

MEMORANDUM OF AGREEMENT

USARAK-MOA-029

CITY OF DELTA JUNCTION, ALASKA - U.S. ARMY ALASKA

City of Delta Junction, Alaska
P.O. Box 229
Delta Junction, Alaska 99707

("the City") and

United States Army Alaska
Department of the Army
724 Postal Service Loop #5000
Fort Richardson, Alaska 99505-5000

("USARAK") agree that:

RECITALS

- A. USARAK plans a range expansion in the Donnelly Training Area southeast of the City, constructing a Combined Arms Collective Training Facility ("CACTF") and a Battle Area Complex ("BAX") in the area commonly known as the Eddy Drop Zone.
- B. USARAK has issued an Environmental Assessment ("EA"), Draft Environmental Impact Statement ("DEIS") and Supplemental Draft Environmental Impact Statement ("SDEIS") pursuant to the National Environmental Policy Act ("NEPA").
- C. The City has disputed the adequacy of the EA and DEIS. The City disputes the adequacy of the SDEIS under NEPA.
- D. As proposed, the BAX will be constructed in the Jarvis Creek flood plain. Executive Order 11988 ("EO 11988") bars construction in a flood plain unless there is no practicable alternative. USARAK asserts that there is no practicable alternative to construction of the BAX in the Jarvis Creek flood plain. The City disputes that assertion.
- E. USARAK asserts that soils in the Donnelly Drop Zone, Alternative No. 3 in the SDEIS, make that area unsuitable for the BAX and CACTF, specifically that the soils are not trafficable. The City disputes that assertion.
- F. USARAK asserts that construction anywhere but in the Eddy Drop Zone is prohibitively expensive. The City asserts that the failure to take into account the costs of fire and flood damage to the City and the Deltana region, and the failure to

include maintenance costs of the BAX, make any cost comparison incomplete and flawed.

- G. The City asserts that construction of the CACTF and BAX so close to the City creates an unacceptable risk of damage to the City and the Deltana region by wildfire. USARAK asserts that mitigation efforts can reduce the risk of wildfire to an acceptable level.
- H. In numerous other material respects, USARAK and the City disagree as to the existence of risks, the extent of those risks, and the capability of mitigating or managing those risks.
- I. USARAK is not willing to voluntarily change its preferred alternative from Eddy Drop Zone to another location in the Donnelly Training Area.
- J. If the City and USARAK were to litigate the adequacy of the SDEIS under NEPA, or the Finding of No Practical Alternative under EO 11988, the outcome would be uncertain, and the risk of delay to USARAK significant.
- K. To reduce the risk of delay in the construction of the CACTF and BAX, and to address the City's concerns to the extent USARAK believes it can, USARAK is willing to enter into this Memorandum of Agreement.
- L. To obtain what pledges of mitigation from USARAK that it can, and to reduce the expense of litigation to the City, and to resolve this protracted dispute, the City is willing to enter into this Memorandum of Agreement.

NOW, THEREFORE, THE CITY AND USARAK AGREE THAT:

A. *Additional Fire Mitigation Treatments Created*

- 1. USARAK will create a fuel break approximately 6 kilometers in length along 33-Mile Loop where it serves as the northern boundary of the BAX. On each side of the road the break will be 75 feet wide, for a total new clearing width of 150 feet. When the 150 feet is added to the width of 33-Mile Loop (approximately 50 feet) the total break width will be about 200 feet, including the road. The break will be anchored by Jarvis Creek on the west and by the area burned in 1987 on the east.
- 2. USARAK will create a 300-foot-wide break connecting Buffalo Drop Zone with Jarvis Creek, which is a length of approximately 800 meters.
- 3. USARAK will create at least 2 off-setting polygon-shaped clearings north of the break proposed in #2 above. Each will be at least 10 acres in size, and shaped similar to those

polygons already in place as part of the Jarvis North Fire Mitigation Project.

4. USARAK will extend the length, by at least 100 meters, of 8 polygon-shaped clearings that are already in place as part of the Jarvis North Fire Mitigation Project.
5. USARAK shall maintain the current and above-described areas as fuel breaks using methods determined in consultation with the Alaska Fire Service. Such methods may include disking, burning, mowing, and conversion to hardwood stands.
6. USARAK shall maintain the vegetation in Buffalo Drop Zone so as to serve as a fuel break using methods determined in consultation with the Alaska Fire Service. Such methods may include disking, prescribed burning and mowing.

