

Comments and Testimony
Dave Palmer, Manager, Juneau International Airport
Public Hearing April 24, 2008

The CBJ petitions ADF&G and DMLW to make a joint finding of a superior public need or use as provided in AS 16.20.034 (j).

The need and use is for the construction of a runway safety area and to fill wetland ponds to eliminate wildlife habitat that is a hazard to aircraft.

The City and Borough of Juneau (CBJ) requests the assistance of ADF&G and DMLW in filling these areas.

AS 16.20.034 (j) provides that upon a joint finding by DMLW and ADF&G that a superior need or use exists, that need or use "shall be permitted." This provision of statute stands alone from the implementing management plan, where criteria, including mitigation is required for the separate conveyance of refuge land to the CBJ for 'airport expansion.'

The superior need or use encompasses the work required to implement Alternative 5E in the July 2007 Record of Decision of the FAA. The work requires construction within the Mendenhall Wetlands State Game Refuge (MWSGR) on 2.06 acres on the east end and 11.58 acres on the west end of the runways. The scope of work is to build a runway safety area at each end of runway 8-26 to provide a 600' undershoot and 1000' overrun. Also included in the acreage is land to be filled to eliminate wildlife hazards.

The Record of Decision of July 2007 documents that a specific hazard to aircraft exists and that the Juneau International Airport's (JNU) required runway safety area does not meet FAA standards. Further, the Record of Decision documents that filling certain areas on the west end of the runway area is required to eliminate wildlife hazards.

An alternative to direct action by the Agencies, which have a duty to prohibit uses hazardous to aircraft in the Refuge is to make a finding of superior public use or need. Upon such a finding, the CBJ will construct preferred Alternative 5E.

The Legislature anticipated the potential conflicts between the use of the land as a wildlife refuge and the uses that may be necessary for aviation safety. It specifically prohibited uses or activities in the refuge that creates a "hazard to aircraft." Further, it provided a means to allow the conversion of uses *within the refuge* if such a use or need is found to be 'superior' to the State's use as a game refuge.

That is exactly the issue today. Upon completion of an environmental impact study, analysis of all possible alternatives, and with participation of numerous agencies, including ADF&G and

DMLW, Alternative 5E has been adopted as the only alternative to meet the FAA's aviation safety standards for the JNU runway. No off-refuge alternative is available.

With a finding of superior need or use, Alternative 5E, being the preferred alternative, becomes a permitted use within the refuge. No conveyance of land is required, and no reduction in acreage of refuge land occurs. Under the statute, the safety area and fill or grading required to eliminate wildlife hazards become permitted uses.

However, CBJ's first choice is to have the minimum land necessary to eliminate the hazard and to comply with the FAA standards conveyed.

Conveyance of Refuge Lands

A second option to a finding of superior use or need is to convey refuge land to the CBJ for 'airport expansion' pursuant to the Mendenhall Wetlands State Game Refuge Management Plan of March 1990. The plan, adopted by regulation to implement the statute that established the Refuge, provides for the conveyance of refuge lands for airport expansion if four tests are met.

There is no higher standard than insuring the safety of the people who use the Juneau International Airport. The *only* use proposed here on Refuge lands is to improve safety, either by extending the required safety areas, or by modifying habitat to reduce the wildlife hazard to aviation. The term 'airport expansion' in this case, is solely related to safety and to meeting the FAA minimum runway safety area standards. No expansion into the Refuge is proposed to increase capacity, economy, or facilities.

The EIS findings on Alternative 5E clearly show the four tests have been met, as discussed in detail below. We agree with the conclusion made by Tom Schumacher of ADF&G in his June 11, 2007, letter of agency concurrence, published in the FAA's July 2007 Record of Decision which states, in part:

“Based on our review [ADG&G] of the FEIS and Section 4(f) Evaluation, we believe the projects as described meet the conditions set forth in the MWSGR Management plan for JNU to acquire refuge land for airport expansion.”

A plan for mitigation is included in the Record of Decision and in CBJ's application to DMLW. The mitigation plan was developed through considerable effort and cooperation of many agencies, including DMLW and ADF&G. ADF&G is a "cooperating agency" and signatory to a Memorandum of Agreement among agencies that participated in the EIS development culminating in the preferred alternative and the mitigation agreement.

The agencies involved throughout the EIS process included National Oceanic and Atmospheric Administration, Federal Aviation Administration, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, Alaska Department of Fish and Game,

Alaska Department of Natural Resources (now Division of Mining Land and Water, DMLW), the City and Borough of Juneau and the Alaska Coastal Management Program. Throughout the EIS process, ADF&G and DMLW (then Department of Natural Resources, DNR) participated fully in evaluating the options and in the negotiations and final review of a mitigation plan for the Runway Safety Area (RSA) project.

CBJ is prepared to fully comply with the mitigation plan (2007 Mitigation Plan-Revised 12/12/07) that was developed with the participation of all relevant agencies. This plan provides more than \$5,300,000 in mitigation funds with more than \$1,000,000 dedicated specifically for the MWSGR.

