

Appendix B

NVE and ADOT&PF Maintenance Agreement

MEMORANDUM OF AGREEMENT
Between
THE NATIVE VILLAGE OF EYAK
And
THE STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

This Agreement is entered into and made effective the first day of April, 2011, by and between the Native Village of Eyak ("Tribe") and the State of Alaska, Department of Transportation and Public Facilities ("DOTPF"). This Agreement authorizes DOTPF to perform maintenance activities on behalf of the Tribe.

WHEREAS, the Tribe is a federally recognized tribe eligible to participate in the Indian Reservation Roads program, and associated activities; and,

WHEREAS, in April 2010, the Tribe entered an Addendum to its Indian Reservation Roads (IRR) Program Agreement with the Federal Highway Administration-Western Federal Lands Highway Division to design, construct, and maintain Shepard Point Road; and,

WHEREAS, the Tribe's Shepard Point Road will be open and available for public use to the same extent as are State roads; and,

WHEREAS, 23 U.S.C 204(f) authorizes the Tribe to enter into maintenance agreements with State governments without the approval of the Secretary of the Interior; and

WHEREAS, 23 U.S.C 204(f) authorizes the Tribe to expend not more than 25% of its IRR Program funds for maintenance purposes (excluding road sealing projects which shall not be subject to any limitation); and

WHEREAS, the Tribe represents that its employees are deemed to be employees of the Federal government when performing work under this Memorandum of Agreement and are entitled to the Federal Tort Claim Act protections afforded under Pub. L. 101-512, Title III, sec. 314, 104 Stat. 1959, as amended Pub. L. 103-138, Title III, sec. 308 (25 U.S.C. § 450f, note); and

WHEREAS, the Tribe requested that DOTPF perform routine and emergency maintenance activities on Shepard Point Road; and,

WHEREAS, DOTPF agrees to perform routine and emergency maintenance activities on Shepard Point Road pursuant to the terms of this Agreement; and,

WHEREAS, the Tribe shall own the road right-of-way as a public authority and remain responsible for all future construction activities on Shepard Point Road such as major repairs (a project or activity estimated to cost more than \$10,000 in a single year) or

replacement of bridges, culverts or embankment, major resurfacing, paving, or improving the road to a higher classification, standard, or capacity to accommodate future traffic increases. DOTPF will notify the Tribe of any identified future construction needs.

1. DOTPF agrees to:

A. Perform routine maintenance work, such as: roadway grading during the summer; snow plowing during the winter; repair of damaged signs, guard rails, and culvert ends; brush cutting; and ditch cleaning. The DOTPF Cordova Maintenance Station will perform all routine maintenance work on Shepard Point Road in conformance with State road maintenance standards. DOTPF Cordova Maintenance Station will, in its sole discretion, schedule maintenance activities in the context of its other maintenance obligations, prioritizing activities on Shepard Point Road in a manner similar to its prioritization of activities on State roads of similar capacity and classification. DOTPF will determine, in its sole discretion, the means, methods, regularity, and extent of routine maintenance on Shepard Point Road. After notice to the Tribe (unless public health and safety concerns require immediate action), DOTPF may temporarily restrict traffic or close Shepard Point Road, in its sole discretion, to perform routine maintenance work.

B. Perform emergency maintenance services (i.e, work that must be accomplished immediately because the road is impassable or unusable due to catastrophic failure or natural disaster) subject to the availability of funds. DOTPF will notify the Tribe prior to performing emergency maintenance services if practicable under the circumstances. DOTPF and the Tribe may discuss alternative methods to respond to an emergency, including temporary road closures. DOTPF will determine, in its sole discretion, the means, methods, and extent of emergency maintenance on Shepard Point Road. After notice to the Tribe (unless public health and safety concerns require immediate action) DOTPF may restrict traffic or close Shepard Point Road, in its sole discretion, due to road or weather conditions or to perform emergency maintenance work.