B. Training Restrictions

7. USARAK agrees to not conduct training at the BAX and CACTF range complex during fire season unless a wildland fire crew with a minimum of three persons is present in the Donnelly Training Area (DTA). This wildland fire crew is in addition to present regular staffing at the Fort Greely Fire Department. Under lower fire indices (Low and Moderate), the fire crew would be available to perform fire protection duties including creation and maintenance of fuel breaks. Under elevated fire indices (High and Extreme), the fire crew must be on standby at the BAX and CACTF range complex. Under extreme fire conditions, no training would occur in the BAX without contemporaneous approval of the USARAK Chief of Staff following consultation with the Alaska Fire Service and, dependent on availability, either consultation with or electronic notice to the City of Delta Junction.
8. USARAK agrees to purchase a new Type VI, 4-wheel drive, initial attack wildland fire engine for the fire crew discussed in #7 above.
9. The wildland fire crew discussed in #7 above would be initially trained and certified, and periodically re-certified, according to BLM Alaska Fire Service standards. USARAK would use good faith efforts to enter into an agreement with the Fort Greely Fire Department such that outside of fire season the fire crew and engine would be based at Fort Greely year-round.
10. During the fire season, under elevated fire indices a helicopter with a water bucket would be immediately available at any time training is being conducted at the BAX and CACTF range complex.

11. Under elevated fire indices soldiers training at the BAX and CACTF range complex would be prohibited from using pyrotechnic devices (including, without limitation, tracers, trip flares, and smoke). These prohibitions could only be waived for critical training exercises (e.g., preparation for deployment to a war theatre). Waiver could only be granted by the USARAK Chief of Staff after consultation with the City at least seven days in advance.
12. During periods of a Moderate fire index, use of pyrotechnic devices would be prohibited unless used in a container that completely contains all burning elements of the device (i.e., a burn pan). These prohibitions could only be waived for critical training exercises (e.g., preparation for deployment to a war theatre). Waiver could only be granted by the USARAK Chief of Staff after consultation with the City at least seven days in advance.
13. Under elevated fire indices ground units training at the BAX and CACTF range complex must carry firefighting equipment.

C. *Jarvis Creek Flood Control Project*

14. USARAK agrees to seek funding from Congress through the annual Department of Army military construction budget request process for the purpose of constructing a flood control dike in Donnelly Training Area East to direct floodwaters back into Jarvis Creek. USARAK will assign priority to this project. USARAK will treat this project as a community-based collaboration with the City. The final design will be selected only after the required environmental review is completed. To the extent possible, USARAK will support the City of Delta Junction's efforts to request funding for the repair of School Road/Nistler Road.
15. USARAK agrees to not harm the 1967 dike built along Jarvis Creek by construction of the BAX/CACTF project. The parties recognize and agree that the 1967 dike may be incorporated into the design of the flood control dike cited in the paragraph immediately above.
16. USARAK agrees to have the U.S. Army Corps of Engineers' hydrologists review and take into account the concerns and risks identified by Travis/Peterson Environmental Consulting, hydrologists retained by the City, in the design of the BAX and USARAK's application to the U.S. Army Corps of Engineers for its Section 404 permits.

D. General

17. Capitalized terms in this Memorandum of Agreement shall have the definitions given to them in the SDEIS, except where the context clearly requires otherwise.
18. USARAK agrees to take reasonable planning and administrative steps to facilitate public crossing of Donnelly Training Area to support public access to the Granite Mountains.
19. In order to mitigate potential interference with wireless communication services in the Deltana area caused by training exercises conducted at the BAX and CACTF, the Army will make available the use of Fort Greely land to communications companies for purposes of installing and operating wireless communications systems.
20. Nothing in this Memorandum of Agreement replaces or substitutes the mitigation efforts required under previously approved projects or the mitigation efforts recommended in the SDEIS dated March 17, 2006.
21. The City and USARAK each warrants that it is authorized to make and enter into this Memorandum of Agreement, that the Memorandum of Agreement is fully enforceable against them, and that there is no supervening authority or power that impairs the enforceability of this Memorandum of Agreement, except as provided herein.
22. The City and USARAK pledge themselves to a standard of good faith and fair dealing under this Memorandum of Agreement.

E. Settlement Agreement

23. So long as USARAK is in compliance with the covenants and conditions set out in this Memorandum of Agreement, the City agrees that the City will not contest the adequacy, completeness or accuracy of the SDEIS or Final Environmental Impact Statement ("FEIS"), and will not protest or appeal from the issuance of a Record of Decision based upon the FEIS.
24. So long as USARAK is in compliance with the covenants and conditions set out in this Memorandum of Agreement, the City agrees that the City will not oppose issuance of a Section 404 permit or permits authorizing construction in wetlands or the flood plain located in the Eddy Drop Zone.
25. USARAK agrees that all mitigation measures identified in the SDEIS, pertaining to construction and operation of the CACTF and BAX at the Eddy Drop Zone location, will be retained in the FEIS. USARAK will take all reasonable efforts to urge Army decision-makers to undertake all of the mitigation