CBJ cautions that any changes or additional conditions to the mitigation plan can upset the carefully balanced mitigation plan which resulted from years of effort. Representatives of numerous agencies can attest to the lengthy negotiations and extensive research that went into the final plan. Compromises were made on all sides to finally reach agreement. Changes proposed to the mitigation plan now by ADF&G or DMLW could reopen the entire program and jeopardize project funding. (See letter from John Lovett, FAA, to Jim Anderson, DMLW of April 18, 2008). This, coupled with the statutory management responsibility of DMLW and ADF&G to manage the refuge in a way as to prohibit hazardous uses or activities unsafe to aircraft, should serve to override late efforts to modify the mitigation plan as presented in CBJ's application.

AS16.020.034 (h) prohibits any use or activity in the Mendenhall Wetlands State Game Refuge that creates a hazard to aircraft. The Departments of Fish and Game and Mining and Land and Water, as administrators of the Refuge, have a duty to eliminate such prohibited uses.

Further, the agencies, by statute, are required to "assist" the airport in filling areas attractive to wildlife that create a hazard. CBJ argues that this assistance requirement, at a minimum, can take the form of working to assist CBJ by adding no new conditions to the mitigation plan, adding no new expenses or charges for the agencies to fulfill their obligations, by proceeding expeditiously to convey land, issue permits, and avoid delays to allow the project to move ahead on schedule.

Background

The FAA has adopted standards for safety areas off the ends of runways to require an area 600' on approach and 1000' on the departure end of runways. An Environmental Assessment, and later, an Environmental Impact Statement, was initiated by the FAA in cooperation with the U.S. Army Corps of Engineers, JNU and cooperating agencies.

The CBJ owns and operates the Juneau International Airport and has made application for the transfer of specific lands, permits, and aviation easements to satisfy requirements of the Federal Aviation Administration (FAA) which regulates aviation safety and issues the certificate of operation for JNU.

The EIS was took seven years, cost over \$3,500,000, and was extensive. The final document weighs in at over 12 pounds, and consultants spanned the globe. For example, the methodology to estimate bird strike hazards was reviewed by experts in the USA, England, Canada and Scotland.

The Record of Decision concluded with a preferred alternative (5E) to construct a runway safety area off each end of the existing runway, and to fill or grade certain areas to eliminate wildlife hazards to aircraft. This new safety area is a mandatory requirement of the FAA for JNU to maintain its airport certificate of operation.

In response to CBJ's application, ADF&G and DMLW has consolidated hearing and comment requirements.

These comments relate to five categories:

1. ADL 107380-Conveyance of refuge land to CBJ
2. ADL 107597-Avigation Easement
3. LAS 26603-Permit for construction
4. FG 07-1-0004-ADF&G Special Areas permit for construction.
5. Per 16.20.034 (j) public hearing to determine that a superior use or need exists.

Completion of the EIS now advances the Runway Safety Project from planning to implementation.

Among other things, the preferred alternative, adopted as Alternative 5E in the FAA's Record of Decision, identifies two areas of Refuge land that are required to comply with FAA Runway Safety Area standards. These sites were selected carefully after many attempts to locate the runway, landing thresholds, and safety areas to minimize the impacts on the Refuge lands.

The Refuge areas required for the safety area are adjacent to each end of Runway 8-26. On the west (Mendenhall River end), the parcel is 11.58 acres lying between the easterly shoreline of the Mendenhall River and the JNU property. The land is required for the construction of the runway safety area, with additional areas required to be filled or regraded to eliminate documented wildlife hazards. The second parcel is adjacent to the most easterly end of the runway and it is 2.06 acres extend not more than 180.64' into the Refuge. (See maps submitted with CBJ's application.)

Public Hearing Issues

Within the Record of Decision, and all work leading up to it, a mitigation plan was developed with the participation of many agencies, including ADF&G and DMLW. CBJ's preference is to honor the plan all parties developed without adding any of the new provisions contained in DMLW's Preliminary Decision ADL 107380.

CBJ prefers conveyance of the state land to the CBJ, but objects to proposed changes to mitigation costs and conditions not contained in the EIS Alternative 5E mitigation plan.

Prohibited: Any Use or Activity Creating a Hazard to Aircraft

The Mendenhall Wetlands State Game Refuge was created by the Alaska Legislature in 1976. Alaska Statute 16.20.034 pertains specifically to the Refuge.

An implementing plan was prepared by the Alaska Department of Fish and Game in 1990. Both the statute and the management plan anticipated the need to maintain aviation safety and to accommodate both air and ground transportation needs in and around the Refuge. There are provisions specific to the Juneau International Airport in both the statute and the Management Plan. These provisions provide for a prohibition of uses in the Refuge that create aviation hazards. A hazard does exist, as found by the FAA, and CBJ seeks to convert the current refuge use for these 13 acres to use as a runway safety area to remove that hazard. The State has a duty to manage the Refuge in a manner that prohibits aviation hazards. With the Record of Decision by the FAA, and adoption of a preferred alternative, the State is on notice that without a change of use on a small portion of Refuge lands, a hazard will continue.