C. Provide maintenance reports and billing for services. DOTPF shall deliver annual statements itemizing the activities performed and the costs incurred maintaining Shepard Point Road and balances remaining from the Tribe's pre-payment funds. In the event that DOTPF determines that actual costs to perform routine maintenance work will exceed the Tribe's annual pre-payment of funds, DOTPF shall promptly confer with the Tribe in an attempt to identify additional funding resources to cover the increased cost. By August 1 of each year DOTPF will deliver an invoice for payment of any cost incurred in excess of the Tribe's pre-payment funds. DOTPF's annual invoice for payment shall list total costs for routine maintenance and total costs for emergency maintenance. Routine maintenance costs in excess of the Tribe's annual pre-payment shall be due and payable within 30 days of receipt. Emergency maintenance costs shall be due and payable within 90 days of receipt.

D. Conformance with federal funding requirements. DOTPF understands and agrees that the Tribe will use its federal Indian Reservation Roads Program funds and such other federal funds as are available to maintain public roads to pay DOTPF for some or all of

the maintenance services provided under this Agreement. DOTPF agrees to cooperate with the Tribe in the event that a federal funding agency requires records or other information regarding the maintenance services performed under this Agreement. DOTPF shall endeavor to comply with all federal requirements governing the use of such federal funds.

2. The Tribe agrees to:

A. Allow the public access to Shepard Point Road to the same extent the public has access to State roads.

B. Periodically inspect DOTPF's maintenance work on Shepard Point Road and promptly notify the Cordova Maintenance Station foreman of any discrepancies, damage, or other concerns about the work.

C. Allow DOTPF employees, agents, and contractors complete and unhindered access to Shepard Point Road, its rights-of-way, and all associated transportation facilities.

D. Seek and reserve sufficient funds to cover the cost of routine and emergency maintenance work. Sources of funds include: the Tribe's IRR Program funding; Emergency Relief for Federally-Owned Road funding; IRR High Priority Project funding; the Tribe's income derived from operations of the marine facility located at the end of Shepard Point Road (e.g., port fees, fuel sales); and the Tribe's income from any business whose operations depend, in whole or in part, on the use of Shepard Point Road (e.g., logging, mining, tourism). The Tribe's income is defined to include gross income, dividends, royalties, or other financial remuneration of any sort earned either by the partnerships, joint ventures, or entities of any sort in which the Tribe has a contractual, ownership, or other interest and through which the Tribe obtains a direct financial benefit. The parties recognize that the Shepard Point marine facility and businesses relying on the use of Shepard Point Road are prospective as of the signing of this Agreement and may never come to fruition.

E. Tender a pre-payment of routine maintenance costs to DOTPF by June 15 of each year to cover activities in the following fiscal year (July 1-June 30). The minimum annual pre-payment shall be in the amount of \$63,000. An increase in the pre-payment amount may be made annually by mutual agreement.

F. Pay in full each annual invoice (see, paragraph 1(C)). Routine maintenance costs in excess of the Tribe's annual prepayment shall be due and payable within 30 days of receipt. Emergency maintenance costs shall be due and payable within 90 days of receipt.

G. Consent to suit in the courts of the State of Alaska as described in the attached limited waiver of sovereign immunity.

H. Promptly notify DOTPF of any road conditions requiring emergency maintenance upon discovery by the Tribe.

I. Fund and perform all future construction activities on Shepard Point Road such as major repairs or replacement of bridges, culverts or embankments, major resurfacing, paving, or improving the road to a higher classification, standard, or capacity to accommodate future traffic increases.

3. Suspension. DOTPF may suspend routine and emergency maintenance activities or close Shepard Point Road, in its sole discretion, if the Tribe does not meet its payment obligations (see, paragraphs 2(E) & 2(F)). DOTPF may suspend emergency maintenance activities or close Shepard Point Road if the Legislature fails to appropriate sufficient funds for the DOTPF Cordova Maintenance Station to provide routine or emergency maintenance services on the Shepard Point Road. DOTPF may suspend routine and emergency maintenance activities or close Shepard Point Road if it determines, in its sole discretion, that DOTPF's ability to provide adequate maintenance services has been impeded by the Tribe's failure to provide adequate construction under paragraph 2(I).

4. Termination. DOTPF may terminate this Agreement upon 180 days notice if (1) the Legislature fails to appropriate sufficient funds for the DOTPF Cordova Maintenance Station to provide routine or emergency maintenance services on the Shepard Point Road; (2) the Tribe fails to provide adequate construction under paragraph 2(I); or (3) the Tribe fails meet its payment obligations (see, paragraphs 2(E) & 2(F)).