efforts currently described in the SDEIS as carried forward in the final form of the EIS or variations of those mitigation efforts reasonably satisfactory to the City. The parties have attached a Table of Mitigation Measures to this Memorandum of Agreement as Exhibit A. The failure by USARAK to timely undertake a mitigation measure identified in Exhibit A as "Critical" shall be a default under this Memorandum of Agreement and resolved under Part G below. The failure to timely undertake a mitigation measure identified as "Important" shall not be a default but shall be the subject of mandatory consultation between USARAK and the City. USARAK agrees that the mitigation efforts described in Exhibit A, as supplemented and modified by this Memorandum of Agreement, represent that minimum level of mitigation that is acceptable to the City.

26. USARAK agrees that it will in good faith implement the mitigation efforts described in the amended Section 404 wetlands permit applications to the U.S. Army Corps of Engineers, or variations in those mitigation efforts reasonably satisfactory to the City. USARAK agrees that those Section 404 mitigation efforts, as supplemented by this Memorandum of Agreement, represent that minimum level of mitigation that is acceptable to the City.
27. Nothing in this Memorandum of Agreement shall be interpreted as a consent by the City to expansion of the CACTF or BAX beyond the levels and uses described in the SDEIS.

F. Implementation

28. The City will introduce an ordinance approving this Memorandum of Agreement on May 2, 2006. A public hearing before the City Council on the proposed ordinance and memorandum of Agreement will be held on May 16, 2006.
29. USARAK will participate in the public hearing on May 16, 2006 before the Delta Junction City Council. At or immediately before that public hearing, USARAK will conduct a demonstration of the noise level associated with the 105mm Stryker Mobile Gun System tank gun and a representative sample of aircraft traffic at the BAX and CACTF respectively.
30. The City's approval of this Memorandum of Agreement shall be final upon the City Council's approval of this ordinance and resolution of any reconsideration of that action.
31. USARAK's approval of this Memorandum of Agreement shall be final upon signature by Major General Charles Jacoby, Commander, United States Army Alaska.

G. Enforcement and Dispute Resolution

32. Should the Army decide to not build the CACTF and BAX at the Eddy Drop Zone or be unable to build the CACTF and BAX at the Eddy Drop Zone, for whatever reason, this agreement will be deemed null and void and subject to termination by either the City or the Army by providing written notice under the terms of this agreement.
33. The City and USARAK intend this Memorandum of Agreement to create enforceable rights in each of them for all times in which Eddy Drop Zone is used as a CACTF or BAX as described in the SDEIS.
34. In the event of a dispute between the City and USARAK as to interpretation, application or enforcement of this Memorandum of Agreement, the dispute shall be resolved as described in this paragraph.
 - (a) In the event of a disagreement between the City and USARAK concerning the interpretation or performance of any aspect of this Memorandum of Agreement, the dissatisfied party shall provide the other party with written notice of the Dispute and a request for informal negotiations within twenty (20) days of the disputed event. The parties shall meet and confer in a good faith effort to attempt to resolve the Dispute within thirty (30) days of the written notice or such time thereafter as is mutually agreed.
 - (b) If the parties are unable to resolve the Dispute informally through negotiation, then the parties shall endeavor to settle the Dispute by non-binding mediation. Within ten (10) days after the close of the informal negotiation period, each party shall provide the other with the names of at least three (3) individuals qualified by experience and background to serve as a neutral mediator, along with a brief summary of each individual's qualifications. The recommended individuals shall not be members of or otherwise affiliated with the party who recommends them. For example, candidates may not be members of or employed by the U.S. Army, or citizens of the City. Within ten (10) days after delivery of the written recommendations, representatives of each party shall confer in person or by telephone to select the individual who will serve as neutral mediator. Prior service as mediator under this Memorandum of Agreement shall not disqualify an individual from subsequent service. The parties shall extend their best reasonable efforts to select a mutually acceptable neutral mediator to resolve the dispute through the mediation process. If

the parties are unable to mutually agree on a neutral mediator within ten (10) days from the first effort, then each party shall select a mediator candidate from their list and those candidates shall select a neutral mediator. The first \$5,000 in reasonable and customary costs of the mediator, including travel, lodging, meals and mediation time, shall be paid by USARAK. If the total costs exceed \$5,000 in any calendar year, the costs in excess of \$5,000 shall be borne equally by the City and USARAK. If a court determines that the mediation demand was frivolous, the court may order a party to pay all of the mediator costs. In mediation, each party shall bear its own costs and attorneys' fees.