ADF&G and DMLW, as managing agencies of the Refuge, upon recognizing that there is no alternative to eliminate the hazard but to convert the refuge use to runway safety area, must move to facilitate the change of use. This circumstance was anticipated by the enabling legislation by placing aircraft safety above all other uses.

Uses Allowed: Superior Use to State's Use as Refuge

Even if DMLW or ADF&G failed to initiate a change of use on their own initiative, (j) above provides another method whereby any superior use (not just aircraft safety) is allowed over and above the use as a refuge.

In the present case, again, because of the FAA's runway safety area requirements and because the only alternative available to bring the Airport into compliance (as identified in the Record of Decision) and because aviation safety is a superior need to Refuge uses, the construction of the runway safety area is an allowed use upon a finding by ADF&G.

Justification is straightforward. The JNU runway does not meet FAA's safety standard. The FAA has mandated that a runway safety area be constructed. Both DMLW and ADF&G have participated in the EIS process for several years, culminating in a Record of Decision. The Record of Decision identifies the one preferred alternative (5 E) that minimized the impacts on the Refuge while meeting the requirement of federal laws and FAA standards.

Aviation safety is a superior use. There is no other use, including use as a refuge, that can be allowed on the lands within the Refuge identified as needed for the Runway Safety Area (see ADF&G letter dated June 11, 2007, published with the Record of Decision).

Upon a finding that a superior use exists, that use is permitted. The four tests, including mitigation, do not apply. Rather, mitigation is required pursuant to other laws related to wetlands management generally, not specific to the MWSGR.

Uses in the Refuge

The Mendenhall Wetlands State Game Refuge is a “use” of land. The notice for this April 24, 2008, hearing is called pursuant to AS16.20.034(j):

(j) Notwithstanding the provisions of (d) - (I) of this section, if the City and Borough of Juneau demonstrates to the Departments of Natural Resources and Fish and Game, jointly, that there is a superior public need for or use of the land to its use as a state game refuge, after public hearing and a finding by the departments supporting the determination that such a need or use exists or is required, the use shall be permitted. A final administrative order, ruling, or determination by the departments adverse to the petition of the City and Borough of Juneau is subject to judicial review under AS.

This language establishes that the Refuge is a *use*. It recognizes that there may be another, superior use proposed at some time in the future, and upon a finding that such a superior use exists, then it is allowed.

Also relevant is 16.20.034(h):

(h) An activity or use may not occur under this section in a manner that creates a hazard to aircraft. Gravel extraction is not considered an incompatible activity on or abutting state-owned land described in (a) of this section and is subject to provisions of the management plan. Except for those ponds, lakes, or other bodies of water adjacent to the airport that are required to be maintained by the City and Borough of Juneau as a seaplane basin under certification for the Juneau Municipal Airport granted by the Federal Aviation Agency, if requested by the City and Borough of Juneau, the Departments of Fish and Game and Natural Resources shall assist in filling the ponds, lakes, or other bodies of water adjacent to the existing airport runway to eliminate them as sites attractive to waterfowl.

This language prohibits any use or activity that creates a hazard to aircraft. It requires that DNR (now DMLW) and ADF&G assist the CBJ in eliminating certain wildlife hazards.

The Legislature anticipated that aviation safety and refuge uses may conflict. It prohibited outright any use or activity that would constitute a hazard to aircraft.

Within the Record of Decision is published a letter of June 11, 2007, from ADF&G's Tom Schumacher. The letter makes the case for a superior need or use. Anticipating a conveyance of Refuge lands to the Airport, the letter concludes that there is a significant public need that cannot be met off-refuge; that FAA has mandated the runway safety area project to meet public safety; that Alternative 5E is the alternative that minimized the amount of refuge land needed for the project; and that the projects of Alternative 5E meet the conditions set forth in the MWSGR Management Plan for JNU to acquire the Refuge land. The letter further describes the mitigation plan as a "fees-in-lieu plan" to mitigate impacts.

Regardless of whether there is a finding of 'superior use' or if action is taken to change/eliminate a hazard to aircraft, each of these changes of use actions are allowed uses within the Refuge. The statute does not require the conveyance of land from the State of Alaska to the CBJ.

There is no loss of Refuge acreage and the conversion from Refuge to Runway Safety Area is an allowed use. There is no requirement for payment or mitigation for the change of use to eliminate a hazard or to meet a superior need. The requirements for mitigation are not contained in the statute, rather, in the Plan, for land that is conveyed, and in other legislation that is not specific to the MWSGR.

The preliminary decision ADL 107380 changes the adopted mitigation plan and adds new and unacceptable costs and conditions. Fees in lieu of mitigation only work if payment of fees satisfies completely the mitigation obligation. Although that was the original agreement, new conditions and uncertain standards leave the mitigation requirements unresolved and uncertain.

Problems With DLMW Mitigation Conditions:

The Record of Decision describes the in-lieu compensatory mitigation plan in section 12.2. Simply put, compensatory mitigation, or payment in lieu of mitigation means that once payment is made, the applicant has satisfied the mitigation obligations.