5. Term. This Agreement is effective upon execution by both parties, and is applicable for twenty years from the date the Shepard Point Road becomes open to the public and routine maintenance is initiated.

6. Cooperation. The officers, employees, and agents of DOTPF and the officers, employees, and agents of the Tribe shall cooperate with each other fully and in good faith. Such duty to cooperate includes, but is not limited to, responding in good faith to requests for information or other general inquiries, and cooperation in the investigation of any notice of claim, claim, demand, or lawsuit arising out of or relating to this Agreement; and in its prosecution of or defense against claims, demands, or lawsuits arising out of or relating to this Agreement. The DOTPF's and Tribe's cooperation shall include, but shall not be limited to, full and good faith participation in all litigation-related discovery.

7. Entire Agreement. This Agreement contains the entire agreement between the parties, and there are no written or oral promises or understandings between the parties that modify its terms. It may be amended only by written agreement of the parties, signed by their respective authorized representatives.

8. Interpretation. This Agreement and the limited waiver of sovereign immunity shall be interpreted and construed in accordance with, and governed and enforced in all respects by, the laws of the State of Alaska in Alaska courts. This Agreement is entered

into freely and voluntarily by the State and Tribe after having had a full and fair opportunity to consider its terms and conditions. Each party has had the opportunity to review this Agreement and the limited waiver of sovereign immunity and to consult with legal counsel. This Agreement and the limited waiver of sovereign immunity shall not be construed for or against any party. The Indian Canon of Construction will not apply to the interpretation of any term or condition of this Agreement or the limited waiver of sovereign immunity.

9. Acting in Tribal Capacity. In signing this Agreement and the limited waiver of sovereign immunity, the Native Village of Eyak is acting solely in its tribal capacity, and not as a corporation or other business or organization form.

The Native Village of Eyak

P.O. Box 1388

Cordova, AK 99574

Contact name: Angela Arnold, Executive Director

Scott Madison, Capitol Projects Coordinator

Tel: (907) 424-7738

By Mark King Tribal Council President
Hon. Mark King

Date 3/24/11

Alaska Department of Transportation and Public Facilities

Notice and Contact Information

2301 Peger Rd.

Fairbanks, AK 99709

Contact name: Clark Milne

Tel: 907-451-5285

By Steve Titus Director, Northern Region
Steve Titus, P.E.

Date 3/31/11

NATIVE VILLAGE OF EYAK LIMITED WAIVER OF SOVEREIGN IMMUNITY
GRANTED TO THE
ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

The Native Village of Eyak, a federally recognized Indian Tribe, acting through the Eyak Tribal Council ("Tribe") under the authority of Council Resolution No. 2011-01-07 (March 15, 2011), hereby waives the sovereign immunity of the Tribe and gives the Tribe's consent to be sued in the courts of the State of Alaska ("State") in the Third Judicial District at Anchorage, Alaska and gives consent to have judgment entered against the Tribe, solely in accordance with the limitations and conditions set forth below, as follows:

1. Action. Immunity is waived solely as to:
 - a. An administrative agency action or a civil court action filed by the State or a State official against the Tribe, or its employees or officials acting in their official capacities, for material breach of the Memorandum of Agreement ("MOA") entered into between the Parties to which this waiver is an exhibit.
 - b. The assertion by the State or a State official of defenses, cross-claims, counterclaims, offsets, and third party claims in any civil court action involving the Tribe or its employees or officials. The Tribe's waiver of immunity in actions wherein the State assert claims against third parties shall not act as waiver of the Tribe's immunity from third party claims asserted against the Tribe (See Paragraph 4).
 - c. An administrative agency action or civil action filed by the State against the Tribe, or its employees or officials acting in their official capacities, (1) to compel compliance with a subpoena, (2) to compel compliance with a lawful judgment, order, or process of the administrative body or state court, or (3) to prevent any other unlawful interference with the process or proceedings of an administrative body or state court (*see* AS 09.50.010, AS 09.50.020 and AS 09.50.040).
2. Remedy. The remedies available under this waiver shall be limited to:
 - a. Specific performance of the terms of the MOA between the Alaska Department of Transportation and Public Facilities ("Department") and the Tribe made effective on April 1, 2011, including the right to direct the payment of present or future Indian Reservation Roads Program funds or any other federal road funds which the Tribe would otherwise receive.

