety of transportation infrastructure throughout Alaska. You may know, as a policy matter, the DOT&PF prefers to own lands used to develop this public infrastructure. This policy preference was implemented to provide more consistency and certainty so that managing this diverse transportation system can be done efficiently over time.

However, we do recognize and respect the desire of the Native community to retain ownership of the land and have developed a policy that allows long-term leases, for this reason. However, leases are subject to interpretation and, as people move on, what may be clear between the original parties may become a source of disagreement in the future. Therefore, as a condition of the special leasing policy for Native lands, the department's policy requires the right to exercise eminent domain as a last resort to assure continued operation of the transportation system, should disputes arise under the lease.

Given the overwhelming demand to provide transportation infrastructure throughout the state, it is our goal to avoid undertaking greater risks, creating more complex administrative situations and undertaking costly management obligations in individual situations. In this situation, we have offered an alternative that, I believe, reasonably balances the responsibilities of the department with the goals of the Native community.

Post-it™ brand fax transmittal memo 7671	# of pages ▸ 2
To John Miller	From Sam Bacino
Co.	Co.
Dept.	Phone #
Fax #	Fax #

25A-T34LH

I believe we both have a sincere concern for the welfare and safety of all air travelers. Consequently, I hope we can move this project forward as quickly as possible so that better service can be provided at Kwigillingok.

Sincerely,

Joseph L. Perkins, P.E.
Commissioner

cc: Governor Tony Knowles
John D. Horn, P.E., Regional Director

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

STATEWIDE AVIATION

4111 AVIATION AVENUE
P.O. BOX 196900
ANCHORAGE, ALASKA 99519-6900
(907) 269-0730 FAX (907) 269-0489

June 10, 1997

Re: Grant Assurances

mpson, Manager
ts Division
Federal Aviation Administration
222 W. 7th Avenue, #14
Anchorage, AK 99513

233 FAA

Dear Mr. Simpson:

We have been notified by your staff, the Airport Improvement Program grant assurances have recently been revised. The State of Alaska hereby submits this blanket assurance that it will follow the attached Assurances, dated 5-97, for each airport development and airport planning grant that we receive. This letter will remain in effect until the Assurances are further modified in the future, at which time a new letter will be issued.

We will work to ensure that requirements of the program are followed diligently.

Sincerely,

Paul Bowers

Paul Bowers, AAE
Director, Statewide Aviation

/orc

Attachment: a/s

cc: Barry Bergdoll, P.E., Acting Regional Director, Southeast Region
John Horn, P.E., Regional Director, Central Region
Roger Maggard, AIP Program Manager, Statewide Aviation
Kurt Parkan, Deputy Commissioner, DOT&PF

[Federal Register: June 2, 1997 (Volume 62, Number 105)]
[Notices]
[Page 29761-29773]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr02jn97-120]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Airport Improvement Program Grant Assurances; Proposed Modifications and Opportunity To Comment

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed modification of airport improvement program grant assurances and of opportunity to comment.

SUMMARY: The FAA proposes to modify the standard grant assurances required of a sponsor before receiving a grant under the Airport Improvement Program (AIP). Pursuant to applicable law, the Secretary of Transportation is required to provide notice in the Federal Register and an opportunity for the public to comment upon proposals to modify the assurances or to require any additional AIP assurances.

These modifications are necessary for two reasons. First, much of Federal transportation law was repealed and reenacted without substantive change by enactment of the Codification of Certain U.S. Transportation Laws as Title 49, United States Code, Public Law 103-272, 108 Stat. 745 (July 5, 1994). Aviation programs, including the AIP, are now found in Subtitle VII of Title 49, rather than the original statutes under which those programs were originally established. Consequently, statutory citations in the existing grant assurances are now obsolete and the modifications published here cite current law. Second, Public Law 103-272 was amended by enactment of the Federal Aviation Administration Reauthorization Act of 1996, Public Law 104-264 (October 9, 1996) (The 1996 Act), which made substantive changes to the statutory grant assurances. The modifications to the grant assurances also incorporate those changes. For ease of reading, Title 49, Subtitle VII, as amended by the 1996 Act will be cited throughout the remainder of this notice as Title 49, U.S.C., as amended. In the actual assurance, however, the reference further specifies Subtitle VII.

DATES: These proposed modifications to the Grant Assurances will be effective on an interim basis on the date of publication in the Federal Register. Comments must be submitted on or before July 2, 1997. Any revision to the interim assurances which are necessary or appropriate in response to comments received will be adopted on or before 60 days after the close of the comment period.

ADDRESSES: Comments may be delivered or mailed to the FAA, Airports Financial Assistance Division, APP-500, Room 619, 800 Independence Ave., SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Mr. James Borsari (Management and Program Analyst) Telephone (202) 267-8822.

SUPPLEMENTARY INFORMATION: The Secretary must receive certain assurances from a sponsor (applicant) seeking financial assistance for airport planning, airport development, noise compatibility planning or noise mitigation under Title 49, U.S.C., as amended. These assurances are submitted as part of a sponsor's application for Federal assistance and are incorporated into all grant agreements. As need dictates, these assurances are modified from time to time to reflect new Federal requirements. Notice of such proposed modifications is published in the Federal Register and an opportunity provided for comment by the public.

The current assurances were published on February 3, 1988, at 53 FR 3104 and amended on September 6, 1988, at 53 FR 34361, on August 29, 1989, at 54 FR 35748 on June 10, 1994 at 59 FR 30076, and on January 5, 1995, at 60 FR 521.

FAA uses three separate sets of standard assurances: Airport Sponsors (owners/operators) (Appendix 1); Planning Agency Sponsors (Appendix 2); and Nonairport Sponsors Undertaking Noise Compatibility Program Projects (hereinafter referred to as Nonairport Sponsor Assurances) (Appendix 3). FAA is planning to modify the assurances currently in effect to reflect the necessary changes. The changes contained in this paragraph affect all three sets of assurances. Section C, subsection 1, ``General Federal Requirements, Federal Regulations'' is amended in each set of assurances to add references to 14 CFR part 13--Investigative and Enforcement Procedure, and 14 CFR Part 16--Rules of Practice for Federally Assisted Airport Enforcement Proceedings.

The following changes affect only Appendix 1, Airport Sponsors assurances:

(a) Under Section C. Sponsor Certification, Item 1, General Federal Requirements, the citations to the following Federal Legislation are included:

1. Native American Grave Repatriation Act--25 U.S.C. Section 3001, et seq.
2. Clean Air Act, Public Law 90-148, as amended.
3. Coastal Zone Management Act, Public Law 93-205.
4. Title 49 U.S.C., Section 303, (formerly known as Section 4(f)).
5. American Indian Religious Freedom Act, Public Law 95-341, as amended.
6. Wild and Scenic Rivers Act, Public Law 90-542, as amended.

(b) Under the section Federal Legislation, reference to the Endangered Species Act--16 U.S.C. 668(a), et seq. is deleted. The airport sponsor must comply with the law irrespective of a receipt of federal funds.

(c) The following Executive Orders are added to the General Federal Requirements:

1. Executive Order 11990--Protection of Wetlands
2. Executive Order 11998--FloodPlain Management

phrases ``not later than 60 days'' after the word ``public'' and ``ending after March 1, 1995'' after the word ``years'' are deleted.

(t) In Assurance 27, the words ``to the United States'' are moved to begin after the opening phrase ``It will make available.''

(u) Assurance 36 is a new assurance required by section 143 of the 1996 Act and codified as section 47107(a)(20) of Title 49, United States Code.

The following changes affect only Appendix 2, Planning Agency Sponsor assurances:

(a) The Federal Regulations are reclassified according to title.

The following changes affect only Appendix 3 Nonairport Sponsor assurances:

(a) Under Section C. Sponsor Certification, Item 1, General Federal Requirements, the citations to the following Federal Legislation are included:

1. Native American Grave Repatriation Act--25 U.S.C. 3001, et seq.
2. Clean Air Act, Public Law 90-148, as amended.
3. Coastal Zone Management Act, Public Law 93-205.
4. Title 49 U.S.C., Section 303, (formerly known as Section 4(f)).
5. American Indian Religious Freedom Act, Public Law 95-341, as amended.
6. Wild and Scenic Rivers Act, Public Law 90-542, as amended.

(b) Under the section on Federal Legislation, reference to the Endangered Species Act--16 U.S.C. 688(a), et seq. is deleted. The airport sponsor must comply with the law irrespective of a receipt of federal funds.

(c) The following Executive Orders are added to the General Federal Requirements:

1. Executive Order 11990--Protection of Wetlands
2. Executive Order 11998--Flood Plain Management
3. Executive Order 12898--Environmental Justice

(d) The Federal Regulations are reclassified according to title.

These assurances are issued pursuant to the authority of Title 49, United States Code.

Issued in Washington, DC on May 23, 1997.

Paul L. Galis,

Director, Office of Airport Planning and Programming.

ASSURANCES
Airport Sponsors

A. General.

1. These assurances shall be complied with in the performance of grant agreements for airport development, airport planning, and noise compatibility program grants for airport sponsors.
2. These assurances are required to be submitted as part of the project application by sponsors requesting funds under the provisions of Title 49, U.S.C., subtitle VII, as amended. As used herein, the term "public agency sponsor" means a public agency with control of a public-use airport; the term "private sponsor" means a private owner of a public-use airport; and the term "sponsor" includes both public agency sponsors and private sponsors.
3. Upon acceptance of the grant offer by the sponsor, these assurances are incorporated in and become part of the grant agreement.

B. Duration and Applicability.

1. **Airport development or Noise Compatibility Program Projects Undertaken by a Public Agency Sponsor.** The terms, conditions and assurances of the grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired for an airport development or noise compatibility program project, or throughout the useful life of the project items installed within a facility under a noise compatibility program project, but in any event not to exceed twenty (20) years from the date of acceptance of a grant offer of Federal funds for the project. However, there shall be no limit on the duration of the assurance against exclusive rights or the terms, conditions and assurances with respect to real property acquired with Federal funds. Furthermore, the duration of the Civil Rights assurance shall be specified in the assurances.
2. **Airport Development or Noise Compatibility Projects Undertaken by a Private Sponsor.** The preceding paragraph 1 also applies to a private sponsor except that the useful life of project items installed within a facility or the useful life of the facilities developed or equipment acquired under an airport development or noise compatibility program project shall be no less than ten (10) years from the date of acceptance of Federal aid for the project.
3. **Airport Planning Undertaken by a Sponsor.** Unless otherwise specified in the grant agreement, only Assurances 1, 2, 3, 5, 6, 13, 18, 30, 32, 33, and 34 in section C apply to planning projects. The terms, conditions, and assurances of the grant agreement shall remain in full force and effect during the life of the project.

C. Sponsor Certification. The sponsor hereby assures and certifies, with respect to this grant that:

1. **General Federal Requirements.** It will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for this project including but not limited to the following:

Federal Legislation

a. Title 49, U.S.C., subtitle VII, as amended.
b. Davis-Bacon Act - 40 U.S.C. 276(a), et seq.[1]
c. Federal Fair Labor Standards Act - 29 U.S.C. 201, et seq.
d. Hatch Act - 5 U.S.C. 1501, et seq.[2]
e. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 Title 42 U.S.C. 4601, et seq.[1] [2]
f. National Historic Preservation Act of 1966 - Section 106 - 16 U.S.C. 470(f).[1]
g. Archeological and Historic Preservation Act of 1974 - 16 U.S.C. 469 through 469c.[1]
h. Native Americans Grave Repatriation Act - 25 U.S.C. Section 3001, et seq.
i. Clean Air Act, P.L. 90-148, as amended.
j. Coastal Zone Management Act, P.L. 93-205, as amended.
k. Flood Disaster Protection Act of 1973 - Section 102(a) - 42 U.S.C. 4012a.[1]
l. Title 49 ,U.S.C., Section 303, (formerly known as Section 4(f))
m. Rehabilitation Act of 1973 - 29 U.S.C. 794.
n. Civil Rights Act of 1964 - Title VI - 42 U.S.C. 2000d through d-4.
o. Age Discrimination Act of 1975 - 42 U.S.C. 6101, et seq.

p. American Indian Religious Freedom Act, P.L. 95-341, as amended.
q Architectural Barriers Act of 1968 -42 U.S.C. 4151, et seq.[1]
r. Powerplant and Industrial Fuel Use Act of 1978 - Section 403- 2 U.S.C. 8373.[1]
s. Contract Work Hours and Safety Standards Act - 40 U.S.C. 327, et seq.[1]
t. Copeland Antikickback Act - 18 U.S.C. 874.[1]
u. National Environmental Policy Act of 1969 - 42 U.S.C. 4321, et seq.[1]
v. Wild and Scenic Rivers Act, P.L. 90-542, as amended.
w. Single Audit Act of 1984 - 31 U.S.C. 7501, et seq.[2]
x. Drug-Free Workplace Act of 1988 - 41 U.S.C. 702 through 706.

Executive Orders

Executive Order 11246 - Equal Employment Opportunity[1]
Executive Order 11990 - Protection of Wetlands
Executive Order 11998 - FloodPlain Management
Executive Order 12372 - Intergovernmental Review of Federal Programs.
Executive Order 12699 - Seismic Safety of Federal and Federally Assisted New Building Construction[1]
Executive Order 12898 - Environmental Justice

Federal Regulations

a. 14 CFR Part 13 - Investigative and Enforcement Procedures.
b. 14 CFR Part 16 - Rules of Practice For Federally Assisted Airport Enforcement Proceedings.
c. 14 CFR Part 150 - Airport noise compatibility planning.
d. 29 CFR Part 1 - Procedures for predetermination of wage rates.[1]
e. 29 CFR Part 3 - Contractors and subcontractors on public building or public work financed in whole or part by loans or grants from the United States.[1]
f. 29 CFR Part 5 - Labor standards provisions applicable to contracts covering federally financed and assisted construction (also labor standards provisions applicable to nonconstruction contracts subject to the Contract Work Hours and Safety Standards Act).[1]
g. 41 CFR Part 60 - Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Federal and federally assisted contracting requirements).[1]
h. 49 CFR Part 18 - Uniform administrative requirements for grants and cooperative agreements to state and local governments.[3]
i. 49 CFR Part 20 - New restrictions on lobbying.
j. 49 CFR Part 21 - Nondiscrimination in federally-assisted programs of the Department of Transportation - effectuation of Title VI of the Civil Rights Act of 1964.
k. 49 CFR Part 23 - Participation by minority business enterprise in Department of Transportation programs.
l. 49 CFR Part 24 - Uniform relocation assistance and real property acquisition for Federal and federally assisted programs.[1 2]
m. 49 CFR Part 27 - Nondiscrimination on the basis of handicap in programs and activities receiving or benefitting from Federal financial assistance.[1]
n. 49 CFR Part 29 - Governmentwide debarment and suspension (non-procurement) and governmentwide requirements for drug-free workplace (grants).
o. 49 CFR Part 30 - Denial of public works contracts to suppliers of goods and services of countries that deny procurement market access to U.S. contractors.
p. 49 CFR Part 41 - Seismic safety of Federal and federally assisted or regulated new building construction.[1]

Office of Management and Budget Circulars

a. A-87 - Cost Principles Applicable to Grants and Contracts with State and Local Governments.
b A-128 - Audits of State and Local Governments.