The Preliminary Decision for the proposed conveyance of tidelands ADL 107380 contains new conditions and costs above the agreed mitigation plan. These conditions make advancement of the project improbable by creating open-ended conditions on the conveyance, by delaying conveyance of lands, and by changing the nature of a payment in lieu of a mitigation plan. The proposed conditions seek to accept payment, but new conditions and costs fail to relieve the CBJ of the mitigation obligation, even after full payment.

This approach creates some additional hurdles in that to obtain FAA funding, CBJ must have control of the land in a manner acceptable to the FAA. This includes ownership, a 20-year lease, or other means determined to be in compliance with FAA Advisory Circular 150/5100-17, US

Code provisions and grant assurances. (See April 18, 2008, letter to Jim Anderson, DNR, from John Lovett FAA, attached.)

Mendenhall Wetlands State Game Refuge Management Plan

Adopted in 1990, the management plan implements the statutory enabling language. It provides for airport expansion, a provision ADF&G and DMLW have applied to the preliminary decision to convey Refuge lands to CBJ (ADL 107380).

If considered 'airport expansion' under the management plan as opposed to above-mentioned statutory provisions, conveyance of Refuge lands to CBJ could occur if four conditions are met: public need, minimized use of Refuge lands, mitigation of impacts, and no creation of hazardous attractants to waterfowl. With the finalization of the EIS and adoption of the Record of Decision, there is no serious question that these criteria are met.

Development of the EIS and resulting Record of Decision anticipated the conveyance of land and payment of mitigation funds. ADF&G submitted comments to the final EIS on June 11, 2007, which is published in the Record of Decision. This letter addresses issues related to the Refuge, including the following:

Expanding RSA's to enhance public safety has been mandated by the FAA and is a condition of JNU retaining its certification to operate in its current capacity. FAA and JNU have agreed that standard RSA construction rather than engineered material arresting system (EMAS) construction is more appropriate for JNU. The need to expand the RSA's cannot be met off-refuge.

The letter concludes: "Based on our review of the FEIS and Section 4(f) Evaluation, we believe the projects as described meet the conditions set forth in the MWSGR Management Plan for JNU to acquire refuge land for airport expansion."

The June 11, 2007, letter and review anticipated mitigation described in the mitigation plan. The letter reviewed the value of functional capacity units (FCUs) and the agreed value of wetlands at twice the appraised \$30,000 per acre. If conveyance of lands, instead of a conversion of use occurs, then CBJ agrees that mitigation is required, but rejects all new costs and conditions in the proposed decision that do not now exist in the Record of Decision or the mitigation plan. All agencies, including ADF&G and DMLW participated fully in the negotiations, analysis, and discussions that led to the approval by all parties culminating in a mitigation plan that was accepted by the U.S. Army Corps of Engineers. This fee-based compensatory mitigation plan allows JNU to completely satisfy its mitigation obligations by making a payment of money to SEAL Trust and to ADF&G of more than one million dollars. Once that payment is made, CBJ's obligations would be extinguished.

A mitigation plan has been developed by all parties and it is satisfactory in all ways. While the concerns of ADF&G and DMLW concerning the replacement of refuge lands are understandable, significant effort has been undertaken to allow a third party, SEAL Trust, to satisfy the replacement obligations.

It should be noted, too, that both ADF&G and DMLW will participate fully in recommendations to SEAL Trust for specific land acquisitions as part of their positions on the advisory committee established. Substantial amounts of mitigation funds have been dedicated to Refuge mitigation. SEAL Trust is capable and prepared to initiate land acquisitions now. ADF&G and DMLW have existing roles in advising the SEAL Trust's Board of Directors regarding mitigation implementation. ADF&G and DMLW have statutory management requirements to assist the CBJ and to manage the Refuge in a manner that promotes aviation safety. These reasons should weigh heavily in a finding that the mitigation plan contained in the Record of Decision and submitted in this application meets the mitigation requirements of the management plan.

Finally, time is of the essence. An approval of a change of use, perpetual easement, or conveyance is required before the RSA project can move ahead. Conditions on the change of use, easement, or transfer that are unresolved at project bidding will stop the project. Funding for mitigation is available when permits, easements, and permissions for the project to proceed are in hand.

List of documents incorporated into the record:

Juneau International Airport Final EIS and Section 4(f) Evaluation Record of Decision July 2007
Juneau International Airport Final EIS and Section 4(f) Evaluation Part I and Part II April 2007
Letter from Jim Lovett, Lead Civil Engineer, FAA to Jim Anderson, Natural Resource Specialist
DMLW April 18, 2007
Memorandum of Agreement-cooperating Agency Agreement between FAA NMFS, FWS and
ADF&G Nov 2001

By reference :

Complete applications submitted by CBJ to DMLW including Attachment B Juneau International
Airport Large Project (mitigation plan)
Mendenhall Wetlands State Game Refuge Management Plan March 1990



Testimony by Diane Mayer, Executive Director

*actual testimony has a few
slight changes.*

Good Evening

My name is Diane Mayer. I am the Executive Director of the Southeast Alaska Land Trust, a private, non-profit organization committed to work with communities and willing, private landowners to insure that vital, natural areas remain in-place for the well-being of each generation. This is accomplished primarily by entering into legally binding conservation agreements (called conservation easements) that apply to the property even as ownership changes. The Trust currently holds conservation easements on over 2800 acres of land through out this region. In many cases land ownership is transfered to public land management agencies as part of our conservation projects.