- b. Judgment for payment of any arrearages due under said MOA. The State may enforce a judgment for payment by any legal means available to enforce a judgment against the Tribe's Indian Reservation Roads Program funds, other federal road maintenance funds or the Tribe's income resulting from operations of the marine facility located at the end of Shepard Point Road (e.g., port fees, fuel sales), and the Tribe's income from any business whose operations depend in whole or in part on the use of Shepard Point Road (e.g., logging, mining, tourism). The Tribe's income is defined to include gross income, dividends, royalties, or other financial remuneration of any sort earned either by the partnerships, joint ventures, or entities of any sort in which the Tribe has a contractual, ownership, or other interest and through which the Tribe obtains a direct financial benefit. The parties recognize that the Shepard Point marine facility and businesses relying on the use of the Shepard Point Road are prospective as of the signing of this Limited Waiver and may never come to fruition. In the event that these non-federal income sources remain prospective at the time a judgment is rendered, the parties understand and agree that the only revenue sources available to satisfy a money judgment (or fulfill a specific performance remedy) are the Tribe's Indian Reservation Roads Program funds, or other federal road maintenance funds, to the extent such funds are legally available for this purpose.
- c. Should the State be declared a prevailing party against the Tribe, the Tribe hereby waives its immunity to permit the State to enforce an award of costs or attorneys fees, but only to the extent that funds are available from any of the sources identified in Section 2(b) of this Limited Waiver.
- d. Should the Tribe be found guilty of contempt, AS 09.50.020 and AS 09.50.040 apply with full force and effect, and the State may levy and execute against the Tribe's real property or other assets wherever located, and whether owned in the name of the Tribe's governing body, the Tribe, or otherwise.
- e. No personal assets of Tribal officials or employees acting in their official capacities are subject to levy, execution, or other mechanisms to enforce a judgment or an order.

3. This waiver of sovereign immunity shall not be construed as an agreement or concession by the Tribe to waive the coverage of section 314 of Public Law 101-512 or the Federal Tort Claims Act for any claim to which those laws apply.

4. The Tribe does not waive sovereign immunity as to any third party. No provision of this waiver shall be interpreted as waiving the Tribe's sovereign immunity or granting Tribal consent for a suit to be brought directly against the Tribe or any Tribal official or employee by any party other than the State of Alaska, nor shall any provision in this waiver be construed as creating in the public or any person a third party benefit or to

otherwise authorize any person not a party to the MOU to maintain a suit against the Tribe for personal injury or other cause of action under the terms of this waiver or the MOA.

5. Except as otherwise provided by statute, Alaska State Courts shall have exclusive jurisdiction over all civil court actions described above, and all civil court actions shall be filed in the courts of the State of Alaska in the Third Judicial District at Anchorage, Alaska.

6. If the Tribe's Constitution or by-laws are amended in the future, this waiver of sovereign immunity shall continue in full force and effect regardless of the terms of any Tribal Constitutional or by-laws amendment.

7. This agreement shall be interpreted under the laws of the State of Alaska.

NATIVE VILLAGE OF EYAK TRIBAL COUNCIL

By: Mark King

Printed Name: Mark King
Title: Tribal Council President

ACKNOWLEDGMENT

State of Alaska)
)
Third Judicial District)

THIS IS TO CERTIFY that on the 24 day of March, 2011, the foregoing waiver of sovereign immunity was signed and acknowledged before me by Mark King, the Tribal Council President of the Native Village of Eyak, and swore, under oath or affirmation, that: (1) he is acting on behalf of the Native Village of Eyak and under the constitutional authority of the Native Village of Eyak, (2) he has the authority to sign for and bind the Native Village of Eyak Tribal Council and the Tribe to the commitments and conditions of this limited waiver of sovereign immunity, and (3) the Native Village of Eyak Tribal Council has fully complied with all current procedures and requirements necessary to validly authorize his signature on this waiver and to waive the Tribe's sovereign immunity.

Rexa Will
Notary Public in and for Alaska
My Commission expires: 6/8/2011