[1] These laws do not apply to airport planning sponsors.
[2] These laws do not apply to private sponsors.

[3] 49 CFR Part 18 and OMB Circular A-87 contain requirements for State and Local Governments receiving Federal assistance. Any requirement levied upon State and Local Governments by this regulation and circular shall also be applicable to private sponsors receiving Federal assistance under Title 49, United States Code.

Specific assurances required to be included in grant agreements by any of the above laws, regulations or circulars are incorporated by reference in the grant agreement.

2. **Responsibility and Authority of the Sponsor.**
   a. **Public Agency Sponsor:** It has legal authority to apply for the grant, and to finance and carry out the proposed project; that a resolution, motion or similar action has been duly adopted or passed as an official act of the applicant's governing body authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.
   b. **Private Sponsor:** It has legal authority to apply for the grant and to finance and carry out the proposed project and comply with all terms, conditions, and assurances of this grant agreement. It shall designate an official representative and shall in writing direct and authorize that person to file this application, including all understandings and assurances contained therein; to act in connection with this application; and to provide such additional information as may be required.
3. **Sponsor Fund Availability.** It has sufficient funds available for that portion of the project costs which are not to be paid by the United States. It has sufficient funds available to assure operation and maintenance of items funded under the grant agreement which it will own or control.
4. **Good Title.**
   a. It holds good title, satisfactory to the Secretary, to the landing area of the airport or site thereof, or will give assurance satisfactory to the Secretary that good title will be acquired.
   b. For noise compatibility program projects to be carried out on the property of the sponsor, it holds good title satisfactory to the Secretary to that portion of the property upon which Federal funds will be expended or will give assurance to the Secretary that good title will be obtained.
5. **Preserving Rights and Powers.**
   a. It will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.
   b. It will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which Federal funds have been expended, for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary. If the transferee is found by the Secretary to be eligible under Title 49, United States Code, to assume the obligations of the grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor shall insert in the contract or document transferring or disposing of the sponsor's interest, and make binding upon the transferee all of the terms, conditions, and assurances contained in this grant agreement.
   c. For all noise compatibility program projects which are to be carried out by another unit of local government or are on property owned by a unit of local government other than the sponsor, it will enter into an agreement with that government. Except as otherwise specified by the Secretary, that agreement shall obligate that government to the same terms, conditions, and assurances that would be applicable to it if it applied directly to the FAA for a grant to

undertake the noise compatibility program project. That agreement and changes thereto must be satisfactory to the Secretary. It will take steps to enforce this agreement against the local government if there is substantial non-compliance with the terms of the agreement.

d. For noise compatibility program projects to be carried out on privately owned property, it will enter into an agreement with the owner of that property which includes provisions specified by the Secretary. It will take steps to enforce this agreement against the property owner whenever there is substantial non-compliance with the terms of the agreement.

e. If the sponsor is a private sponsor, it will take steps satisfactory to the Secretary to ensure that the airport will continue to function as a public-use airport in accordance with these assurances for the duration of these assurances.

f. If an arrangement is made for management and operation of the airport by any agency or person other than the sponsor or an employee of the sponsor, the sponsor will reserve sufficient rights and authority to insure that the airport will be operated and maintained in accordance Title 49, United States Code, the regulations and the terms, conditions and assurances in the grant agreement and shall insure that such arrangement also requires compliance therewith.

6. **Consistency with Local Plans.** The project is reasonably consistent with plans (existing at the time of submission of this application) of public agencies that are authorized by the State in which the project is located to plan for the development of the area surrounding the airport. For noise compatibility program projects, other than land acquisition, to be carried out on property not owned by the airport and over which property another agency has land use control or authority, the sponsor shall obtain from each such agency a written declaration that such agency supports that project and the project is reasonably consistent with the agency's plans regarding the property.

7. **Consideration of Local Interest.** It has given fair consideration to the interest of communities in or near where the project may be located.

8. **Consultation with Users.** In making a decision to undertake any airport development project under Title 49, United States Code, it has undertaken reasonable consultations with affected parties using the airport at which project is proposed.

9. **Public Hearings.** In projects involving the location of an airport, an airport runway, or a major runway extension, it has afforded the opportunity for public hearings for the purpose of considering the economic, social, and environmental effects of the airport or runway location and its consistency with goals and objectives of such planning as has been carried out by the community and it shall, when requested by the Secretary, submit a copy of the transcript of such hearings to the Secretary. Further, for such projects, it has on its management board either voting representation from the communities where the project is located or has advised the communities that they have the right to petition the Secretary concerning a proposed project.

10. **Air and Water Quality Standards.** In projects involving airport location, a major runway extension, or runway location it will provide for the Governor of the state in which the project is located to certify in writing to the Secretary that the project will be located, designed, constructed, and operated so as to comply with applicable air and water quality standards. In any case where such standards have not been approved and where applicable air and water quality standards have been promulgated by the Administrator of the Environmental Protection Agency, certification shall be obtained from such Administrator. Notice of certification or refusal to certify shall be provided within sixty days after the project application has been received by the Secretary.

11. **Pavement Preventive Maintenance**. With respect to a project approved after January 1, 1995, for the replacement or reconstruction of pavement at the airport, it assures or certifies that it has implemented an effective airport pavement maintenance-management program and it assures that it will use such program for the useful life of any pavement constructed, reconstructed or repaired with Federal financial assistance at the airport. It will provide such reports on pavement condition and pavement management programs as the Secretary determines may be useful.

12. **Terminal Development Prerequisites.** For projects which include terminal development at a public use airport, as defined in Title 49, it has, on the date of submittal of the project grant application, all the safety equipment required for certification of such airport under section 44706 of Title 49, United States Code, and all the security equipment required by rule or regulation, and

has provided for access to the passenger enplaning and deplaning area of such airport to passengers enplaning and deplaning from aircraft other than air carrier aircraft.

13. **Accounting System, Audit, and Recordkeeping Requirements.**
    a. It shall keep all project accounts and records which fully disclose the amount and disposition by the recipient of the proceeds of the grant, the total cost of the project in connection with which the grant is given or used, and the amount or nature of that portion of the cost of the project supplied by other sources, and such other financial records pertinent to the project. The accounts and records shall be kept in accordance with an accounting system that will facilitate an effective audit in accordance with the Single Audit Act of 1984.
    b. It shall make available to the Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, for the purpose of audit and examination, any books, documents, papers, and records of the recipient that are pertinent to the grant. The Secretary may require that an appropriate audit be conducted by a recipient. In any case in which an independent audit is made of the accounts of a sponsor relating to the disposition of the proceeds of a grant or relating to the project in connection with which the grant was given or used, it shall file a certified copy of such audit with the Comptroller General of the United States not later than six (6) months following the close of the fiscal year for which the audit was made.

14. **Minimum Wage Rates.** It shall include, in all contracts in excess of $2,000 for work on any projects funded under the grant agreement which involve labor, provisions establishing minimum rates of wages, to be predetermined by the Secretary of Labor, in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5), which contractors shall pay to skilled and unskilled labor, and such minimum rates shall be stated in the invitation for bids and shall be included in proposals or bids for the work.

15. **Veteran's Preference.** It shall include in all contracts for work on any project funded under the grant agreement which involve labor, such provisions as are necessary to insure that, in the employment of labor (except in executive, administrative, and supervisory positions), preference shall be given to Veterans of the Vietnam era and disabled veterans as defined in Section 47112 of Title 49, United States Code. However, this preference shall apply only where the individuals are available and qualified to perform the work to which the employment relates.

16. **Conformity to Plans and Specifications.** It will execute the project subject to plans, specifications, and schedules approved by the Secretary. Such plans, specifications, and schedules shall be submitted to the Secretary prior to commencement of site preparation, construction, or other performance under this grant agreement, and, upon approval of the Secretary, shall be incorporated into this grant agreement. Any modification to the approved plans, specifications, and schedules shall also be subject to approval of the Secretary, and incorporated into the grant agreement.

17. **Construction Inspection and Approval.** It will provide and maintain competent technical supervision at the construction site throughout the project to assure that the work conforms to the plans, specifications, and schedules approved by the Secretary for the project. It shall subject the construction work on any project contained in an approved project application to inspection and approval by the Secretary and such work shall be in accordance with regulations and procedures prescribed by the Secretary. Such regulations and procedures shall require such cost and progress reporting by the sponsor or sponsors of such project as the Secretary shall deem necessary.

18. **Planning Projects.** In carrying out planning projects:
    a. It will execute the project in accordance with the approved program narrative contained in the project application or with the modifications similarly approved.
    b. It will furnish the Secretary with such periodic reports as required pertaining to the planning project and planning work activities.
    c. It will include in all published material prepared in connection with the planning project a notice that the material was prepared under a grant provided by the United States.
    d. It will make such material available for examination by the public, and agrees that no material prepared with funds under this project shall be subject to copyright in the United States or any other country.

e. It will give the Secretary unrestricted authority to publish, disclose, distribute, and otherwise use any of the material prepared in connection with this grant.

f. It will grant the Secretary the right to disapprove the sponsor's employment of specific consultants and their subcontractors to do all or any part of this project as well as the right to disapprove the proposed scope and cost of professional services.

g. It will grant the Secretary the right to disapprove the use of the sponsor's employees to do all or any part of the project.

h. It understands and agrees that the Secretary's approval of this project grant or the Secretary's approval of any planning material developed as part of this grant does not constitute or imply any assurance or commitment on the part of the Secretary to approve any pending or future application for a Federal airport grant.

19. Operation and Maintenance.

a. The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for nonaeronautical purposes must first be approved by the Secretary.
In furtherance of this assurance, the sponsor will have in effect arrangements for-

(1) Operating the airport's aeronautical facilities whenever required;
(2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and
(3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.

Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

b. It will suitably operate and maintain noise compatibility program items that it owns or controls upon which Federal funds have been expended.

20. Hazard Removal and Mitigation. It will take appropriate action to assure that such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.

21. Compatible Land Use. It will take appropriate action, including the adoption of zoning laws, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft. In addition, if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction, that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which Federal funds have been expended.

22. Economic Nondiscrimination.

a. It will make its airport available as an airport for public use on reasonable terms and without unjust discrimination, to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport.

b. In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to-
(1) furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and
(2) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

c. Each fixed-based operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities.

d. Each air carrier using such airport shall have the right to service itself or to use any fixed-based operator that is authorized or permitted by the airport to serve any air carrier at such airport.

e. Each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and utilize similar facilities, subject to reasonable classifications such as tenants or nontenants and signatory carriers and nonsignatory carriers. Classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status.

f. It will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport; from performing any services on its own aircraft with its own employees (including, but not limited to maintenance, repair, and fueling) that it may choose to perform.

g. In the event the sponsor itself exercises any of the rights and privileges referred to in this assurance, the services involved will be provided on the same conditions as would apply to the furnishing of such services by commercial aeronautical service providers authorized by the sponsor under these provisions.

h. The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.

i. The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

23. **Exclusive Rights.** It will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of the services at an airport by a single fixed-based operator shall not be construed as an exclusive right if both of the following apply:

a. It would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and

b. If allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport.

It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities, including, but not limited to charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as

an aeronautical activity, and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49, United States Code.

24. **Fee and Rental Structure.** It will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. No part of the Federal share of an airport development, airport planning or noise compatibility project for which a grant is made under Title 49, United States Code, the Airport and Airway Improvement Act of 1982, the Federal Airport Act or the Airport and Airway Development Act of 1970 shall be included in the rate basis in establishing fees, rates, and charges for users of that airport.

25. **Airport Revenues.**

a. All revenues generated by the airport and any local taxes on aviation fuel established after December 30, 1987, will be expended by it for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and which are directly and substantially related to the actual air transportation of passengers or property; or for noise mitigation purposes on or off the airport. Provided, however, that if covenants or assurances in debt obligations issued before September 3, 1982, by the owner or operator of the airport, or provisions enacted before September 3, 1982, in governing statutes controlling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all revenues generated by the airport (and, in the case of a public airport, local taxes on aviation fuel) shall not apply.

b. As part of the annual audit required under the Single Audit Act of 1984, the sponsor will direct that the audit will review, and the resulting audit report will provide an opinion concerning, the use of airport revenue and taxes in paragraph (a), and indicating whether funds paid or transferred to the owner or operator are paid or transferred in a manner consistent with Title 49, United States Code and any other applicable provision of law, including any regulation promulgated by the Secretary or Administrator.

c. Any civil penalties or other sanctions will be imposed for violation of this assurance in accordance with the provisions of Section 47107 of Title 49, United States Code.

26. **Reports and Inspections.** It will:

a. submit to the Secretary such annual or special financial and operations reports as the Secretary may reasonably request and make such reports available to the public; make available to the public at reasonable times and places a report of the airport budget in a format prescribed by the Secretary;

b. for airport development projects, make the airport and all airport records and documents affecting the airport, including deeds, leases, operation and use agreements, regulations and other instruments, available for inspection by any duly authorized agent of the Secretary upon reasonable request;

c. for noise compatibility program projects, make records and documents relating to the project and continued compliance with the terms, conditions, and assurances of the grant agreement including deeds, leases, agreements, regulations, and other instruments, available for inspection by any duly authorized agent of the Secretary upon reasonable request; and

d. in a format and time prescribed by the Secretary, provide to the Secretary and make available to the public following each of its fiscal years, an annual report listing in detail:

(i) all amounts paid by the airport to any other unit of government and the purposes for which each such payment was made; and

(ii) all services and property provided by the airport to other units of government and the amount of compensation received for provision of each such service and property.

27. **Use by Government Aircraft.** It will make available all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, charge may be made for a reasonable share, proportional to such use, for the cost of operating and maintaining the facilities used. Unless otherwise determined by the Secretary, or otherwise agreed to by the sponsor and the using agency, substantial use of an airport by Government aircraft will be considered to exist when operations of such aircraft are in excess of those which, in the opinion of the Secretary, would unduly interfere with use of the landing areas by other authorized aircraft, or during any calendar month that-
    a. Five (5) or more Government aircraft are regularly based at the airport or on land adjacent thereto; or
    b. The total number of movements (counting each landing as a movement) of Government aircraft is 300 or more, or the gross accumulative weight of Government aircraft using the airport (the total movement of Government aircraft multiplied by gross weights of such aircraft) is in excess of five million pounds.