We receive funding from membership dues, benefactor's donations, grants from public agencies and private foundations, and we received fees that are paid in-lieu of mitigation for wetland impacts caused by projects permitted under Section 404 of the Clean Water Act as managed by the Corps of Engineers (COE.) The Trust has a standing agreement with the COE that authorizes us to receive and expend these "fees-in-lieu," as they are called, to accomplish wetland conservation projects throughout Southeast Alaska.

The Mendenhall Wetlands State Game Refuge is one of Juneau's crown jewels—bursting with bird and marine life. As open space, it's a canvas that paints the seasons for all to witness on their daily commute, and truly a refuge for the many who explore its interior— hunters and naturalists, the joggers, strollers with kids, friends in conversation.... All of us in Juneau are enriched by the up-close, accessible vitality and naturalness of Refuge.

Since we were formed in 1996, the Southeast Alaska Land Trust has concerned itself with the issue of fixing the meander boundary of the Refuge to protect it from loosing additional acreage through accretion claims. Nearly 60 acres have been transferred from the original surveyed Refuge to upland owners in quiet title accretion actions; another 20 acres are pending decisions. We hope to acquire some of this land, or an interest in it, to protect the conservation values of the Refuge. To date the Trust has worked closely with the Departments of Fish and Game and Natural Resources to understand the administrative and legal processes that control these land transfers and that could be used to replace the surveyed meander line with a "fixed and limiting" boundary for the Refuge.

We've met with Refuge and property management personnel—individually and in teams working to address this issue. We've made presentations to Refuge neighbors at events hosted by concerned upland owners. We sought and received several small grants to

pursue approaches for fixing the Refuge boundary. And we have partnered with Fish and Game to develop grant proposals to this end.

Given our “fee-in-lieu” agreement with the COE, our history of work on the accreted lands issue and our relationship with willing landowners, the Trust is a logical partner in the City’s mitigation plan to be responsible for acquiring wetlands to mitigate the projects impacts. Our top priority for the funds is securing the Refuge boundary and transferring these acquired lands to the Refuge. The funds we will receive are substantial and I anticipate will allow us to acquire considerably more than the 13.64 impacted Refuge acres from adjacent landowners in normal market conditions.

Striking a balance between keeping the Refuge lands and resources in-tact and the establishment and expansion of the Juneau International Airport is not simple. Direction for addressing the exact circumstances we face is set forth within the Refuge’s founding statute (AS 16.20.020.) Our task now is to interpret that legislative direction for airport expansion (subsection (i)) and hazards to aircraft (subsections (h)) of that statute for the first time in this large project. These subsections make management and expansion of the Juneau airport a statutorily recognized use of Refuge land.

Within subsection (i), the City is implicitly granted, subject to reasonable conditions that can be predictably accomplished, the right to acquire land needed for the airport expansion. A Refuge plan is to detail the terms. Among these, the 1990 Refuge plan states (3) “that all impacts to the refuge and to refuge resources are fully mitigated through restoration and/or replacement.”

The Finding incorrectly limits the location of this mitigation to the Refuge itself. Section (b) of the statute seems to limit Refuge boundary expansion to “abutting” lands. This effectively sets forth a ‘no-net loss’ to the Refuge acreage from airport expansion. This interpretation means if owners of abutting land are unwilling to sell, or if no undeveloped land abuts the Refuge in the future, the airport in fact cannot acquire lands for expansion. This plan interpretation is contrary to subsection (i) of the statute which provides for airport needs. The Statute does not provide a basis for requiring on-site or (abutting-site) mitigation, nor does the plan define mitigation as such.

Considerable precedent has been set for defining mitigation priorities within the COE and other mitigation programs. Interpreting mitigation more consistent with these existing precedent by, for example, first by acquiring land abutting the Refuge, then moving to a provision for mitigation elsewhere—such as adjacent to other special management areas, then adjacent to other State lands—creates a path that is clear and predictable, and would be a reasonable restriction to satisfy the rights granted the City for airport use in the refuge. I believe that the mitigation requirement of the plan is being misinterpreted, and of greater concern, is the unintended consequences it causes.

Specifically, the finding, as written, will negatively impact on landowner willingness to negotiate at appraised values. It outlines every possible measure to acquire replacement Refuge acres—allowing for more time, for more money, change agents from the Trust to

the State if the Trust has not performed satisfactorily, and if all that fails to make landowners willing to sell, penalizes the city with further financial burdens. Though I'm sure it's unintended, the consequence of so strictly limiting the mitigation area is to create a very small, isolated refuge mitigation market where abutting owners would feel empowered to 'name their price' while the Trust is required to work at Juneau-wide appraised values. Several landowners who are aware that we are seeking lands for the Refuge have seriously approached me with offers to sell at 2 to 10 times the known market value. Landowner willingness is always the most uncertain factor in conservation projects, and the terms of the State's finding will magnify this uncertainty significantly. Asserting that mitigation can only occur "on-site" is the root of this problem.

