September 23, 2002

The Honorable Pat Pourchot, Commissioner
Department of Natural Resources
550 W. 7th Ave., Ste. 1400
Anchorage, Alaska 99501-3554

The Honorable Frank Rue, Commissioner
Department of Fish and Game
PO Box 25526
Juneau, Alaska 99802-5526

Honorable Joseph L. Perkins, Commissioner
Department of Transportation and Public Facilities
3132 Channel Dr.
Juneau, Alaska 99801-7898

Re: Land Status in the Anchorage Coastal Wildlife Refuge
2002 Op. Att'y Gen. No. 1

Dear Commissioners Pourchot, Rue, and Perkins:

You have asked a number of questions regarding land title issues related to the Anchorage coastal trail extension project. Most of the questions center around conveyances of the former Point Campbell military reserve and of land at the mouth of

Campbell Creek that are within the exterior boundary of the Anchorage Coastal Wildlife Refuge (ACWR or refuge) to the Municipality of Anchorage[1]

SUMMARY OF QUESTIONS AND CONCLUSIONS

More specifically, you ask: (1) whether the 1982 conveyance to the municipality of land at Point Campbell between the "toe of the bluff" and the mean high tide line is void; (2) whether certain land at the mouth of Campbell Creek is state land or municipal land; (3) whether a third party could bring suit to invalidate either the Point Campbell or mouth of Campbell Creek conveyance; (4) whether privately owned and municipal lands within the outer boundaries of the Anchorage Coastal Wildlife Refuge are inholdings are excluded from the refuge; (5) whether reservation of the mineral estate in non-state-owned land allows the Department of Fish and Game (ADF&G) to assert regulatory authority over activities on the non-state-owned land; (6) whether a right-of-way across private land within the refuge boundaries acquired by the Department of Transportation and Public Facilities (DOT&PF) automatically becomes part of the refuge; and (7) whether any provision in state law extends permitting or refuge authority to land adjacent to the refuge.

In short, we conclude: (1) the Point Campbell land was never part of the Anchorage Coastal Wildlife Refuge and the conveyance to the municipality is valid; (2) the municipality holds equitable title to the land at the mouth of Campbell Creek and

[1] For simplicity, in this memorandum the terms Municipality of Anchorage, municipality, and Anchorage include the Greater Anchorage Area Borough.

it is not part of the Anchorage Coastal Wildlife Refuge; (3) a third party who meets the jurisdictional requirements could bring suit to invalidate the conveyances, but we do not think the suit would be successful; (4) private and municipal lands within the exterior boundaries of the ACWR are not inholdings and are not part of the refuge; (5) reservation of the mineral estate in private land does not give ADF&G broad regulatory authority over the land estate; (6) a right-of-way acquired by DOT&PF does not automatically become part of the refuge; and (7) we are unaware of any provision of state law that extends ADF&G's authority to regulate refuge land to adjacent land. A more detailed discussion of the facts and our conclusions follows.

FACTS

1. Creation of the Anchorage Coastal Wildlife Refuge

In 1971, the legislature created the predecessor to the ACWR, the Potter Point State Game Refuge. Sec. 1, ch. 81, SLA 1971, codified at former AS 16.20.030(b). It provided:

> The following described state-owned lands and adjacent state waters, excluding existing [and][2] applied-for highway, pipelines and railway rights-of-way as of the effective date of this Act, 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.

[2] The word "and" was added as recommended by the revisor of statutes in sec. 28, ch. 53, SLA 1973.

According to a 1981 management plan, approximately 32 percent of the land within the outer boundary was privately owned. In 1975, the legislature amended AS 16.20.030(b) to allow the municipality one year to adopt zoning for the privately owned land, and if the municipality failed to act, to authorize the Department of Natural Resources (DNR) to adopt zoning regulations for the private land. Sec. 1, ch. 192, SLA 1975. This provision appears to be in response to a concern that the state lacked authority to regulate private land within park or refuge boundaries and to preserve the land until the state could acquire it and add it to the refuge. *See* Attachment 1, unpublished memorandum from James E. Cantor, Assistant Attorney General, to Bruce M. Botelho, Attorney General, dated January 17, 2001 (Cantor memo).

In approximately 1983, an evaluation of the Potter Point State Game Refuge revealed concerns with the imprecision of the "toe of the bluff" description of the landward boundary and the desire to add additional land to the refuge. In 1988, legislation addressing these and other issues became law. Chapter 8, SLA 1988, repealed AS 16.20.030(b) and enacted AS 16.20.031, redrawing the boundaries and renaming the refuge the Anchorage Coastal Wildlife Refuge. The statute includes in the refuge the "described state-owned land and water," changes landward boundaries from the "toe of the bluff" to the "20 foot elevation contour,"and modifies the boundary to describe land from Point Campbell to Point Woronzof and land at the mouth of Campbell Creek, as well as other land. It eliminates DNR's authority to zone private land within the refuge boundaries, and prohibits the use of eminent domain to acquire land for addition to the

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

2. Point Campbell Military Reserve

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

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

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

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

3. Land at the Mouth of Campbell Creek

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

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

was not in the refuge and thus was available for selection. DNR issued a final decision approving the non-refuge portion of the selection and rejecting the rest on June 10, 1986.[4]

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

DISCUSSION

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

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

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

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

land, while within the outer boundary line of the refuge, are not part of the refuge and are not within the jurisdiction of the refuge. That memorandum is consistent with previous opinions issued by this department, including 1985 Op. Att'y Gen. No. 4 (Nov. 8, 1985) and 1980 Inf. Op. Att'y Gen. (Oct. 9, 1980; A66-022-81).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[9] Confusion often arises as to ownership of sand and gravel in Alaska because under the Alaska Native Claims Settlement Act, the regional corporations receive the "subsurface estate" underlying "surface estate" conveyed to the village corporations. 43 U.S.C. 1613. For purposes of ANCSA, the courts have construed "subsurface estate" to include sand and gravel, leading to disputes over use of these materials to develop the surface estate. *Koniag, Inc., v. Koncor Forest Resource,* 39 F.3d 991 (9th Cir. 1994). "Subsurface estate" and "mineral estate" are not the same. *See Norken Corp. v. McGahan*, 823 P.2d 622 (Alaska 1991).

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

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

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

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

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

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

CONCLUSION

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

Sincerely,

Bruce M. Botelho
Attorney General

Attachment

BMB/EJB