28. **Land for Federal Facilities.** It will furnish without cost to the Federal Government for use in connection with any air traffic control or air navigation activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction, operation, and maintenance at Federal expense of space or facilities for such purposes. Such areas or any portion thereof will be made available as provided herein within four months after receipt of a written request from the Secretary.

29. **Airport Layout Plan.**
    a. It will keep up to date at all times an airport layout plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed nonaviation areas and of all existing improvements thereon. Such airport layout plans and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the airport layout plan. The sponsor will not make or permit any changes or alterations in the airport or any of its facilities which are not in conformity with the airport layout plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility or efficiency of the airport.
    b. If a change or alteration in the airport or the facilities is made which the Secretary determines adversely affects the safety, utility, or efficiency of any federally owned, leased, or funded property on or off the airport and which is not in conformity with the airport layout plan as approved by the Secretary, the owner or operator will, if requested, by the Secretary (1) eliminate such adverse effect in a manner approved by the Secretary; or (2) bear all costs of relocating such property (or replacement thereof) to a site acceptable to the Secretary and all costs of restoring such property (or replacement thereof) to the level of safety, utility, efficiency, and cost of operation existing before the unapproved change in the airport or its facilities.

30. **Civil Rights.** It will comply with such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from funds received from this grant. This assurance obligates the sponsor for the period during which Federal financial assistance is extended to the program, except where Federal financial assistance is to provide, or is in the form of personal property or real property or interest therein or structures or improvements thereon in which case the assurance obligates the sponsor or any transferee for the longer of the

following periods: (a) the period during which the property is used for a purpose for which Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits, or (b) the period during which the sponsor retains ownership or possession of the property.

31. **Disposal of Land.**

a. For land purchased under a grant for airport noise compatibility purposes, it will dispose of the land, when the land is no longer needed for such purposes, at fair market value, at the earliest practicable time. That portion of the proceeds of such disposition which is proportionate to the United States' share of acquisition of such land will, at the discretion of the Secretary, 1) be paid to the Secretary for deposit in the Trust Fund, or 2) be reinvested in an approved noise compatibility project as prescribed by the Secretary.

b. (1) For land purchased under a grant for airport development purposes (other than noise compatibility), it will, when the land is no longer needed for airport purposes, dispose of such land at fair market value or make available to the Secretary an amount equal to the United States' proportionate share of the fair market value of the land. That portion of the proceeds of such disposition which is proportionate to the United States' share of the cost of acquisition of such land will, (a) upon application to the Secretary, be reinvested in another eligible airport improvement project or projects approved by the Secretary at that airport or within the national airport system, or (b) be paid to the Secretary for deposit in the Trust Fund if no eligible project exists.

(2) Land shall be considered to be needed for airport purposes under this assurance if (a) it may be needed for aeronautical purposes (including runway protection zones) or serve as noise buffer land, and (b) the revenue from interim uses of such land contributes to the financial self-sufficiency of the airport. Further, land purchased with a grant received by an airport operator or owner before December 31, 1987, will be considered to be needed for airport purposes if the Secretary or Federal agency making such grant before December 31, 1987, was notified by the operator or owner of the uses of such land, did not object to such use, and the land continues to be used for that purpose, such use having commenced no later than December 15, 1989.

c. Disposition of such land under (a) or (b) will be subject to the retention or reservation of any interest or right therein necessary to ensure that such land will only be used for purposes which are compatible with noise levels associated with operation of the airport.

32. **Engineering and Design Services.** It will award each contract, or sub-contract for program management, construction management, planning studies, feasibility studies, architectural services, preliminary engineering, design, engineering, surveying, mapping or related services with respect to the project in the same manner as a contract for architectural and engineering services is negotiated under Title IX of the Federal Property and Administrative Services Act of 1949 or an equivalent qualifications-based requirement prescribed for or by the sponsor of the airport.

33. **Foreign Market Restrictions.** It will not allow funds provided under this grant to be used to fund any project which uses any product or service of a foreign country during the period in which such foreign country is listed by the United States Trade Representative as denying fair and equitable market opportunities for products and suppliers of the United States in procurement and construction.

34. **Policies, Standards, and Specifications.** It will carry out the project in accordance with policies, standards, and specifications approved by the Secretary including but not limited to the advisory circulars listed in the Current FAA Advisory Circulars for AIP projects, dated _____ and included in this grant, and in accordance with applicable state policies, standards, and specifications approved by the Secretary.

35. **Relocation and Real Property Acquisition.** (1) It will be guided in acquiring real property, to the greatest extent practicable under State law, by the land acquisition policies in Subpart B of 49 CFR Part 24 and will pay or reimburse property owners for necessary expenses as specified in Subpart B. (2) It will provide a relocation assistance program offering the services described in Subpart C and fair and reasonable relocation payments and assistance to displaced persons

as required in Subpart D and E of 49 CFR Part 24. (3) It will make available within a reasonable period of time prior to displacement, comparable replacement dwellings to displaced persons in accordance with Subpart E of 49 CFR Part 24.

36. **Access By Intercity Buses.** The airport owner or operator will permit, to the maximum extent practicable, intercity buses or other modes of transportation to have access to the airport, however, it has no obligation to fund special facilities for intercity buses or for other modes of transportation.

ASSURANCES
Planning Agency Sponsors

A. General

1. These assurances shall be complied with in the performance of grant agreements for integrated airport system planning grants to planning agencies.
2. These assurances are required to be submitted as part of the project application by sponsors requesting funds under the provisions of Title 49, U.S.C., subtitle VII, as amended. A sponsor is a planning agency designated by the Secretary of Transportation which is authorized by the State or States or political subdivisions concerned to engage in areawide planning.
3. Upon acceptance of the grant offer by the sponsor, these assurances are incorporated in and become part of the grant agreement.

B. Duration. The terms, conditions and assurances of the grant agreement shall remain in full force and effect during the life of the project.

C. Sponsor Certification. The sponsor assures and certifies, in respect to this grant, that:

1. **General Federal Requirements.** It will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for this project including but not limited to the following:

Federal Legislation.

a. Title 49 U.S.C., subtitle VII, as amended.
b. Federal Fair Labor Standards Act - 29 U.S.C. 201, et seq.
c. Hatch Act - 5 U.S.C. 1501, et seq.
d. Rehabilitation Act of 1973 - 29 U.S.C. 794.
e. Civil Rights Act of 1964 - Title VI - 42 U.S.C. 2000d through d-4.
f. Age Discrimination Act of 1975 - 42 U.S.C. 6101, et seq.
g. Single Audit Act of 1984 - 31 U.S.C. 7501, et seq.
h. Drug-Free Workplace Act of 1988 - 41 U.S.C. 702 through 706.

Executive Orders

Executive Order 12372- Intergovernmental Review of Federal Programs

Federal Regulations

a. 14 CFR Part 13 - Investigative and Enforcement Procedures.
b. 14 CFR Part 16 - Rules of Practice For Federally Assisted Airport Enforcement Proceedings.
c. 49 CFR Part 18 - Uniform administrative requirements for grants and cooperative agreements to state and local governments.
d. 49 CFR Part 20 - New restrictions on lobbying.
e. 49 CFR Part 21 - Nondiscrimination in federally assisted programs of the Department of Transportation - effectuation of Title VI of the Civil Rights Act of 1964.
f. 49 CFR Part 23 - Participation by minority business enterprise in Department of Transportation programs.
g. 49 CFR Part 29 - Government-wide debarment and suspension (non-procurement) and government-wide requirements for drug-free workplace (grants).
h. 49 CFR Part 30 - Denial of public works contracts to suppliers of goods and services of countries that deny procurement market access to U.S.

Office of Management and Budget Circulars.

a. A-87 - Cost Principles Applicable to Grants and Contracts with State and Local Governments.
b. A-128 - Audits of State and Local Governments.

Specific assurances required to be included in grant agreements by any of the above laws, regulations or circulars are incorporated in reference in the grant agreement.

2. **Responsibility and Authority of the Sponsor.** It has legal authority to apply for the grant, and to finance and carry out the proposed project; that a resolution, motion or similar action has been duly adopted or passed as an official act of the applicant's governing body authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.
3. **Sponsor Fund Availability.** It has sufficient funds available for that portion of the project costs which are not to be paid by the United States.
4. **Preserving Rights and Powers.** It will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary.
5. **Consistency with Local Plans.** The project is reasonably consistent with plans (existing at the time of submission of this application) of public agencies in the planning area.
6. **Accounting System, Audit, and Recordkeeping Requirement.**
   a. It shall keep all project accounts and records which fully disclose the amount and disposition by the recipient of the proceeds of the grant, the total cost of the project in connection with which the grant is given or used, and the amount and nature of that portion of the cost of the project supplied by other sources, and such other financial records pertinent to the project. The accounts and records shall be kept in accordance with an accounting system that will facilitate an effective audit in accordance with The Single Audit Act of 1984.
   b. It shall make available to the Secretary and Comptroller General of the United States, or any of their duly authorized representatives, for the purpose of audit and examination, any books, documents, papers, and records of the recipient that are pertinent to the grant. The Secretary may require that an appropriate audit be conducted by the recipient. In any case in which an independent audit is made of the accounts of a sponsor relating to the disposition of the proceeds of a grant or relating to the project in connection with which the grant was given or used, it shall file a certified copy of such audit with the Comptroller General of the United States not later than six (6) months following the close of the fiscal year for which the audit was made.
7. **Planning Projects.** In carrying out planning projects:
   a. It will execute the project in accordance with the approved program narrative contained in the project application or with modifications similarly approved.
   b. It will furnish the Secretary with such periodic reports as required pertaining to the planning project and planning work activities.
   c. It will include in all published material prepared in connection with the planning project a notice that the material was prepared under a grant provided by the United States.
   d. It will make such material available for examination by the public, and agrees that no material prepared with funds under

this project shall be subject to copyright in the United States or any other country.

e. It will give the Secretary unrestricted authority to publish, disclose, distribute, and otherwise use any of the material prepared in connection with this grant.

f. It will grant the Secretary the right to disapprove the Sponsor's employment of specific consultants and their subcontractors to do all or any part of this project as well as the right to disapprove the proposed scope and cost of professional services.

g. It will grant the Secretary the right to disapprove the use of the sponsor's employees to do all or any part of the project.

h. It understands and agrees that the Secretary's approval of this project grant or the Secretary's approval of any planning material developed as part of this grant does not mean constitute or imply any assurance or commitment on the part of the Secretary to approve any pending or future application for a Federal airport grant.

8. **Reports and Inspections.** It will submit to the Secretary such annual or special financial and operations reports as the Secretary may reasonably request.

9. **Civil Rights.** It will comply with such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from funds received from this grant. This assurance obligates the sponsor for the period during which Federal financial assistance is extended to the program.

10. **Engineering and Design Services.** It will award each contract, or sub-contract for planning studies, feasibility studies, or related services with respect to the project in the same manner as a contract for architectural and engineering services is negotiated under Title IX of the Federal Property and administrative Services Act of 1949 or an equivalent qualifications-based requirement prescribed for or by the sponsor.

11. **Foreign Market Restrictions.** It will not allow funds provided under this grant to be used to fund any project which uses any product or service of a foreign country during the period in which such foreign country is listed by the United States Trade Representative as denying fair and equitable market opportunities for products and suppliers of the United States in procurement and construction.

12. **Policies, Standards, and Specifications.** It will carry out the project in accordance with policies, standards, and specifications approved by the Secretary.

ASSURANCES
Nonairport Sponsors Undertaking Noise Compatibility Program Projects

A. General.

1. These assurances shall be complied with in the performance of grant agreements for noise compatibility projects undertaken by sponsors who are not proprietors of the airport which is the subject of the noise compatibility program.
2. These assurances are required to be submitted as part of the project application by sponsors requesting funds under the provisions of Title 49, U.S.C., subtitle VII, as amended. Sponsors are units of local government in the areas around the airport which is the subject of the noise compatibility program.
3. Upon acceptance of the grant offer by the sponsor, these assurances are incorporated in and become part of the grant agreement.

B. Duration. The terms, conditions, and assurances, of the grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired or throughout the useful life of the items installed under the project, but in any event not to exceed twenty (20) years from the date of the acceptance of a grant offer of Federal funds for the project. However, there shall be no time limit on the duration of the terms, conditions, and assurances with respect to real property acquired with Federal funds. Furthermore, the duration of the Civil Rights assurance shall be as specified in the assurance.

C. Sponsor Certification. The sponsor hereby assures and certifies, with respect to this grant that:

1. **General Federal Requirements.** It will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines and requirements as they relate to the application, acceptance, and use of Federal funds for this project including but not limited to the following:

Federal Legislation.

a. Title 49, U.S.C., subtitle VII, as amended.
b. Davis-Bacon Act - 40 U.S.C. 276(a). et seq.
c. Federal Fair Labor Standards Act - 29 U.S.C. 201 et seq.
d. Hatch Act - 5 U.S.C. 1501, et seq.
e. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 - 42 U.S.C. 4601, et seq.
f. National Historic Preservation Act of 1966 - Section 106 - 16 U.S.C. 470(f).
g. Archeological and Historic Preservation Act of 1974 - 469 through 469c.
h. Native American Grave Repatriation Act - 25 U.S.C. Section 3001, et seq.
i. Clean Air Act, P.L. 90-148, as amended.
j. Coastal Zone Management Act, P.L. 93-205, as amended.
k. Flood Disaster Protection Act of 1973 - Section 102(a) -42 U.S.C. 4012a.
l. Title 49, U.S.C., Section 303, (formerly known as Section 4(f)).
m. Rehabilitation Act of 1973 - 29 U.S.C. 794.
n. Civil Rights Act of 1964 - Title VI - 42 U.S.C. 2000d through d-4.
o. Age Discrimination Act of 1975 - 42 U.S.C. 6101, et seq.
p. American Indian Religious Freedom Act, P.L. 95-341,
q Architectural Barriers Act of 1968 - U.S.C. 4151, et seq.
r. Powerplant and Industrial Fuel Use Act of 1978 - Section 403 - 42 U.S.C. 8373.
s. Contract Work Hours and Safety Standards Act - 40 U.S.C. 327, et seq.
t. Copeland Antikickback Act -18 U.S.C. 874.
u. National Environmental Policy Act of 1969 - 42 U.S.C. 4321, et seq.

v. Wild and Scenic Rivers Act, P.L. 90-542, as amended.
w. Single Audit Act of 1984 - 31 U.S.C. 7501, et seq.
x. Drug-Free Workplace Act of 1988 - 41 U.S.C. 702 through 706.