The Finding is also misguided by requiring that "fees-in-lieu" given to the Trust for wetland conservation in accord with our COE mitigation agreement, are potentially to be passed the State's general fund. Any transfer of these funds to the State as a "payment" for State lands transferred to the City would be a misuse of the intended purpose. Also, to my knowledge the State does not hold a similar agreement with the COE, nor can they keep these funds isolated from general State funds for conservation purposes. In any event, transfer of "fees-in-lieu" to the State will require considerable renegotiation of the current mitigation plan and establishment of a unique COE/State mitigation agreement. If funds are potentially to be transferred to the State as payment for land or land use, these so designated funds must be allocated separately from the established "fee-in-lieu."

I am also concerned that the Finding requires DNR/DFG approval of each parcel proposed as replacement lands. While it is certain that State approval is implicitly required for them to engage in receiving lands, I expect that their approval criteria would be limited to technical concerns related to potential hazardous wastes, flawed titles, etc. I would not expect the State to be able to simply reject a property because of someone's personal bias. If the State has a right to reject an abutting property, we must know the basis for those rejections up front to avoid wasting our time and mitigation funds.

The Trust is committed to acquiring every parcel of available adjacent property for inclusion in the Refuge given the fees we will receive and the willingness of the surrounding land owners. We intend to take this approach under any workable terms of a Final Finding. As written, however, and the interpretations upon which it is based, we believe the Finding increase the obstacles in the already difficult processes and psychologies that govern accretion rights, private property ownership and valuation, and real estate transaction.

To the extent that the State cannot see clear of this "no loss of Refuge" interpretation, the Finding should allow flexibility to minimize the negative effects of that interpretation. This can be done by reducing the number of acres needed by the City for the project.

The City's land conveyance request is based on two needs—runway expansion (approximately 4 acres) and elimination of sites attractive to waterfowl at the west end of the runway (approximately 9 acres.) Regarding the later, subsection (h) specifically requires elimination of waterfowl hazards to aircraft as a refuge use. Hazardous ponds at

3

Preliminary Decision
Proposed Tideland Conveyance to CBJ
ADL 107380

the west end of the runway can be filled without conveying any land. FAA funds for the project, however, can only be spent if the airport can gain control of the project area by lease or title. The City requested title. Further, the refuge does not want to retain management over this rock-filled zone. While both parties prefer the land transfer, the projects goals can be met under subsection (h) by issuing a lease for the minimum FAA required time period after which that area becomes unencumbered Refuge land.

The State's finding could provide for a minimum land conveyance of the 4-acre runway section and a maximum conveyance of the entire 13.64 Refuge impacted acres. The actually conveyance would depend on the total acres of mitigation lands that have be acquired by a set time. Any cost incurred to acquire a lease, in the unlikely event that this option is necessary, should only cover the minimum lease period required by FAA, and must not come from "fees-in-lieu" of mitigation under Section 404 permitting. If not needed for leasing, the funds could be released for additional Refuge mitigation.

I believe the State's interest can be better served by reworking mitigation terms outlined in the Preliminary finding. The mitigation plan as proposed by the City required several years of interagency debate to strike the balance it represents. All parties engaged with this project have worked in the public's best interest. I believe the Refuge statute and plan are complementary to the mitigation work done to date. Small changes to the existing mitigation plan could easily serve the State's best interest in this project. I am available to work with the State and the City at your convenience to finalize this comprehensive the mitigation plan.

Anderson, James W (DNR)

From: Tom Carson [tcarson@carsondorn.com]
Sent: Monday, May 05, 2008 5:08 PM
To: Anderson, James W (DNR); Schumacher, Thomas V (DFG)
Cc: setrust@ptialaska.net; dave_palmer@ci.juneau.ak.us
Subject: Comments relating to Proposed Actions

Jim and Tom,

The purpose of this message is to provide my comments relating to the transfer of refuge land to the airport. Please consider the following:

