

MEMORANDUM

State of Alaska
Department of Law

TO: Bruce M. Botelho
Attorney General

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SUBJECT: Anchorage Coastal
Trail Planning

FROM: James E. Cantor
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WITH
REVIEW Kevin Saxby and Lance Nelson
AND EDITS Assistant Attorneys General
BY: Natural Resources Section, Anchorage

I. Questions Presented

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

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

II. The Location and Effect of the Refuge Boundary

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

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

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

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

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

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

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

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

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

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

In 1975, the legislature added a provision to AS 16.20.030(b) giving the Municipality of Anchorage one year to zone the privately owned land within the outer boundary of the Potter Point State Game Refuge. If the Municipality did not act within a year, the Department of Natural Resources was given the power to adopt zoning

regulations governing privately owned land within the refuge. A similar scheme exists in some other refuges. Although the legislative history of the 1975 provision is sparse, the

sponsor of the bill, Senator Pat Rodey, explained to the House Committee on Community and Regional Affairs that “The State is attempting to buy all the lands that have been dedicated for park purposes but don’t [sic] have enough money right now. There are still private lands inside the boundaries of the refuge and it is important to zone these to keep them consistent with the use of the refuge.” Meeting Minutes, May 6, 1975.

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

In 1980, the Office of the Attorney General issued a memorandum of advice, drafted by Assistant Attorney General Thomas Meacham, evaluating whether the Department of Fish and Game had authority over a tract of land within the Potter Point State Game Refuge that the Department of Natural Resources had mistakenly conveyed to a private party. 1980 Inf. Op. Att’y Gen. (October 9; A66-022-81). The memorandum is particularly applicable because the Potter Point State Game Refuge was the predecessor to the Anchorage Coastal Wildlife Refuge. The memorandum “concluded that the subject lands are not now a part of the Potter Point State Game Refuge, and that the Commissioner does not have the authority to review and approve development plans for these lands pursuant to AS 16.20.060.” Alaska Statute 16.20.060 is a statute giving the Department of Fish and Game authority to review construction

plans in a game refuge; however, pursuant to AS 16.20.050 this authority only applies “[w]here the use, lease, or disposal of real property in state game refuges created by AS

16.20.010 – 16.20.080 is under the control or jurisdiction of the state, whether through federal permit or state ownership.” The Department of Fish and Game lacked authority over the land at issue because that land was private, not public, land within the outer boundary of the refuge.

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

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

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

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

private land.” Thus, although the Department of Fish and Game would not have authority over the private lands, the private lands would be considered within the refuge for the purpose of the statutorily authorized activity – in that case zoning by the Department of Natural Resources.

In 1985, the Attorney General issued a formal opinion regarding the respective authorities of the Departments of Natural Resources and Fish and Game in game refuges, game sanctuaries, and fish and game critical habitat areas. This opinion and the chart attached to it formally confirmed the Department of Law’s position that state game refuges only consist of the state-owned land within the refuge boundaries (in contrast to critical habitat areas, which include both private and state land).

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

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

The 1988 legislation mimicked the opening line of the statute that had established the Potter Point State Game Refuge, stating, “The following described state-owned land and water is established as the Anchorage Coastal Wildlife Refuge” In establishing certain powers and prohibitions, the legislation also mimicked the prior description of privately owned land “within” the refuge (that description had previously applied to the power to zone within the refuge). Thus, AS 16.20.031(e) was enacted to read: “The state

or the Municipality of Anchorage may not acquire privately owned land within the Anchorage Coastal Wildlife Refuge described in (a) of this section by eminent domain for inclusion within the Anchorage Coastal Wildlife Refuge.” Alaska Statute 16.20.031(d) uses similar language in authorizing the Department of Fish and Game and the Municipality of Anchorage to enter an agreement “for the management of the land within the Anchorage Coastal Wildlife Refuge that is owned by the Municipality of Anchorage”

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

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

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

To the extent the limitations of the English language led the statutory drafters to use the word “within” in differing manners in the same statute, the private and municipal properties within the outer boundary of the refuge are only “within the refuge” for the specific purposes enumerated. Thus, the Department of Fish and Game and the

Municipality of Anchorage may enter into agreements governing the management of municipal lands “within the refuge” as specified in AS 16.20.031(d), and the Department of Fish and Game and Municipality of Anchorage may acquire privately owned land “within the refuge” by purchase, exchange, or otherwise, except by eminent domain, as specified in AS 16.20.031(e).

III. The Applicability of § 4(f) to Private Lands within the Outer Boundary of the Anchorage Coastal Wildlife Refuge

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

IV. The Authority of the Department of Transportation and Public Facilities to Condemn Land for a Coastal Trail

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

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

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

the department's divisions, its two deputy commissioners, and its commissioner, Esther Wunnicke.

Decision Memorandum #57 included a recommendation to adopt specific wording concerning state land acquisition powers to clarify that the limitation on eminent domain related only to the purpose of adding land to the refuge. Decision Memorandum #57 explained:

5. State land acquisitions.

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

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

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

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

- (e) The state or the Municipality of Anchorage may not acquire privately owned land within the Anchorage Coastal State

Wildlife Refuge described in (a) of this section by eminent domain for inclusion within the Anchorage Coastal State Wildlife Refuge. The Department of Fish and Game or the Municipality of Anchorage may acquire privately owned land within the Anchorage Coastal State Wildlife Refuge by purchase, exchange, or otherwise except by eminent domain.

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

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

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

A last potentially relevant legislative action occurred in 1999 with the passage of HB 131, which stated: "Except for the public right-of-way and utility corridor created in this subsection [to Fire Island] and identified in the management plan, for a realignment of the right-of-way for the new Seward Highway, or for a realignment of the right-of-way for the Alaska Railroad, a public right-of-way or other easement for surface transportation may not be created across the refuge without prior approval of the legislature by law." The legislative history makes it clear that the major aim of this bill was to require legislative approval of coastal trail construction. The bill was vetoed.

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

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

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

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

The state and municipality are prohibited from acquiring privately owned land within the refuge "by eminent domain for inclusion within the Anchorage Coastal Wildlife Refuge." AS 16.20.031(e). Thus, the Legislature intended, and stated, that the refuge may not be expanded through the use of the eminent domain power by the state, including all of its various agencies, or by the municipality. If this specific prohibition is

to be given its intended meaning and effect, we think the appropriate interpretation is that

if private land within the refuge boundaries is acquired by the state through use of the eminent domain power, even though that land becomes "state-owned" land, as that term is used in the refuge description, AS 16.20.031(a), the land does not thereby become refuge land. A contrary interpretation would circumvent the prohibition.

JEC/bap