Executive Orders

Executive Order 11246 - Equal Employment Opportunity
Executive Order 11990 - Protection of Wetlands
Executive Order 11998 - FloodPlain Management
Executive Order 12372 - Intergovernmental Review of Federal Programs.
Executive Order 12699 - Seismic Safety of Federal and Federally Assisted New Building Construction
Executive Order 12898 - Environmental Justice

Federal Regulations

a. 14 CFR Part 13 - Investigative and Enforcement Procedures.
b. 14 CFR Part 16 - Rules of Practice For Federally Assisted Airport Enforcement Proceedings.
c. 14 CFR Part 150 - Airport noise compatibility planning.
d. 29 CFR Part 1 - Procedures for predetermination of wage rates.
e. 29 CFR Part 3 - Contractors and subcontractors on public building or public work financed in whole or part by loans or grants from the United States.
f. 29 CFR Part 5 - Labor standards provisions applicable to contracts covering federally financed and assisted construction.
g. 41 CFR Part 60 - Office of Federal contract compliance programs, equal employment opportunity, Department of Labor (Federal and federally-assisted contracting requirements).
h. 49 CFR Part 18 - Uniform administrative requirements for grants and cooperative agreements to state and local governments.
i. 49 CFR Part 20 - New restrictions on lobbying.
j. 49 CFR Part 21 - Nondiscrimination in federally-assisted programs of the Department of Transportation - effectuation of Title VI to the Civil Rights Act of 1964.
k. 49 CFR Part 23 - Participation of minority business enterprise in Department of Transportation programs.
l. 49 CFR Part 24 - Uniform relocation assistance and real property acquisition regulation for Federal and federally assisted programs.
m. 49 CFR Part 27 - Non-Discrimination on the basis of handicap in programs and activities receiving or benefitting from Federal financial assistance.
n. 49 CFR Part 29 - Governmentwide debarment and suspension (non-procurement) and governmentwide requirements for drug-free workplace (grants).
o. 49 CFR Part 30 - Denial of public work contracts to suppliers of goods and services of countries that deny procurement market access to U.S. contractors.
p. 49 CFR Part 41 - Seismic safety of Federal and federally assisted or regulated new building construction.

Office of Management and Budget Circulars

a. A-87 - Cost Principles Applicable to Grants and Contracts with State and Local Governments.
b. A-128 - Audits of State and Local Governments.

Specific assurances required to be included in grant agreements by any of the above laws, regulations or circulars are incorporated by reference in the grant agreement.

2. **Responsibility and Authority of the Sponsor.** It has legal authority to apply for the grant, and to finance and carry out the proposed project; that a resolution, motion, or similar action has been duly adopted or passed as an official act of the applicant's governing body authorizing the filing of the application, including

all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.

3. **Sponsor Fund Availability.**
   a. It has sufficient funds available for that portion of the project costs which are not to be paid by the United States.
   b. It has sufficient funds available to ensure operation and maintenance of items funded under the grant agreement which it will own or control.

4. **Good Title.** For projects to be carried out on the property of the sponsor, it holds good title satisfactory to the Secretary to that portion of the property upon which Federal funds will be expended or will give assurance to the Secretary that good title will be obtained.

5. **Preserving Rights and Powers.**
   a. It will not enter into any transaction, or take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act to acquire, extinguish, or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.
   b. It will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property, for which it holds good title and upon which Federal funds have been expended, for the duration of the terms, conditions, and assurances in the grant agreement, without approval by the Secretary. If the transferee is found by the Secretary to be eligible under Title 49, United States Code, to assume the obligations of the grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor shall insert in the contract or document transferring or disposing of the sponsor's interest, and making binding upon the transferee, all of the terms, conditions and assurances contained in this grant agreement.
   c. For all noise compatibility projects which are to be carried out by another unit of local government or are on property owned by a unit of local government other than the sponsor, it will enter into an agreement with that governmental unit. Except as otherwise specified by the Secretary, that agreement shall obligate that governmental unit to the same terms, conditions, and assurances that would be applicable to it if it applied directly to the FAA for a grant to undertake the noise compatibility project. That agreement and changes thereto must be approved in advance by the Secretary.
   d. For noise compatibility projects to be carried out on privately owned property, it will enter into an agreement with the owner of that property which includes provisions specified by the Secretary.

6. **Consistency with Local Plans.** The project is reasonably consistent with plans (existing at the time of submission of this application) of public agencies that are authorized by the State in which the project is located to plan for the development of the area surrounding the airport. For noise compatibility projects to be carried out on property which is not owned by the sponsor and which is under the land use control or authority of a public agency other than the sponsor, the sponsor shall obtain from each agency a written declaration that

such an agency supports the project and the project is reasonably consistent with the agency's plans regarding the property.

7. **Consideration of Local Interest.** It has given fair consideration to the interest of communities in or near which the project may be located.

8. **Accounting System, Audit, and Recordkeeping Requirements.**
   a. It shall keep all project accounts and records which fully disclose the amount and disposition by the recipient of the proceeds of the grant, the total cost of the project in connection with which the grant is given or used, and the amount or nature of that portion of the cost of the project supplied by other sources, and such other financial records pertinent to the project. The accounts and records should be kept in accordance with an accounting system that will facilitate an effective audit in accordance with the Single Audit Act of 1984.
   b. It shall make available to the Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, for the purpose of audit and examination, any books, documents, papers, and records of the recipient that are pertinent to the grant. The Secretary may require that an appropriate audit be conducted by a recipient. In any case in which an independent audit is made of the accounts of a sponsor relating to the disposition of the proceeds of a grant or relating to the project in connection with which the grant was given or used, it shall file a certified copy of such audit with the Comptroller General no later than six (6) months following the close of the fiscal year for which the audit was conducted.

9. **Minimum Wage Rates.** It shall include, in all contracts in excess of $2,000 for work on any projects funded under the grant agreement which involve labor, provisions establishing minimum rates of wages, to be predetermined by the Secretary of Labor, in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5), which contractors shall pay to skilled and unskilled labor, and such minimum rates shall be stated in the invitation for bids and shall be included in proposals or bids for the work.

10. **Veteran's Preference.** It shall include, in all contracts for work on any project funded under the grant agreement which involve labor, such provisions as are necessary to insure that, in the employment of labor (except in administrative, executive, and supervisory positions), preference shall be given to veterans of the Vietnam era and disabled veterans as defined in Section 47117 of Title 49, United States Code. However, this preference shall apply only where the individuals are available and qualified to perform the work to which the employment relates.

11. **Conformity to Plans and Specifications.** It will execute the project subject to plans, specifications, and schedules approved by the Secretary. Such plans, specifications, and schedules shall be submitted to the Secretary prior to commencement of site preparation, construction, or other performance under this grant agreement, and, upon approval by the Secretary, shall be incorporated into this grant agreement. Any modifications to the approved plans, specifications, and schedules shall also be subject to approval by the Secretary and incorporation into the grant agreement.

12. **Construction Inspection and Approval.** It will provide and maintain competent technical supervision at the construction site throughout the project to assure that the work conforms with the plans, specifications, and schedules approved by the Secretary for the project. It shall subject the construction work on any project contained in an approved project application to inspection and approval by the Secretary and such work shall be in accordance with regulations and procedures prescribed by the Secretary. Such regulations and procedures shall require such cost and progress reporting by the sponsor or sponsors of such project as the Secretary shall deem necessary.

13. **Operation and Maintenance.** It will suitably operate and maintain noise program implementation items that it owns or controls upon which Federal funds have been expended.

14. **Hazard Prevention.** It will protect such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) by preventing the establishment or creation of future airport hazards on property owned or controlled by it or over which it has land use jurisdiction.

15. **Compatible Land Use.** It will take appropriate action, including the adoption of zoning laws, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft. In addition, it will not cause or permit any change in land use, within its jurisdiction that will reduce the compatibility, with respect to the airport, of the noise compatibility measures upon which Federal funds have been expended.

16. **Reports and Inspections.** It will submit to the Secretary such annual or special financial and operations reports as the Secretary may reasonably request. It will also make records and documents relating to the project, and continued compliance with the terms, conditions, and assurances of the grant agreement including deeds, leases, agreements, regulations, and other instruments, available for inspection by any duly authorized agent of the Secretary upon reasonable request.

17. **Civil Rights.** It will comply with such rules as are promulgated, to ensure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or handicap, be excluded from participating in any activity conducted with or benefiting from funds received from this grant. This assurance obligates the sponsor for the period during which Federal financial assistance is extended to the program, except where Federal financial assistance is to provide, or is in the form of personal property or real property interest therein, or structures or improvements thereon, in which case the assurance obligates the sponsor or any transferee for the longer of the following periods: (a) the period during which the property is used for a purpose for which Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits or (b) the period during which the sponsor retains ownership or possession of the property.

18. **Engineering and Design Services.** It will award each contract or subcontract for program management, construction management, planning studies, feasibility studies, architectural services, preliminary engineering, design, surveying, mapping, or related services with respect to the project in the same manner as a contract for architectural and engineering services as negotiated under Title IX of the Federal Property and Administrative Services Act of 1949 or an equivalent qualifications-based requirement prescribed for or by the sponsor.

19. **Foreign Market Restrictions.** It will not allow funds provided under this grant to be used to fund any project which uses any product or service of a foreign country during the period in which such foreign country is listed by the United States Trade Representative as denying fair and equitable market opportunities for products and suppliers of the United States in procurement and construction.

20. **Disposal of Land.**

    a. For land purchased under a grant for airport noise compatibility purposes, it will dispose of the land, when the land is no longer needed for such purposes, at fair market value, at the earliest practicable time. That portion of the proceeds of such disposition which is proportionate to the United States' share of acquisition of such land will, at the discretion of the Secretary, 1) be paid to the Secretary for deposit in the Trust Fund, or 2) be reinvested in an approved noise compatibility project as prescribed by the Secretary.

b. Disposition of such land under (a) will be subject to the retention or reservation of any interest or right therein necessary to ensure that such land will only be used for purposes which are compatible with noise levels associated with operation of the airport.

21. **Relocation and Real Property Acquisition.** (1) It will be guided in acquiring real property, to the greatest extent practicable under State law, by the land acquisition policies in Subpart B of 49 CFR Part 24 and will pay or reimburse property owners for necessary expenses as specified in Subpart B. (2) It will provide a relocation assistance program offering the services described in Subpart C and fair and reasonable relocation payments and assistance to displaced persons as required in Subparts D and E of 49 CFR Part 24. (3) It will make available within a reasonable period of time prior to displacement comparable replacement dwellings to displaced persons in accordance with Subpart E of 49 CFR Part 24.

Author: Mike Gavin at FAIPM1
Date: 6/13/97 1:08 PM
Priority: Normal
TO: John Jensen at ANCAV1, John Miller at FAIBWR-CCMAIL
Subject: Meeting--Leasing at Airports in Native Communities

Forward Header

Author: Roger Maggard ~~266-1053~~ ~~269-0509~~ 269-0727
Subject: Meeting--Leasing at Airports in Native Communities
06-13-1997 10:52 AM

Statewide Aviation is proposing to schedule a rural community airports land lease meeting between DOT&PF and FAA to discuss and clarify issues associated with FAA policy/grant assurances/regulations and DOT/PF policy/regulations. The meeting will focus on addressing these issues relative to sufficient title interest (fee simple/land lease) at non-primary airports in Native communities. Key DOT&PF Right of Way, Planning, Leasing and Statewide Aviation staff as well as FAA Airports Division staff are requested to attend this meeting.

We have tentatively scheduled this meeting on July 1 in the Central Region Conference Room beginning at 10:00 AM and ending approximately 4:00 PM. (The July 1 meeting date was selected to coordinate with a July 2 meeting on Title 17 for the DOT/PF Leasing representatives.)

The meeting OBJECTIVES are to:

1) Review the recently revised FAA sponsor assurances. ?

2) Define DOT&PF & FAA 'minimum' land interest criteria that meet grant requirements for AIP funding.

3) Define DOT&PF minimum criteria beyond the FAA AIP minimal threshold criteria (if any).

4) Define acceptable/unacceptable lease covenants, relative to rural community airport maintenance and/or operational needs. — LSE OF PROPERTY FOR AIRPORT OR LSE OF AIRPORT LOTS

5) Define a coordinated correspondence policy regarding these ROW/leasing issues. ?

The following ISSUES will be discussed:

1) Establishing satisfactory property interest through securing a lease rather than a deed to:

   A. develop an AIP project for airfield improvements, buildings and equipment; and

   B. operate and maintain the airport.

2) Defining state and FAA policy regarding the establishment of airport services and revenue generation through inclusion of lease lots when developing an AIP project.

3) Allowable leasing activities on airport property, DOT&PF/community control over leasehold activities, and community review/input procedures

for existing and proposed leases/subleases.

The above will be reduced to a DOT&PF airport development land interest policy for the Commissioner's consideration.

We hope to have adequate representation at the meeting to adequately cover the basic issues. Please confirm ASAP if you or a representative are available to attend this July 1 meeting and please copy all parties on your response, so all are informed of schedule evolution.

Author: Clyde Stoltzfus at JNUHQ1
Date: 6/23/97 11:07 AM
Priority: Normal
Receipt Requested
TO: John Miller at FAIBWR-CCMAIL
CC: John Jensen at ANCAV1, Rob Murphy at DOTSEMAIL, Tony Johansen at FAIPM1
Subject: Re: Upcoming Mtg. with FAA re Sufficient Title

John,
The problem is that I don't think we know what our bottom line is with several of the critical threshold issues that are on the agenda. What I liked about Roger's agenda was that it focused on WHAT should be acquired NOT how it should be acquired. I think, and I know Kurt thinks, that is an appropriate discussion to have with FAA and that Statewide Aviation needs to be the lead in that discussion.

I think an agreement between FAA and DOT on these "what" issues is a prerequisite to other discussions that may follow on "how". My sense of all of the meetings we had so far with FAA on sponsorship, etc., is that there are a lot of details about operating airports in rural Alaska that we need to have better fleshed out BEFORE we go further on some of the thorny acquisition issues.

What I assume is coming from the meeting will be a recommended policy to the Commissioner. If the Commissioner adopts the recommended policy, that would hopefully establish our bottom line.

I hope this helps, John, but if it don't satisfy your concerns, please let me know. Clyde

---

Subject: Upcoming Mtg. with FAA re Sufficient Title
From: John Miller at FAIBWR-CCMAIL
Date: 6/19/97 1:11 PM

> Clyde, I share Jensen's concern. We're pretty sure where the FAA is going to be coming from. They're so desperate to avoid having to deal with this issue directly that they'll agree to almost anything to keep us between them and the problems. We need to go into this exchange knowing what WE want; what is OUR bottom line.
>
> I'd sure like to see some dialogue on this question before we make up our minds, too.
>
> Whasay at least a conference call on it next week sometime?
>
> Thanks,
>
> JAM

AIRPORTS MEETING
APRIL 18, 1997
8:30 AM to 11:30 AM

Opening/Introductions

Objectives

- to agree on process to develop agreements between the State and villages
- to begin the process by identifying the interests of the State and what they perceive are the interests of the villages.
- to brainstorm possible options that would meet both parties interests

Role of Facilitator

Groundrules

Expectations: Each person share what his/her expectations are for today's meeting. Capture key issues on flip chart.