- 1) The statute, the management plan, and the mitigation plan are written documents that provide for the transfer of land from the refuge to the airport and for the mitigation for loss of those lands. To date, however, such a transfer has never before occurred. Consequently, we are all involved in a first-time event for which there is no operational precedent.
- 2) Because there is no precedent, the current event offers a rare opportunity to set precedent.
- 3) Any written document (such as the statute, the management plan, or the mitigation plan) must be interpreted in order to be applied. Words are imperfect and it is incumbent upon all of us to accept that fact. Hence, we have a responsibility to interpret the written words in a way that provides the most benefit to the situation at hand (while at the same time realizing our interpretation today will carry an impact into the future). The situation at hand calls for us to maximize mitigation for wetlands lost to the airport projects. If our interpretation of the documents does not maximize mitigation, then our interpretation will have fallen short.
- 4) The mitigation plan is the functional document for mitigating wetlands loss caused by airport projects. The document is the result of many months of negotiation by many parties including (among others) the airport, Seal Trust, DNR Lands, and ADF&G. It has been crafted to address all concerns that were raised throughout the negotiation process. It is tempting to say the mitigation plan is a finished document, but in reality, it is a living document. If some small adjustment is needed to address newly acknowledged concerns, so be it.
- 5) ADF&G should resist the temptation to conclude "that all impacts to the refuge and to refuge resources are fully mitigated through restoration and/or replacement" is limited to action within or adjacent to the existing refuge boundaries. There is no need to make such an interpretation. The mitigation plan addresses the issue in broader terms, creating a dedicated fund for refuge impacts and identifying geographic priorities. The plan gives SEAL Trust maximum operating latitude. ADF&G is encouraged to do the same.
- 6) Wetlands are going away, and not just within the boundaries of the refuge. The \$5.3 million in mitigation funds resulting from the airport projects will provide SEAL Trust the ability to move on purchases to preserve wetlands adjacent to the refuge but in many other local areas as well. Our job should be to facilitate that work, not to place constraints on it. SEAL Trust's operating agreement with the Army Corps of Engineers is enough. DNR Lands, the airport, and ADF&G are all on the SEAL Trust advisory committee. That is enough. I suggest that each time we are called upon to interpret words in the statute, the management plan, and mitigation plan, we choose the interpretation that allows the most latitude for preserving wetlands. By setting such a precedent, we will all have helped maximize mitigation now and in the future.

Regards,

Tom Carson

May 5, 2008

Jim Anderson
Natural Resource Specialist
State of Alaska, Dept of Natural Resources
Division of Mining, Land & Water
400 Willoughby Ave
Juneau, Alaska 99801

Re: Response to Letter of April 2, 2008 to Honsinger Family Trust

Dear Mr Anderson:

We are in favor of the proposed changes at the Juneau Airport in order for Juneau to have an airport that will comply with FAA regulations.

We have approximately 83 acres of land that adjoins the airport property. This land is for sale. If the state is interested in our property please contact me, Penny Miller at 907-789-6811 or FAX 907-790-7225.

Thank you.

Sincerely,



Penny Miller
PO Box 20490
Juneau, Alaska 99802

STATE OF ALASKA

SARAH PALIN, GOVERNOR

DEPARTMENT OF FISH AND GAME

Division of Sport Fish

802 3rd Street
PO Box 110024
Douglas, AK 99811-0024
PHONE: (907) 465-4346
FAX: (907) 465-4272

MEMORANDUM

TO: Jim Anderson
Division of Mining, Land, and Water
Department of Natural Resources

FROM: Tom Schumacher
Habitat Biologist, Region V.
Division of Sport Fish

DATE: May 5, 2008

SUBJECT: Juneau Airport Improvements Projects, Land Conveyance Comments
State I.D. No. AK 0705-03J

The Alaska Department of Fish and Game (ADF&G) has reviewed the preliminary decision issued by Alaska Department of Natural Resources, Division of Mining Land, and Water (DML&W) for the Juneau International Airport's (JNU) request that about 13.65 acres of state-owned land within the Mendenhall Wetlands State Game Refuge (MWSGR) be conveyed to JNU ownership. JNU seeks MWSGR land for Federal Aviation Administration (FAA) mandated improvements in airport safety. The ADF&G and DML&W co-manage the MWSGR. ADF&G manages activities affecting habitat and DML manages the surface and subsurface estate. Conveyance of refuge land requires a public review and consent of Commissioners of ADF&G and ADNR.

JNU seeks ownership of MWSGR land to address two specific safety concerns identified by FAA. Those concerns are inadequate runway safety areas (RSA) and a wildlife hazard related to tidal wetlands between the west end of the runway and the Mendenhall River which attracts waterfowl and other large birds. Addressing these concerns is a condition of JNU maintaining its FAA certification. The MWSGR surrounds JNU on three sides. Expanding the RSAs will require use of about 4 acres of MWSGR land. Eliminating the wildlife safety hazard will involve modifying and ongoing maintenance of about 9.5 acres of tidal wetland habitat into a free draining surface that is no longer attractive to wildlife.

The statute that created the MWSGR (AS 16.20.034) specifically allows JNU to acquire refuge land for airport expansion, and the refuge management plan developed by ADF&G and adopted as regulation sets conditions that JNU must meet to acquire refuge land. Those conditions include avoiding or minimizing use of refuge land to the maximum extent feasible and ensuring that effects of airport expansion on the refuge and refuge resources are fully mitigated through restoration and/or replacement.

From 2005 through 2007 ADF&G participated in a multi-agency effort to minimize effects of the projects on refuge land and resources and to develop a mitigation plan that will compensate for unavoidable impacts. ADF&G is satisfied that project effects on MWSGR land have been minimized and supports the proposed land conveyance provided ADF&G can be adequately compensated for the loss of refuge land. Although the need to compensate the State of Alaska was recognized in the mitigation plan, funding for that plan will be provided by the Federal Aviation Administration (95%) and JNU (5%) as a condition of the US Army Corps of Engineers (COE) permit for filling about 70 acres of refuge and JNU-owned wetlands. JNU plans to contract the Southeast Alaska Land Trust (SEAL Trust) to implement aspects of the mitigation plan addressing wetlands mitigation including replacement of refuge land.