- (c) If the Dispute remains unresolved after completion of the mediation process, then either the City or USARAK may petition the United States District Court for the District of Alaska to resolve the Dispute. The parties waive all jurisdictional defenses to such a petition.
- (d) All informal negotiations, mediations, and related communications and proceedings conducted pursuant to subparagraphs (a) - (b) of this Paragraph shall be treated as compromise and settlement negotiations for the purposes of all applicable rules of evidence. However, a recital of compliance with the dispute resolution requirements of this Paragraph shall be admissible.

35. In any litigation under this Memorandum of Agreement before a competent court the prevailing party shall be entitled to recover its costs and attorneys' fees.

H. Force Majeure

36. The City and USARAK recognize that circumstances outside the reasonable control of USARAK may delay compliance with the timetables established in this Memorandum of Agreement. Such a delay in performance shall not constitute a breach of this Memorandum of Agreement, provided that USARAK acts with such reasonable diligence as those circumstances may permit. A failure of funding for Wildfire Protection shall not be excused under this Paragraph. Any disputes as to the applicability of this clause shall be resolved under the Dispute Resolution provisions of this Memorandum of Agreement.

I. Miscellaneous

37. The parties agree that this Memorandum of Agreement was jointly drafted by the parties. The parties agree that any

and all rules of construction that require an ambiguity to be interpreted against the drafting party shall be inapplicable.

38. If, subsequent to the execution of this Memorandum of Agreement, any change in the law occurs that increases, decreases, or otherwise alters USARAK's obligations concerning matters addressed in this Memorandum of Agreement, then this Memorandum of Agreement shall be amended to conform to such changes. Any disputes as to the applicability of this clause shall be resolved under the Dispute Resolution provisions of this Memorandum of Agreement.
39. Any notice required or made with respect to this Memorandum of Agreement shall be in writing and shall be effective upon receipt. Any notice or other documents required pursuant to this Memorandum of Agreement shall be sent to the following persons:

FOR THE CITY OF DELTA JUNCTION:

City Clerk
City of Delta Junction
P.O. Box 229
Delta Junction, Alaska 99737
pwhite@ci.delta-junction.ak.us

FOR UNITED STATES ARMY ALASKA

Mike Gieryic, Esq.
Office of the Staff Judge Advocate
U.S. Army Alaska
724 Postal Service Loop # 5700
Fort Richardson, Alaska 99505-5700
mike.gieryic@us.army.mil

Upon written notice to the other parties, any party may designate a successor contact person for any matter related to this Memorandum of Agreement.

Notice given by email shall not be effective unless it is acknowledged to have been received by the recipient.

40. The parties recognize that USARAK's performance under this Memorandum of Agreement is subject to fiscal and procurement laws and regulations of the United States, including without limitation the Anti-Deficiency Act, 31 U.S.C. §1341 et seq. Nothing in this Memorandum of Agreement shall be interpreted to require USARAK to obligate or pay funds in contravention of those laws. Any disputes as to the applicability of this

Delta Junction, Alaska 99737
pwhite@ci.delta-junction.ak.us

FOR UNITED STATES ARMY ALASKA

Mike Gieryic, Esq.
Office of the Staff Judge Advocate
U.S. Army Alaska
724 Postal Service Loop # 5700
Fort Richardson, Alaska 99505-5700
mike.gieryic@us.army.mil

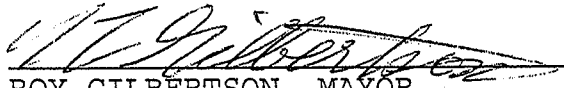
Upon written notice to the other parties, any party may designate a successor contact person for any matter related to this Memorandum of Agreement.

Notice given by email shall not be effective unless it is acknowledged to have been received by the recipient.

40. The parties recognize that USARAK's performance under this Memorandum of Agreement is subject to fiscal and procurement laws and regulations of the United States, including without limitation the Anti-Deficiency Act, 31 U.S.C. §1341 et seq. Nothing in this Memorandum of Agreement shall be interpreted to require USARAK to obligate or pay funds in contravention of those laws. Any disputes as to the applicability of this clause shall be resolved under the Dispute Resolution provisions of this Memorandum of Agreement.
41. This Memorandum of Agreement constitutes the full, final and complete agreement between the City and USARAK with respect to the matters addressed in this Memorandum of Agreement. There are no representations, agreements or understandings relating to this settlement other than those expressly contained in this Memorandum of Agreement.


DATED at Delta Junction, Alaska this 16th day of May, 2006.

CITY OF DELTA JUNCTION, ALASKA


ROY GILBERTSON, MAYOR

DATED at Fort Richardson, Alaska this 16th day of May, 2006.

UNITED STATES ARMY ALASKA


Major General Charles Jacoby,
Commander, United States Army
Alaska