Review Agenda and change as necessary

Proposed Process

Identifying Interests/of the State (INTERESTS / MOTIVATION OF FAA; MOT.)

Identifying Perceived Interests/of the Villages (MOT.)

Developing possible options that meet both parties interests ("PUSH THE ENVELOPE")

Next Steps (IDENTIFY TEAM MEMBERS)

Closure

HAMMER 1/

DOT/FAA CIRCUS : 4/18/97

TELECONF - SAM KITO, JACK HUTCHINSON (FAA SEATTLE)
PRESENT - JIM LOMEN, RON SIMPSON, PAUL BOWERS, KAY ROBINSON, CLYDE STOLTZFUS, ROGER MAGGARD, STEVE PAULSEN, JOHN JENSEN, DON LARSON, SHARON DARDIN, DAVE STALLINGS, CARLA FOLLET, SAM.
FACILITATOR : CHRIS CONQUERGOOD

EXPECTATIONS

SIMPSON - FIND A WAY - KEY MEMB. OF TEAM TO "IN DEPTH" → MAY 1ST MTG.
STOLTZ - IDENTIFY PROBLEMS → WHO IS LEAD AGENCY FOR SOLUTIONS.
BOWERS - WHAT IS A SATISFACTORY LSE. INT. FOR AIRPORT DEV.
ROBINSON - "BIG PICTURE" - WHAT DOES FAA/DOT WANT TO DO IN VILLAGES.
~~HUTCHINSON~~ LARSON - WHY DO WE NEED AGR. BET STATE & VILLAGES.
MAGGARD - DISTINGUISH LEGAL VS POLICY ISSUES
BOWERS - OBJECTIVES OF PARTIES W "CONTROL" & CONSTRUCTION & ACCESS.
LOMEN - STRONG FDN. TO CARRY PROCESS FURTHER.

LOMEN IS FAA PERSON - GOING TO BETHEL, MEET WITH "VILLAGES" - TO INCL STEVENS, KWIGK, KONG, GOODNEWS BAY., OTHERS.

SAM - BIG PICTURE IS VILLAGES WANT AIRPORTS & ARE "FRUSTRATED" IN DEALING W/ DOT.

SIMPSON - STATE ALSO "FRUSTRATED" W/ VILLAGES - WE'RE HERE TO "IDENTIFY ISSUES"

BREAK

FAA MOTIVATION/INTEREST:

VILLAGES APPROACHING FAA TO BE OWN SPONSER
FAA WANTS TO GET KEY PLAYERS TOGETHER

DAVIS - WANTS STATE TO STAY IN CAUSE VILLAGES NOT CAPABLE
SIMPSON - FAA WANTS STATE IN - NAT. COMM. CAN'T HANDLE THE JOB.
" - FAA WANTS STATE TO BE IN WITH VILLAGES (CO-SPONSORSHIP)
" - FAA WANTS TO "LOOK AT" CO-SPONSORSHIP.
" - FAA WANTS TO BE "INVOLVED" IN NEGOTIATIONS.
BOWERS - FAA IS NOT (AND STATE IS) EQUIPPED (INFRASTRUCTURE) TO DEAL WITH VILLAGES AS INDIVIDUAL SPONSORS.
CLYDE - STATE NOT GEARED UP TO DEAL W/ VILLAGES NOT SPONSORS.
SAM - WHY IS FAA NOT UNWILLING? - THIS IS THE WAY IT'S DONE ELSEWHERE
LOTSA - ALASKA'S DIFFERENT - YADDA, YADDA
SAM - DOT IS STAFFED EQUIPPED TO BE SPONSOR; NOT TRAINER OF SPONSORS.
BOWERS - VILLAGES WANT AIRPORTS, NOT SPONSORSHIP.
ROBINSON - VILLAGES WANT CONTROL (EMPLOYMENT, LEASES, ETC.)
PARISH - FAA'S INTEREST IS (OR SHOULD BE) PUBLIC AIRPORT SYSTEM.
STOLTZFUS - WHAT'S FAA'S MOT/INT IN JOBS
DARDINI - FAA WANTS VILLAGE TO HAVE "OWNERSHIP" FEELING (SO THE WON'T TRASH IT AS WELL)
SAM - ELIM IS EXAMPLE OF HOW VILLAGERS WORKING ON AIRPORT LED TO "OWNERSHIP", PRIDE ⇒ LOW VANDALISM & M&O COSTS.

STATE MOTIVATION / INTEREST:

SDOT – PROVIDE TRANSP. SERVICES.

STOLTZ – MEETING EXPECTATIONS OF CONSTITUENCIES

J.J. – OPERATE & MAINTAIN FOR ALL THE PUBLIC

ROLLINSON – DOT HAS INTEREST IN TRAINING / EMPLOYMENT IN RURAL.

~~JAM~~ – MINIMIZE EXPOSURE TO RISKS / LIABILITIES

BOWERS – COMPLY W/ FAA GRANT ASSURANCES. (INTERESTING THIS WAS NOT ON FAA LIST)

DARBIN – ? MAINTAIN A "CULTURE" – STOLTZ – SEE #2 ABOVE.

MAGGARD – AVIATION SYS. PLAN ENCOURAGES TRANSP. TO COMMUNITIES

STOLTZ – DOT MUST WORK WITHIN STATE LAW / CONSTITUTION.

BOWERS – MAINTAINING PUBLIC ACCESS TO VARIOUS PARTS OF STATE & A STATE AIRPORT SYS.

PAVISH – WE NEED TO GET ON WITH IT –

~~JAM~~ – NOT NEW PROB – WE DIDN'T CHANGE RULES / PRACTICES

DARBIN – MISSED IT

PAVISH – FLEXIBILITY IS WHAT CAUSED THIS PROBLEM.

~~STOLTZ~~ ~~JAM~~ – PUBLIC POLICY EVOLVES – NEED TO BE FLEXIBLE.

PAVISH – USED TO HAVE SIMPLE FORMULA – FEE ⇒ AIRPORT
NOW WE HAVE ? ⇒ AIRPORT

ROLLINSON – ISTEA SAID "MAY" HAVE INDIAN PREF., BUT STATE WON'T DO IT.

BOWERS – STATE WANTS DEFINABLE (DEFINED) LAND INTEREST REQUIREMENTS

DARBIN – CAN'T HAVE "COOKIE CUTTER" APPROACH., NEED TO DEVELOP TRUST.

JJ – ISTEA DON'T HAVE NOTHING TO DO WITH THIS – THE ISSUE IS CONTROL OF THE LAND.

ROLLISON – INTEREST OF STATE IS TO INSURE ROW ISSUES DON'T SET UP ANIMOSITIES, DISTRUST.

MAGGARD – LOTS OF EXTRA $ / INEFFICIENCIES RESULT WHEN PROJECTS GET DERAILED BY LANDS ISSUES.

VILLAGE MOTIVATION/INTEREST:

SIMPSON – HAVE IMPROVED AIRPORT FACILITY / MORE SAFE (MEDIVAC)

[illegible] – WANTS ABILITY TO INCREASE ECONOMIC DEV.

– EMPLOYMENT / LOCAL HIRE – LOCAL CONTRACTING. (CONSTR & MAINT.)

ROBINSON – TERO. – THEY WANT TO BE EDUCATED / UNDERSTAND PROCESS

LARSON – THEY WANT TO BE PARTICIPANTS FROM ORIGINAL CONCEPT THROUGH

[illegible] – PUBLIC AIRPORT PROJECTS ARE MONEY-MAKING OPPORTUNITIES

STOTT. – WANT TO PROTECT COMMUNITY VALUES (CONTROL)

AMBOIN – WANT TO CONTROL LEASE LOTS.

STOCTEF – MINIMIZE OBLIGATIONS / RULES.

SAM – DON'T WANT TO "GIVE UP THE LAND"

SAM – OWNERSHIP ≠ CONTROL, THEY WANT VILLAGE TO RETAIN OWNERSHIP, THEY DON'T CARE THAT MUCH ABOUT CONTROL

BOOKERS – ECONOMICAL TRANSPORTATION

LARSON [illegible] – THEY DON'T WANT THE AIRPORT TO BE PUBLIC

– RACISM (BUT I DIDN'T HAVE THE GUTS TO SAY IT).

~~OPTIONS~~ SUMMARY :

LOMEN — ~~4~~ MAJOR ISSUES : 1. LOCAL HIRE (~~CREDIT~~)
PAVISH WHERE INTERESTS CONFLICT. 2. LAND ISSUES
3. LEASE LOTS
4. TERO / COMMUNITY INVOLV.

OPTIONS : (WE DON'T NEED OR HAVE TIME FOR THIS)

NEXT STEPS :

BOWERS — 2/3 DAY SEMINAR TO EDUCATE/DISCUSS — INVITE ALL PARTICIPANTS. (EVERYBODY USES TERMS LIKE "COSPONSOR", BUT MEANS DIFF. THINGS TO ALL PARTICIPANTS).

DAMSON — SET SOME MINIMUM STANDARDS.

LOMEN — THEY ~~NEED~~ (VILLAGES) NEED TO BE "INVOLVED" IN PROCESS.

LL — WE — DOT/FAA — NEEDS TO FORM "WORKING GROUP" TO RESOLVE WHAT WE WANT TO DO. — DEVELOP STRATEGY.

SLOTTE SAM — WE'LL SEPERATE INTO OUR RESPECTIVE CAMPS & DECIDE WHO'S GONNA BE ~~ON~~ IN THE WORK GROUP — OFFICES/INDIVIDUALS.

SIMPSON — WANTS POLICY LEVEL PEOPLE. IN WORK GROUP.

WORK GROUP : — WILL ESTAB. FAA/DOT :

- LIMITATIONS
- COMMON GROUND
- DEVELOP STRATEGY TO RESOLVE 4 CONFLICT POINTS + ADD'L VILLAGE ISSUES. (IF ANY)

SIMPSON — MAY 1ST MTG. SHOULD INCL. DOT/FAA WORKING GROUP & A LIKE NUMBER OF NATIVE REPS.

LARSON — HOW DOES NATIVE SIDE LIMIT REPRESENTATION.

- MAY 1ST MTG. IS TO CONFIRM THAT OUR PERCEPTIONS OF NATIVE INTEREST ARE ACCURATE, BUT NOT NECESSARILY TO REACH ANY SPECIFIC CONCLUSIONS, BUILD TRUST.

- MTG. WILL BE FAA/DOT WORK GROUP & HOWEVER MANY NATIVES WANT TO PARTICIPATE.

- WORK GROUP TO BE NAMED BY NEXT THURS (4/24)

- COMMUNICATION PATH WILL BY CLYDE STOLTZFUS ⟷ RON SIMPSON

S: new/John M/ tribal . mem

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Northern Region

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

Date: February 28, 1997

File No.:

Tel No.: 451-5423

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

Subject: Airport Leases from Tribal Governments

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

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

CHIEF R/W AGENT	
PRE AUDIT	
ENGINEERING	
APPRAISALS	
NEGOTIATION	
[illegible]	
[illegible]	
ROD	
RETURN TO	
FILE	

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

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

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

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

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

cc: Kurt Parkan
Sam Kito III
John Steiner, AGO

Author: Paul Bowers at ANCAV1
Date: 4/16/97 7:33 PM
Priority: Normal
CC: Steve Pavish, Shirley Horn, J.Lomen@faa.dot.gov at DOTPFWAN, Tony Johansen at FAIPM1
TO: John Miller at FAIBWR-CCMAIL
CC: John Horn, Clyde Stolzfus, Kay Rollison at ANC-ANNEX, Kurt Parkan at DOTPFWAN, Boyd Brownfield at JNUHQ1, Roger Maggard, Ron.V.Simpson@faa.dot.gov at DOTPFWAN
Subject: Re[4]: Agenda for April 18, 1997 Meeting

JM: Yes, mtg is at FAA Conf Rm in Anc (Arpts Div will b able to advise where) & u r invited to either attend or participate by teleconference. Sorry for not better coordination; u were obviously omitted frm early rounds of notification. Yur call as to attending or joining by telecon (pls advise if u need a ride frm arpt if u arrive Anc that am).

Perhaps to better help u decide whether or not to attend, am including initial email which was genesis for this mtg. Below is RonSimpson to Clyde Stoltzfus, PaulBowers, KayRollison discussion of 'brainstorming session', which is what we r to b doing Fri at FAA offices. If ?s, pls call. PB

**INITIAL 4/11/97 RS MESSG*

Hello Clyde, Paul and Kay,
During my visit with Commissioner Perkins on April 1st, we discussed several concerns about airport development in rural Alaskan communities, in light of the current debate on tribal rights and sovereignty. Commissioner Perkins committed to work with us to determine how we can most effectively proceed (jointly) with airport development in rural Native communities.

Based on our discussion with the Commissioner, and with each of you, we would like to host a meeting with the appropriate representatives of FAA Airports and the State to brainstorm and explore options on how we can best proceed in working through these issues with the Native communities. Please coordinate your schedules and determine a convenient date when we can gather; sometime during the week of April 21st would be our preference.

The ideas and information from our brainstorming meeting will be used to formulate an agenda for a meeting with Native communities in the May 1st time frame.

Mr. Jim Lomen will be coordinating our brainstorming meeting. Please contact him at (907) 271-5816 with your preferred dates.
Thank you for your support and assistance,
Ron S.

_____ Forward Header _____

Subject: Tentative May 1, 1997 Meeting
Author: J Lomen at AAL600
Date: 4/3/97 12:13 PM

Ron,
As I work to pull this joint meeting together on the Sponsorship question, between the State of Alaska and various native communities, it appears there are a lot of questions outstanding for all parties. I would like to propose that instead of just having one joint meeting that we actually have three meetings; the State and FAA, the native communities and FAA, and the May 1, 1997 joint meeting with all parties. The two separate meetings, prior to our joint meeting will assist us in better understanding all of the issues that are out there. It is my hope that through this effort we will be in a better position to make the joint meeting much more productive for all. What are your thoughts on this?