To compensate for refuge land used in airport expansion, the initial goal of the mitigation plan is to re-acquire (accreted) lands within the original refuge boundary that due to isostatic rebound and accumulation of sediments have risen above mean high tide and now belong to or may be claimed by adjacent upland owners. SEAL Trust may only acquire land from willing sellers at fair market value, and the statute creating the refuge only envisions lands within or abutting the boundary as eligible for inclusion in the MWSGR. To date SEAL Trust does not have binding purchase and sale agreements with owners of sufficient accreted land to replace refuge resources. As a result, there is uncertainty about whether ADF&G will be fully compensated.

To address this uncertainty, the Preliminary Decision listed several contingencies to ensure ADF&G and the State of Alaska are adequately compensated. These included a requirement for JNU to post an annual performance bond of \$40,920 as an incentive to complete mitigation in a timely manner and to ensure sufficient funding is available to buy land, and a provision where if JNU fails to provide sufficient replacement land after 10 years, JNU would be granted a fair market value lease for use of state land not yet replaced.

The allocation in the current mitigation plan of \$1,043,275 with which to acquire replacement wetlands with the Functional Capacity Unit (FCU) equivalent of refuge land used in airport expansion appears sufficient. In fact, as a hedge against inflation and higher than anticipated costs, the allocation is for double the funding estimated necessary to compensate for lost refuge resources. For this reason, ADF&G believes the requirement for JNU to post an annual performance bond is unnecessary.

Nonetheless, uncertainty remains about SEAL Trust's ability to acquire all necessary replacement land. Uncertainty also remain over types of compensation ADF&G can or will accept if sufficient accreted land cannot be acquired within a reasonable period. These questions and issues include:

1. Under the current proposal, the State of Alaska would convey state-owned land with no third party restrictions on how they may be used to JNU, and the state would like similarly unencumbered lands as compensation. SEAL Trust feels they are obligated to ensure long-term preservation of lands they acquire for conservation purposes using COE fees-in-lieu money by placing conservation easements on those lands. The State of Alaska and SEAL Trust need to reconcile the terms and conditions placed on lands SEAL Trust acquires as compensation for conveyed refuge land before a final decision on the land conveyance can be reached.
2. JNU would like to obtain ownership of the lands proposed for conveyance as soon as possible. ADF&G and DMLW will not approve conveyance of all of those lands until the agencies have been fully compensated. What is a reasonable period for SEAL Trust to complete acquisition of replacement land, after which ADF&G would be provided with another form of acceptable compensation and JNU could be granted ownership?
3. If SEAL Trust fails to acquire acceptable replacement land within a reasonable period, can SEAL Trust provide money, and can ADF&G accept money that SEAL Trust acquired via the COE fees-in-lieu program as compensation? Would the money still be considered fees-in-lieu money? If so, would the COE restrict ways in which ADF&G can spend it? Would the State of Alaska's interests be better protected by accepting a monetary settlement from JNU outside of the COE fees-in-lieu program?

ADF&G is currently working with the appropriate parties to determine answers to these questions. We believe terms of the Best Interest Finding should be informed by those answers, and we request that finding not be issued until these questions are resolved to the satisfaction of all parties.

Airport Dike Trail Easement

The Airport Dike Trail, which is on JNU property, is among the most heavily used recreational trails in Juneau. To accommodate expansion of the RSAs and relocation of the mouth of Duck Creek, a new parking area will be built for Dike Trail users and the trail between that parking lot and the western end of the float pond will be relocated westward. The relocated portion of the trail will cross land currently owned by JNU and refuge land for which JNU is seeking ownership (Parcel 2). Although the Dike Trail does not currently cross MWSSGR land, the trail is an important refuge access route. The next closest refuge access point on the Juneau mainland east of the Mendenhall River is at Sunny Point, over 2 miles away. The Preliminary Decision requests JNU to provide a public access easement across only Parcel 2 of the state land requested for conveyance. Because that portion of the trail would be isolated within JNU property, we request that

JNU ensure public access along the Mendenhall River and to MWSGR land by providing the state with an access easement along the entire length of this important trail.

ADF&G appreciates this opportunity to comment on the preliminary decision for the best interest finding. If you have questions about these comments, please contact me at 465-4346 or tom.schumacher@alaska.gov.

cc'd by e-mail:

Charlie Swanton, ADF&G/Sport Fish, Director
Tom Brookover, ADF&G/Sport Fish, Anchorage
Mark Fink, ADF&G/Sport Fish, Anchorage
Ellen Simpson, ADF&G/Sport Fish, Anchorage
Lance Nelson, Dept. of Law
Neil Barten, ADF&G/Wildlife Cons., Douglas
Ryan Scott, ADF&G/Wildlife Cons., Douglas
Teri Camry, CBJ/Planning
Patti Sullivan, FAA, Anchorage
Randy Vigil, USACOE, Juneau
Dave Palmer, Juneau Airport Manager
Tom Carson, Carson-Dorn Inc.
Diane Mayer, SEAL Trust