Author: Shirley Horn at ANCAV1
Date: 4/17/97 6:42 AM
Priority: Normal
TO: John Miller at FAIBWR-CCMAIL
Subject: April 18, 1997 Brainstorming session with FAA Airports

Folks; FYI. Pls call me if interested in participation. PB

---------- Forward Header ----------
Subject: April 18, 1997 Brainstorming session with FAA Airports
Author: J Lomen <J.Lomen@faa.dot.gov> at dotpfwan
Date: 4/11/97 3:06 PM

Paul/Kay/Clyde;

This is to reconfirm our discussions from yesterday. I greatly appreciate all of your ideas and support in pulling these meetings together. On April 18th I have a conference room reserved here in our building from 8:30 AM to 11:30 AM, please plan on meeting at our office. The goal of our first meeting is to;

-brainstorm all of the issues/concerns from DOT&PF's perspective with regard to; sponsorship, cosponsorship, local hire, force account work, airport maintenance, and long term leases.

-identify various options to the above issues/concerns that can assist in moving each forward.

-document clearly the results of our efforts and any IOU's assigned.

-identify individuals to attend the May 1, 1997 meeting.

-reaffirm that the goal of the May 1, 1997 meeting is to develop options to the above issues/concerns that are acceptable to each party in attendance.

We are looking forward to working on these issues with you. If there is anyone else you feel is important to this initial brainstorming session could you please extend to them an invitation to attend. If you have any questions or additional recommendations as to how we can gain the best possible results from these meetings please let me know.

Thanks,
Jim
271-5816

Jim
****END INITIAL MESSG*

_____ Reply Separator _____
Subject: Re[3]: Agenda for April 18, 1997 Meeting
Author: John Miller at FAIBWR-CCMAIL
Date: 4/16/97 1:20 PM

This is the first I've heard of it. I am assuming this is an invitation and I am making arrangements to be there. I further assume it's at the DOT offices?
JAM

_____ Reply Separator _____
Subject: Re[2]: Agenda for April 18, 1997 Meeting
Author: Paul Bowers at ANCAV1
Date: 4/16/97 8:45 AM

SP: Shirley Horn & Sam Bacino hav been invited to this 'internal pre-mtg'. My understanding is John Miller was to be invited via teleconference (am confirming same w/ this messg). PB

_____ Reply Separator _____
Subject: Re: Agenda for April 18, 1997 Meeting
Author: Steve Pavish at ANCAV1
Date: 4/16/97 8:33 AM

Paul - If you haven't already done so, it might be a good idea to talk to Shirley Horn about Friday's meeting, in particular, about the importance of having ROW representation at the meeting. Also, has there been any consideration given to bringing John Miller or someone else from N. Region ROW down for the meeting? The FAA / DOT&PF / Village problems are not limited to Central Region.
Steve

_____ Reply Separator _____
Subject: Agenda for April 18, 1997 Meeting
Author: Paul Bowers at ANCAV1
Date: 4/15/97 4:30 PM

Folks; Below is the agenda FAA ArptsDiv has proposed for a mtg this Fri at Arpts Div offices re rural arpt development/leasing issues. This is to be an 'internal' strategy/work/brainstorming session prior to a more 'public' work session on May 1 w/ various village community reps. On behalf of ArptsDiv, wld cordially invite y'all to attend. Pls advise. PB

_____ Forward Header _____
Subject: Agenda for April 18, 1997 Meeting
Author: J Lomen <J.Lomen@faa.dot.gov> at dotpfwan
Date: 4/15/97 7:31 PM

Attached is the Agenda for our meeting on Friday. Because we seem to have such trouble with attachments I am also inserting the document below. If you have any questions let me know.
Jim

AIRPORTS MEETING
APRIL 18, 1997
8:30 AM to 11:30 AM

Opening/Introductions

Objectives

. to agree on process to develop agreements between the State and villages

. to begin the process by identifying the interests of the State and what they perceive are the interests of the villages.
. to brainstorm possible options that would meet both parties interests

Role of Facilitator

Groundrules

Expectations: Each person share what his/her expectations are for today's meeting. Capture key issues on flip chart.

Review Agenda and change as necessary

Proposed Process

Identifying Interests of the State

Identifying Perceived Interests of the Villages

Developing possible options that meet both parties interests

Next Steps

Closure

MEMORANDUM

State of Alaska
Department of Law

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

DATE: March 3, 1997

FILE NO: 665-97-0040

TEL. NO.: 451-2905

FROM: Paul R. Lyle
Assistant Attorney General

SUBJECT: Proposed Agreement with Stevens Village

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

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

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

PRL/

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

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

MEMORANDUM

State of Alaska
Department of Law

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

DRAFT
CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

FACTS

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

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

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

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

QUESTIONS PRESENTED AND SUMMARY OF ADVICE

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

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

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

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

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

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

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

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

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

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

> Answer: The proposed contract treats the village like any other municipality exercising governmental jurisdiction within its political boundaries. Although it is difficult to predict how a court would view the proposed agreement, it is probable that the proposed contract would be interpreted as tacit state recognition of the right of villages to exercise tribal governmental control over transportation facilities located within their claimed territory.
>
> The proposed contract may also require approval by the Secretary of the Interior under 25 U.S.C. § 81. If secretarial approval of the contract is required, the contract may imply the existence of Indian country in Alaska. It would be prudent for the department to avoid entering into the proposed contract with Stevens Village until the scope of Native village governmental powers is better defined.

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

> Answer: Yes.

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

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

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

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

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

LEGAL ANALYSIS

The Indian Reorganization Act and the Legal Status of Stevens Village

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

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

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

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

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

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

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

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

1. Statutory Authority to Assist Stevens Village

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

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

(Emphasis added).

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

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

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

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

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

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

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

2. Tribal Status and Sovereign Immunity

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

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

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

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

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

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

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

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

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

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

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

569 P.2d at 163.

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

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

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

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

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

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

3. Contractual Provisions to Avoid Immunity

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

a. Case Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Constitution of Stevens Village

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

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

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

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

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

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

c. Alternatives to a Waiver of Immunity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[10] The land on which the new airport will be constructed has various ownerships. Tract 1b is part of the present airport which is constructed within an ANS withdrawal. Tract 1b is presently owned by the United States. BLM plans to convey this tract to Dinyee which, in turn, is required to deed it to the state under ANCSA § 14(c)(4). Tracts II and III of the airport were deeded to the IRA Council by the BLM townsite trustee. Stevens Villages owns Tracts II and III in fee. The IRA Council owns the surface estate in Tract IV by deed from Dinyee. The subsurface in Tract IV is owned by Doyon, Ltd. Section 81 applies to any land owned by a tribe whether it was acquired by purchase or otherwise. Narragansett Indian Tribe v. Ribo, 686 F.Supp. 48, 51 (D.R.I. 1988).

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

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

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

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

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

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

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

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

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

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

a. Management of the Facility.

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

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

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

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

c. May the tribe encumber the property after construction?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Local Hire Preferences.

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

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

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

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

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

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

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

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

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

b. Exclusive Rights on Airports

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

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

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

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

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

6. Protection of the State against potential negligence claims.

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

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

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

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

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

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

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

7. Does the Procurement Code Apply?

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

a. The department's contract with Stevens Village.

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

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

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

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

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

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

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

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

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

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

Conclusions and Recommendations

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

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

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

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

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

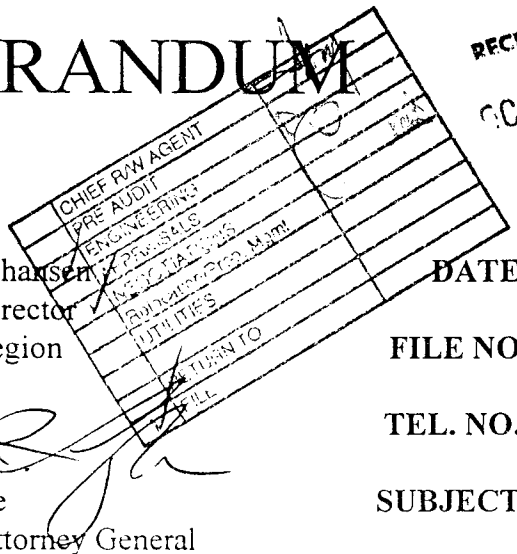
If you have questions concerning this advice, please do not hesitate to contact me.

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

PRL/

Bennett Stevens II

MEMORANDUM



State of Alaska
Department of Law

TO: Anton K. Johansen
Regional Director
Northern Region

DATE: October 23, 1996

FILE NO: 665-97-0040

TEL. NO.: 451-2811

FROM: Paul R. Lyle
Assistant Attorney General

SUBJECT: Proposed MOU between DOT&PF and Stevens Village

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

Facts

I have been asked to review the attached MOU between DOT&PF and Stevens Village. The attached MOU requires DOT&PF to design an airport for Stevens Village and provide the village with bid-ready plans and specifications. The agreement supports the village's decision to "sponsor" the application for FAA grant funding and requires the village to bid, award and manage the construction of the airport. The village will own and operate the airport after it is constructed. Stevens Village is to pay DOT&PF for its design services out of FAA grant funds.

Support for Stevens Village's direct sponsorship of a federally funded airport project may have a significant impact on state - tribal relationships. As briefly explained below, this agreement raises issues regarding the extent of tribal governmental powers and tribal sovereign immunity.

Tribal Governmental Powers

DOT&PF has the statutory authority to provide design, engineering services, and financial support to Stevens Village to construct a public airport. State law authorizes DOT&PF to provide this assistance, with or without charge, to state agencies, municipalities or private individuals.[1] If

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[1] The term "person" in the laws of Alaska "includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person." AS 01.10.060(8). I believe a court would rule that the Stevens Village Council is an "organization" under AS 01.10.060(8) and thus a "person" to whom the Department may render assistance under AS 02.15. The Native Village of Stevens has adopted a constitution under section 16 of the Indian Reorganization Act, 25 U.S.C. § 461 et seq. ("IRA"). The Dep't of Interior has approved this constitution. Stevens Village has not formed an organization under section 17 of the IRA. Section 17 IRA organizations are federally chartered corporations and are thus clearly within AS

DOT&PF renders this assistance, the airport **must** be open to use by the general public and **must** be maintained as a public airport until abandoned. *See* AS 02.15.120 -- AS 02.15.140.

Federal regulations require "each sponsor" of an airport development project to "be a **public agency** authorized by law to submit the project application." 14 CFR § 152.103 (a)(1) (emphasis added). The term "public agency" is defined as a state, a municipality or other political subdivision, a tax-supported organization, or **an Indian tribe** or pueblo. 14 CFR § 152.3 (emphasis added).

The state recently decided to recognize the tribal status of Native villages included on a list of Alaska villages issued by the Dep't of the Interior. Because Stevens Village is on the Interior list, the state has conceded its tribal status. However, whether Native villages have the power of local government and, if so, the extent of that power is still an open issue that the state is pursuing through litigation.

I am concerned that this agreement may be construed as tacit recognition of the village's governmental power to receive and expend federal funds for airport purposes. Given the state's ongoing litigation concerning the scope of tribal powers in Alaska, an agreement that may have an impact on that issue should be reviewed by and discussed with Attorney General Botelho before it is executed. Therefore, I recommend that Commissioner Perkins seek the advice of Attorney General Botelho in this matter before I take further action to review the agreement.

Sovereign Immunity

Sovereign immunity will become an issue if the agreement is signed and DOT&PF finds it necessary to file a lawsuit for breach of contract. In Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32. 40 (Alaska 1988) the Alaska Supreme Court held that "mere approval" by the federal government of Stevens Village's IRA section 16 constitution "does not suffice to afford the Village tribal status for the purpose of application of the doctrine of tribal sovereign immunity." Now that the state has accepted Stevens Village's tribal status, the court may take a different view of the issue.

Stevens Village's 1990 constitution contains an express claim to sovereign immunity waivable only by a vote of all village members. In light of this constitutional provision, it is likely

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01.10.060(8)'s definition of "person".

Traditional village councils, i.e. councils which have not been organized under the IRA, are unincorporated associations. The status of unincorporated associations as "persons" under AS 01.10.060(8) is uncertain. 1984 Inf. Op. Att'y Gen. (Oct. 24; 166-134-84) at pp. 2-5.

that Stevens Village would claim immunity if DOT&PF found it necessary to file suit. Therefore, I recommend the state include in this agreement a waiver of any immunity that Stevens Village may claim and an agreement that any litigation be tried in state court. In the absence of a waiver of immunity, the state could find itself without a remedy against Stevens Village in the event the village breaches the contract.

In addition, if the village sues the state for breach of contract,[2] tribal immunity may preclude the state from raising counterclaims against the village if the court finds the state's counterclaims insufficiently related to the village's cause of action. The Ninth Circuit's decision in *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989) is instructive on this issue.

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

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

In the event of a contract dispute, DOT&PF could find itself involved in protracted litigation concerning sovereign immunity unless the Stevens Village contract includes an explicit waiver of any claim the village may have to sovereign immunity.[3]

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[2] For example, if problems arise in the construction of the airport, Stevens Village may assert a claim against DOT&PF for allegedly negligent design.

[3] The Alaska Supreme Court takes a less stringent view than the Ninth Circuit on how explicit contractual language must be in order to effect a waiver of immunity. *Compare* Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983) *with* Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989). In Eyak, the Alaska Supreme Court held a contractual arbitration clause waived tribal immunity. The Ninth Circuit held that a similar clause did not constitute a waiver in Pan American. Since any litigation concerning this agreement has the

Scope of Waiver

A simple waiver of sovereign immunity may not be sufficient to protect DOT&PF's interests in being paid for its design work in this case. Last week the Alaska Supreme Court issued an opinion in Hydaburg Cooperative Ass'n. v. Hydaburg Fisheries, ___ P.2d ___, Slip Op. 4415 (Alaska Oct. 17, 1996). Hydaburg holds that state courts have no jurisdiction over property owned by and dedicated to the functions of an IRA "governmental unit". As a result, a money judgment can be executed only against property owned by or dedicated to an IRA business entity or business purpose.[4]

Although it is not entirely clear from a reading of the Hydaburg opinion, the supreme court appears to believe that a single IRA entity can simultaneously exercise both governmental and business functions. Id. at 2-3 and n. 3. Thus, it is important to distinguish between those assets dedicated to governmental functions and those dedicated by the tribe to business functions. The problem is that IRA organizations rarely specify which of their assets they own in their governmental capacity and which they own in their business capacity or have dedicated to business functions.

In Hydaburg, a building was constructed, as part of a joint commercial venture, on one-third of a lot of land owned by an IRA Council. The court found that the portion of the land on which the building was constructed was dedicated to the commercial venture and thus subject to execution to satisfy a money judgment in state courts. The case was remanded to the superior court to determine whether the remaining two-thirds of the same lot were dedicated to the same business function or whether that portion of the lot was owned by the IRA Council in its governmental capacity.

The Hydaburg case demonstrates the complexity of the IRA. The Hydaburg case has been to the supreme court three times and is likely to return, regardless of the decision rendered by the superior court on remand.

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potential of ending up in federal court, either through direct filing or a removal action, an explicit waiver of any tribal immunity claim is recommended.

[4] The Indian Reorganization Act provides for the formation of two separate legal organizations. Section 16 organizations are "governmental units". Section 17 organizations are business organizations formed to facilitate tribal economic development "in the modern business world." Section 16 organizations are immune. Section 17 organizations either do not possess immunity or may waive immunity with respect to assets owned by them or dedicated to them. Atkinson v. Haldane, 569 P.2d 151, 170-75 (Alaska 1977).

Based on this recent decision, I recommend that any waiver of immunity include a waiver of execution in state court against assets owned by Stevens Village. If a general waiver to execute against assets can not be negotiated, then I recommend that the agreement expressly provide that Stevens Village is pursuing this project in its "business purpose" capacity and that Stevens Village identify and pledge assets as security for the performance of its contractual duties.[5] Such a provision is especially important in this case because Stevens Village has no section 17 organization and because construction of an airport can just as easily be construed as a governmental function as it can be construed a business function.

Conclusion

DOT&PF should request Attorney General Botelho's review of this agreement because of the policy implications it raises with regard to the extent of tribal governmental powers in Alaska. If the Attorney General approves the agreement in concept, then I suggest that we prepare a more detailed contract to provide design services. The present agreement fails to address basic contractual concerns, e.g. default, a proper indemnification clause, a firm contract price, a definite payment date for services rendered, how DOT&PF is to be paid if Stevens Village is unsuccessful in obtaining FAA funding, an appropriate waiver of immunity, and which party will bear maintenance and operation costs related to the airport following construction.

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

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

i:\lylep\stevens.m

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[5] A recent Alaska Law Review article suggested identifying which IRA organization owns specific assets and pledging particular assets as security for business transactions as a way to avoid confusion in the IRA commercial context. Kenton Keller Pettit, Note: The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court?, 10 Alaska Law Review 363, 397-98 (1993).

Post-it™ brand fax transmittal memo 7...	# pages ▸ 2
To John Athens	From Dan Urbach
Co. A.G.'s	Co. DOT & PF
Dept.	Phone # 451-2275
Fax # 451-2846	Fax # 451-5126

DRAFT

of Understanding

ween

Stevens Village Council

and

Alaska Department of Transportation

and Public Facilities

Background and Objectives

Beginning in 1989, the Department of Transportation and Public Facilities (DOT&PF) conducted a study for the location of a new airport facility near Stevens Village and has proceeded with a preliminary design for such a facility. The DOT&PF supports the Stevens Village Council's decision to sponsor the project as owner/operator of the airport. The Council wishes to utilize the DOT&PF design of the airport facility. The Stevens Village Council will reimburse the DOT&PF for the design under the terms of this memorandum of understanding.

Agreement

It is hereby agreed that the DOT&PF will provide the plans, specifications, and estimate for a new airport facility at Stevens Village to the Stevens Village Council and the Stevens Village Council will reimburse the DOT&PF for the engineering costs incurred in producing the study and the plans, specifications, and estimate for that facility. The DOT&PF shall be held harmless in any claims or legal action, other than those directly attributed to the design, that may occur after the facility is constructed. The DOT&PF must approve any changes to the design in order to be responsible for the finished product.

Work Product

The work product will consist of the bid ready plans, specifications, and estimate for the facility and the study that selected the site for the new facility. The plans shall be sealed and signed by the DOT&PF engineer responsible for their production. Advertising, bid opening, and award of the contract shall be the sole responsibility of the Stevens Village Council.

DRAFT Memorandum of Understanding-Stevens Village 2

Reimbursement

The DOT&PF shall provide an itemized statement to the Stevens Village Council showing the costs incurred for the study and the production of the plans and specifications. Upon the receipt of the AIP grant from FAA, or as specified in the section titled "Performance", the Stevens Village council will reimburse the DOT&PF for the costs incurred.

Performance

The Stevens Village Council agrees to actively pursue AIP funding for airport development. The Stevens Village Council agrees to reimburse DOT&PF for its work product, as described herein, within three years from receipt of the work product.

Signature

The undersigned agree to the provisions of this Memorandum of Agreement:

For: Stevens Village Council

Chief Date

Date

For: State of Alaska, Department of Transportation and Public Facilities
Recommended:

Pre-Construction Engineer Date

Approved:

Regional Director Date

ORDER

5100.38A

AIRPORT IMPROVEMENT PROGRAM (AIP) HANDBOOK

October 24, 1989

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Distribution: ZRP-510; A-FAS-1 (MAX)

Initiated By: APP-510

fore, or gives assurance to the Secretary that good title will be acquired.

611. TITLE FOR LANDING AND BUILDING AREAS.

a. General. Title with respect to lands to be used for landing area or building area purposes can be either fee simple title (free and clear of any and all encumbrances), or title with certain rights excepted or reserved. Any encumbered title must not deprive the sponsor of possession or control necessary to carry out all obligations under the grant. A deed containing a reversionary clause, for "so long as the property is being used for airport purposes," does not negate good title provided the other conditions are satisfied. Where rights excepted or reserved would prevent the sponsor from carrying out its obligations under the grant, such rights must be extinguished or subordinated prior to approval of the project.

b. Airport Property Subject to a Mortgage. The existence of a mortgage on the airport property, in and of itself, is not a sufficient reason to render such project ineligible. However, the sponsor's ability to meet the principle and interest payments on the mortgage must be determined prior to the approval of the project.

c. Lease of Aeronautical Land. Private airport sponsors must own the landing and building areas and may not be a lessee of land for aeronautical purposes. In those instances where the public sponsor's title consists of a long-term lease, such title is satisfactory provided the following conditions are met:

(1) If the landing area is leased, the lessor must be a public agency;

(2) The sponsor has a long-term lease (minimum of 20 years from the date of the grant) to all landing areas and building areas;

(3) The lease contains no provision which prevents the sponsor from assuming any of the obligations of the grant agreement;

(4) That consideration for the entire lease be paid in advance. However, this condition may be waived if the sponsor has adequate financial resources to assure future lease payments.

612. TITLE FOR OFF-AIRPORT AREAS. Property interests required in off-airport areas (see paragraph 303) must be sufficient to assure that the sponsor will not be deprived of its right to occupy and use such lands for the purposes intended.

613. DETERMINATION OF ADEQUATE TITLE. A certification by a sponsor that it has acquired property interests required for a project may be accepted in lieu of any detailed title evidence and need not be submitted to the Regional Counsel unless the regional Airports Division Manager considers legal review necessary. Without such certification, the sponsor's submission of title evidence must be reviewed to determine adequacy of title. The adequacy of such title is an administrative determination made by Airports personnel and need not be submitted to Regional Counsel for review unless there is reason to suspect title is not adequate.

614. TITLE REQUIREMENT PRIOR TO NOTICE TO PROCEED. Authorization for the sponsor to issue a notice to proceed with construction work should not be given until it has been determined that the required property interests have been acquired in the land on which construction is to be performed. See paragraph 1203 for more information.

615.-619. RESERVED.

SECTION 3. LAND COSTS

620. GENERAL. The purchase price or cost of land, including costs incidental to the acquisition of any property interest necessary for airport purposes including appraisal costs, is allowable provided such costs are necessary and reasonable in amount. Sponsor costs for obtaining title insurance for lands it purchased are not allowable. The sponsor must submit appraisals to support the cost of acquisition.

621. RELOCATION COST.

a. General. The cost incurred by the sponsor to meet the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 is eligible for Federal assistance as project costs except that the Federal share of the cost incurred by the sponsor of providing payments and assistance under the Act from January 2, 1971, through June 30, 1972, is 100 percent of the first $25,000. (See Order 5100.37.) See special condition in Appendix 9, paragraph 4.

b. Examples of Relocation Costs:

(1) Moving expenses;

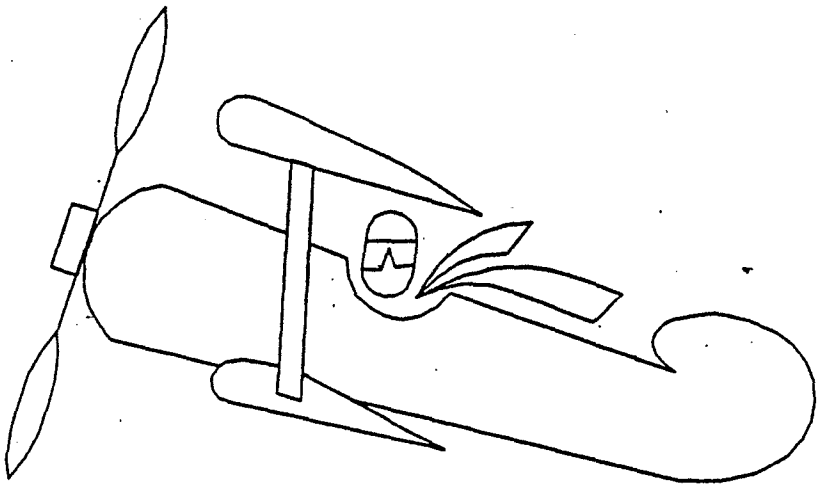
SPONSORS GUIDE

TO

LAND ACQUISITION

AND

RELOCATION ASSISTANCE



FEDERAL AVIATION ADMINISTRATION

NORTHWEST MOUNTAIN REGION

GENERAL REQUIREMENTS

The following subjects address general matters which may aid in the administration of AIP land acquisition projects. The guidance provides basic land acquisition and relocation assistance procedures.

AIRPORT LAND OWNERSHIP AND IDENTIFICATION - The sponsor must hold good title to the landing area or site. The landing area or site means the basic runway, the Runway Safety Area, and the innermost portion of the approach surface known as the Runway Protection Zone (RPZ). If fee title to the RPZ is impracticable, an avigation easement is required. The sponsor must also protect the "instrument and visual operations to the airport" which includes all approaches to current and proposed airport runways. .

The approved Airport Layout Plan (ALP) serves as the primary basis for determining land areas necessary for airport purposes. This document identifies both current and future airport development.

CERTIFICATION - Each sponsor is required to certify that adequate title has been obtained for land acquired under the AIP for airport development, future development or noise purposes and that the appropriate requirements of Part 24 have been met in the project acquisition. Preparation of Land Certification, Appendix B, contains the necessary forms and guidance for this certification.

EXHIBIT "A" (PROPERTY MAP) - The airport sponsor is required to prepare and maintain a current Exhibit "A" property map. An Exhibit "A" identifies the AIRPORT LAND "dedicated" for airport purposes and/or acquired with federal funds. Airport purposes is defined as land that is used, and planned to be used, in the airport operations. Preparation of Exhibit "A", Appendix C, details the requirements for an Exhibit "A".

Exact land descriptions may not always be available in the early stages of a project. However, the land to be acquired, and shown on the Exhibit "A", becomes a contractual obligation through the grant agreement. Therefore, the airport sponsor must know as much about the proposed land acquisition as possible.

applicable only under a purchase assurance or transaction assistance provisions. A voluntary acquisition under a FAA approved noise project typically renders the owner **INELIGIBLE** for relocation assistance and payment benefits. Voluntary acquisitions are not to be confused with other acquisitions of land made by a sponsor for land eligible for "airport development purposes." Contact the FAA project manager before proceeding with any kind of voluntary acquisition.

MITIGATION LAND - Acquisition of land, on or off airport, as mitigation land, is eligible for reimbursement in an AIP grant as development land, provided it is a condition for approval of an environmental action associated with approved airport development. Sponsors should coordinate with the FAA project manager before proceeding with acquisition of land for environmental mitigation.

FUTURE DEVELOPMENT LAND - Land acquisition for future airport development is eligible. "Future development" is considered to be development of an airport facility more than 5 years after acquisition. The same essential requirements for the acquisition of such land are required to be followed, including the requirements of the National Environmental Policy Act (NEPA) of 1969 and Part 24. Land for future development must also be identified on the ALP. Since there are several unusual aspects to the approval of future development land for AIP funding, close coordination with the FAA project manager is essential.

LIFE ESTATE - The acquisition of a life estate, in lieu of full fee title, may be considered eligible for AIP funding with prior approval of the FAA. This type of property interest can be used effectively in FAR Part 150 Noise Compatibility Programs and in approach and transitional areas where the purpose of the acquisition is for other than development with airport improvements. This type of acquisition can be particularly useful in the control of residentially improved properties when the property owner(s) are older and desire to occupy the property until their death. Special requirements in the valuation of life estates apply. In addition, arrangements must be made for future maintenance and utility costs as well as for removal of any structures at the time full title transfers to the sponsor. Notification to the occupant of relocation benefits must also be considered. Sponsors should consult with the FAA project manager when considering this type of acquisition.

It is suggested that prior to the appraisal of any land to be acquired, including donated land, an environmental audit be secured and the results furnished to the appraiser for inclusion in the appraisal report. Appraisers should be advised to be aware of and report to the sponsor, prior to completion of the appraisal, actual property conditions that exist at a site that may warrant further environmental investigation. The appraiser must not be allowed to condition the report assuming no knowledge of environmental hazards.

If land is in the process of being acquired (appraisal completed or offers made), the sponsor should conduct an environmental audit prior to a firm commitment to acquire or actual closing. An offer to acquire based on cleanup of environmental contamination by the seller is not considered satisfactory without knowledge of the environmental conditions since cleanup may extend over a protracted period and not meet sponsor schedules.

AVIGATION EASEMENTS - If a fee interest in the RPZ is not acquired, an avigation easement interest is required. An avigation easement is the conveyance of a specified property interest in the airspace over real property. The easement restricts the use of the property above a specified height, together with adequate assurances that the use of the property will be subject to the rights specifically granted in the easement document. It does not, however, prohibit development of structures or improvements below the imaginary surface. The intent is to restrict any development that protrudes into the airport airspace.

Avigation easement appraisal is unique and unfamiliar to many appraisers. Careful consideration must be given to the appraiser selected for these assignments as well as the techniques and documentation used in the appraisal report. Close coordination with the FAA in selection of the appraiser is expected. Guidelines for Securing Avigation Easements, Appendix D, should be used as a reference for the appraisal of such easements.

PROFESSIONAL SERVICES CONTRACT REVIEW AND APPROVAL. Professional services of appraisers, review appraisers, negotiators, relocation agents, attorneys and other related services are normally obtained by the sponsor by: (1) contract; or, (2) sponsor's force account.

Any defects in the title requiring correction after acceptance by the FAA will be at the sponsor's expense.

b. FAA requirements provide:

1) General: Title with respect to land to be used for landing area or building area purposes can be either fee simple title (free and clear of any and all encumbrances), or title with certain rights excepted or reserved. An encumbered title must not deprive the sponsor of possession or control necessary to carry out all obligations under the grant. A deed containing a reversionary clause for "so long as the property is being used for airport purposes," does not negate good title, provided the other conditions are satisfied. Where rights excepted or reserved would prevent the sponsor from carrying out its obligations under the grant, such rights must be extinguished or subordinated prior to approval of the project.

2) Airport Property Subject to a Mortgage. The existence of a mortgage on acquired airport property, in and of itself, will not render such land ineligible. However, the sponsor's ability to meet the principal and interest payments on the mortgage must be satisfied prior to the approval of the project costs.

3) Lease of Aeronautical Land. Private airport sponsors must own the landing and building areas and may not be a lessee of land for aeronautical purposes. In those instances where the public sponsor's title consists of a long-term lease, such title is satisfactory provided the following conditions are met:

(a) If the landing area is leased, the lessor must be a public agency;

(b) The sponsor has a long-term lease (minimum of 20 years from the date of the grant) to all landing areas and building areas;

(c) The lease contains no provision which prevents the sponsor from assuming any of the obligations of the grant agreement;

(d) That consideration for the entire lease be paid in advance. However, this condition may be waived if the sponsor has adequate financial resources to assure future lease payments.

4) Title for Off-Airport Areas. Property interests acquired in off-airport areas must be sufficient to assure that the sponsor will not be deprived of its right to use and occupy, where necessary, such lands for the purposes intended.

c. FAA requirements provide that the interests granted in the airport approach zones (including runway protection zone), horizontal, conical, and transitional zones at airports are required to contain the right of flight. This also includes the right to remove existing obstructions and to restrict the establishment of future obstructions. As used herein, zone means land lying under the appropriate Part 77 surface.

(a) Runway Protection Zone. The sponsor is encouraged to acquire fee title to all land within the runway protection zone (RPZ), with first priority given to land within the Object Free Area (OFA). Structures or activities located on or within the OFA must be removed unless excepted by the Airports Division or otherwise needed for air navigation aids. If fee title acquisition to the RPZ is impracticable, an avigation easement is required. This easement must convey the right of flight with inherent noise and vibration above the approach surface, the right to remove existing obstructions, the right of ingress and egress to enforce the restrictions, and a restriction against the establishment of future obstructions.

(b) Approach and Transitional Zones. The sponsor should acquire the land interest necessary to restrict the use of land in the approach and the transitional zones (the dimensions as cited in the applicable ACs) to activities and purposes compatible with normal airport operations as well as to meet current and anticipated development at the airport. Unless there is a need for future development, compatible use or noise purposes, sponsors are encouraged to acquire the minimum property interest necessary to ensure safe aeronautical use.

PROCEDURES

a. TITLE - The sponsor's attorney will investigate the quality of the title obtained and prepare a submission for land acquired under an AIP project consisting of a title evidence package or certification of title, or both, for each parcel or tract of land included in the grant agreement.

1) Title Evidence Package. The sponsor's attorney is to prepare, and maintain in the parcel file, title evidence consisting of the following:

Memorandum

ROUTE	COPY	NORTHERN REGION DOT&PF	INITIAL
✓		REGIONAL DIRECTOR	
	✓	D&C DIRECTOR	
	✓	M&O DIRECTOR	
	✓	PLANNING/ADM. CHIEF	
		SAFETY OFFICER	
		F.I.A. MANAGER	
		RETURN to Reg. Dir. Sec.	
	✓	FILE	

State of Alaska
Department of Transportation and Public Facilities
Engineering and Operations

To: Tony Johansen, P.E.
Northern Region Director

Date: April 9, 1997

File No.: 0906

Telephone: (907) 465-6948

From: Michael L. Downing, P.E.
Director

Subject: Force Account
Projects 67178/67180

Performing force account projects with the Department's staff and equipment is considered by both the Alaska Statutes and the Code of Federal Regulations to be an anomaly within our federal aid highway program. We are generally discouraged from using any procurement method other than competitive bidding, for example 23 CFR 635.205 (a) reads as follows:

> "Congress has expressly provided that the contract method based on competitive bidding shall be used by a State highway agency or county for performance of highway work financed with the aid of Federal funds unless the State highway agency demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists."

The relevant State law on the subject would the be following portion of AS 35.15-Construction Procedures:

> "Sec. 35.15.010. Construction by Department.
>
> (a) Except as provided in AS 44.33.300, it is the general policy of the state to require the construction of all public works under bid contract in accordance with AS 36.30 (State Procurement Code). However, when the estimated cost of a construction project is less than $100,000, or when it appears to be in the best interests of the state, the department may perform the work, notwithstanding any other provisions of law. A complete record shall be kept by the commissioner or the commissioner's designee of all transactions entered into under this section including names of employees involved in the transactions.
>
> (b) Construction or professional services in connection with the construction of a public work performed by the department under (a) of this section which have an estimated cost exceeding $5,000 may not be performed by the department unless the commissioner determines, in writing, that the cost to the state will be less than that incurred as a result of a formally advertised or negotiated contract. The determination of the commissioner shall be supported by findings of fact which shall set out enough facts and circumstances to clearly justify the determination. The determinations and findings shall be maintained as a, permanent record of the department."

We are left with the discretion to use force account as particular circumstances warrant. But, we are also held to a high standard in demonstrating that the use of force account is in the state's best interest and is cost effective. Procedurally, the best interest determination called for in statute is delegated by the Commissioner to the Director of Engineering and Operations. The delegation does not diminish the high standards to which we are all held.

For preventative maintenance projects, we must meet certain eligibility requirements. These requirements were addressed by the Alaska District of the FHWA in a letter to Deputy Commissioner, Bo Brownfield, dated September 11, 1996. The letter clearly defines what preventative maintenance work is eligible under federal aid and what is not. Included in the letter is the following guidance: "Work should not be scheduled for isolated problems but should be of a sufficient scope to extend the service life of a reasonable length of roadway."

We have a department procedure for force account work (DPDR 05.01.080) which requires an analysis supporting a public interest finding. This is where the demonstration of cost effectiveness would occur. The procedure also calls for an analysis showing that the impact on the private sector is minimal.

The finding submitted for projects 67178 and 67180 requests the approval to perform a very broad range of activities on any portion of five major state highways using $1,711,000 in federal aid funding of which only 20 to 25% is actually subject to a public interest finding.

I have provided the discussion above so that you can see the number of ways in which the finding as drafted is inadequate. I also wanted to show that it is not a question of convenience. The only requirement added at the department's discretion is the analysis of the impacts to the private sector.

The FHWA, in their review of the project funding documents, will require that you add considerable definition to the scope and location of work. The FHWA will also require that the conditions contained within their letter on preventative maintenance be met. Keep in mind that any commodities purchased can only be used for a federal aid project. Once the project is approved for construction by FHWA, minor changes to the mix of labor, equipment and materials need not be resubmitted to FHWA so long as the adjustments are within the approved scope of work.

To determine that the project is more cost effective than other methods, statutes require the determination be "supported by findings of fact which shall set out enough facts and circumstances to clearly justify the determination." I cannot agree that incorporating all of the project funding under the public interest finding so as to create flexibility in funding distribution meets this standard. You should refer to 23 CFR 635.115 (b) for guidance on force account estimates and cost comparisons.

The portion of the project which is to be competitively bid should be excluded from the finding. If you then decide to increase the portion of work performed by the Department's forces, another public interest finding can be written. You have existing authorization to make public interest determinations when the estimated cost is under $100,000. You should consider that authority to be cumulative within a project. If the estimated cost of work under the finding exceeds $100,000, the finding would need to be executed by this office. Due to the Certification Acceptance Agreement between FHWA and the Department, these findings do not need to be approved by FHWA. Changing the scope of work however would require FHWA approval.

The difficulty and risks associated with creating a fixed price contract for the scope of work in these two projects is acknowledged. There is very likely a sufficient public interest in performing the work under force account. The force account method is also likely to be more cost effective. The public interest finding needs to clearly establish those points and address the additional issues raised. I can provide assistance upon request otherwise, we will stand by for the revised finding. I can be reached at (907) 465-6948.

cc: Boyd Brownfield, P.E.
Deputy Commissioner

OFFICE COPY

U.S. Department of Transportation
Federal Highway Administration

Alaska Division

P.O. Box 21648
Juneau, Alaska 99802

September 11, 1996

HFO-AK
MA-2

Boyd Brownfield
Deputy Commissioner
ADOT&PF
3132 Channel Dr.
Juneau, AK 99801

Dear Mr. Brownfield:

Preventive Maintenance Eligibility

Preventive Maintenance Legislation

In 1991, the ISTEA established the Interstate Maintenance Program, and designated a special category of funds (IM) which could only be used on the Interstate System for preventive maintenance and 3R work.

The National Highway System Designation Act of 1995 added a new section to Title 23 entitled Preventive Maintenance. Activities that are eligible for funding under this section are those that cost-effectively extend the useful life of a Federal-aid highway. Since Section 118(f) of Title 23 allows Alaska to use Federal-aid funds on any public road, preventive maintenance activities on any public road are eligible. Except for IM funds, any regular system funds available under Title 23 can be used for the work.

Eligible Preventive Maintenance Work

The Alaska DOT&PF must be able to demonstrate that activities undertaken are a cost-effective means of extending the useful life of the roadway or bridge. In general, qualifying work includes any work which provides additional pavement structural capacity, prevents the intrusion of water into the pavement or base, provides for removal of water that is in the pavement or base, restores surface rideability , or prevents the deterioration of bridges.

A normal Federal-aid project must be established for preventive maintenance work. Work should not be scheduled for isolated problems but should be of a sufficient scope to extend the service life of a reasonable length of roadway. Upgrading of safety appurtenances is also encouraged.

Routine maintenance work is not eligible.

Eligible Roadway Work

1. Overlays or replacement of the pavement structure or roadway surface.
2. Seal coats, joint and crack sealing.
3. Restoration of drainage systems.
4. Profiling or milling to smooth the surface.

Roadway Work NOT Eligible

1. Mowing, brushing, or cleaning roadsides and ditches.
2. Snowplowing.
3. Painting or replacing pavement markings.
4. Pothole patching.
5. Landscape maintenance.
6. Guardrail repair.
7. Spot improvements to isolated areas.

Eligible Bridge Work

Federal funds may be used to perform preventive maintenance on bridges included in the National Bridge Inventory that are not owned by a Federal Agency.

1. Seismic Retrofit. Bridges must be on Alaska's Seismic Retrofit Prioritization List.
2. Scour Countermeasures. Repair of spurs, spur dikes, rip-rap, and other river training structures used to minimize scour. Removal of significant amounts of debris upon concurrence of the Region or Headquarters hydraulic engineer.
3. Crack Sealing. Decks, girders, and substructure.
4. Joint Repair.
5. Painting and repainting an entire bridge or areas essential for bridge performance.
6. Deck Overlays. Including repair of delaminated and spalled areas.

7. Spalled concrete repair. Including repair to damaged superstructure due to bridge rail impacts.

Bridge Work NOT Eligible

1. Cleaning normal amounts of debris.
2. Routine cleaning of deck drains.
3. Minor touch-up painting.
4. Bridge rail repair.

If you have questions on this program or on the eligibility of work activities, please contact our office.

Sincerely yours,

Robert E. Ruby
Division Administrator

s/ Phillip A. Smith

By: Phillip A. Smith
Field Operations Engineer

091103r1.ps

John Jensen

MEMORANDUM State of Alaska

Department of Transportation & Public Facilities
Office of the Commissioner

TO: Mike Downing, Director
Engineering & Operations

AND: Paul Bowers, Director
Statewide Aviation

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

AND: Kurt Parkan
Deputy Commissioner

DATE: March 21, 1997

TELEPHONE NO: 465-3901

TEXT TELEPHONE: 465-3652

FAX NUMBER: 586-8365

SUBJECT: General Aviation
Long-term Land
Transactions

To facilitate better communications and community relations, the Federal Aviation Administration (FAA) should be given the opportunity to participate in future long-term land negotiations that involve rural General Aviation airports. As a major stateholder in the aviation system, the FAA can add valuable input into the process by providing guidance on the federal rules that govern land transactions on airports as the negotiations develop.

To coordinate development of this policy, please work together with FAA and regional personnel to institute an acccptable procedure.

CEIVE

2 7 '97

cc: Ron Simpson, Division Manager, Federal Aviation Administration
Regional Directors, DOT&PF
Directors of Design & Construction, DOT&PF
Clyde Stoltzfus, Special Assistant to the Commissioner, DOT&PF
Sam Kito III, Special Assistant to the Commissioner, DOT&PF

RIGHT OF WAY CENTRAL REGION	Action	Copy
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To John Miller	From Shirley Hora
Co. DOT	Co. ROW
Dept. ROW	Phone # 269-0709
Fax # 451-5411	Fax # 248-9456

MTG. re LYLE MEMO ON STEVENS PROPOSED CONTRACT 4/24/97

JOHNSON, LYLE, PARKLAND, DEPUTY A.G. BARBARA RITCHIE, [illegible], SNOW

Pg 3. — "PROBABLE" - TREAT EM LIKE CO'S'T ⇒ THEY ARE.

WE COULDN'T ENTER INTO ANY CONTRACTS - PRECISELY

IN AREAS WHERE STATE & TRIBE ARE EMPOWERED TO ACT, THEY ARE "EQUAL SOVEREIGNS".

~~BECAUSE~~ THE PROB. IS:

A. IF ~~INDIAN~~ CET SEC'Y APP'L (TRIBE/ INDIAN LAND) ⇒ INDIAN COUNTRY IS RECOGNIZED

B IF NOT SEC'Y APP'L THEN CONTRACT NOT VALID.

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Office of the Commissioner

TO: Mike Downing, Director
Engineering & Operations

AND: Paul Bowers, Director
Statewide Aviation

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

AND: Kurt Parkan
Deputy Commissioner

DATE: March 21, 1997

TELEPHONE NO: 465-3901

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SUBJECT: General Aviation
Long-term Land
Transactions

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APR 07 1997

To facilitate better communications and community relations, the Federal Aviation Administration (FAA) should be given the opportunity to participate in future long-term land negotiations that involve rural General Aviation airports. As a major stateholder in the aviation system, the FAA can add valuable input into the process by providing guidance on the federal rules that govern land transactions on airports as the negotiations develop.

To coordinate development of this policy, please work together with FAA and regional personnel to institute an acceptable procedure.

cc: Ron Simpson, Division Manager, Federal Aviation Administration
Regional Directors, DOT&PF
Directors of Design & Construction, DOT&PF
Clyde Stoltzfus, Special Assistant to the Commissioner, DOT&PF
Sam Kito III, Special Assistant to the Commissioner, DOT&PF

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