

SETTLEMENT AGREEMENT

[*EKLUTNA, INC. VS. MUNICIPALITY OF ANCHORAGE*, Case No. 3AN-13-09759 CI]

THIS SETTLEMENT AGREEMENT (“Agreement”) is executed by and between Eklutna, Incorporated (hereinafter referred to as “Eklutna”) and the Municipality of Anchorage (hereinafter referred to as the “Municipality”) (Eklutna and the Municipality are sometimes hereinafter collectively referred to as “Parties” or singularly as a “Party”).

WITNESSETH:

WHEREAS, on October 3, 2013, Eklutna filed suit, captioned *Eklutna, Inc. vs. Municipality of Anchorage*, Case No. 3AN-13-09759 CI (the “Lawsuit”), against the Municipality alleging, among other causes of action, breaches by the Municipality of Anchorage of that certain agreement known as the North Anchorage Land Agreement (“NALA”) as it applies to the Municipality’s agreement with Doyon Utilities, LLC, at the Anchorage Regional Landfill (“ARL”);

WHEREAS, the Parties have agreed to settle the Lawsuit on the terms set out in this Agreement.

NOW, THEREFORE, for and in consideration of the mutual promises, covenants and undertakings set out herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by all Parties to this Agreement, Eklutna and the Municipality hereby agree as follows:

1. **Payment to Eklutna.** In addition to the payment to Eklutna described in Section 2, the Municipality shall pay to Eklutna, Inc., at Closing, the sum of \$750,000 in collectible funds. As used in this memorandum of agreement, “Closing” shall have the meaning set out in Section 6.

2. **Acceleration of Expansion of Housing Supply.** The Parties agree each to make significant contributions toward the expansion of housing supply in Anchorage, as follows:

2.1. The Municipality’s contributions shall consist of the following:

2.1.1. The Municipality shall pay to Eklutna at Closing the sum of \$5,000,000 in immediately collectible funds. Of the sum of \$5,000,000, Eklutna shall deposit the sum of \$2,000,000 in Eklutna’s permanent fund investment account and shall commit not to withdraw any portion of the principal amount of \$2,000,000 from its permanent fund investment account except in accordance with the provisions of Sections 2.3, 2.4, and 2.5, below. Other than the commitment not to withdraw any portion of the principal amount of the \$2,000,000 from Eklutna’s permanent fund investment account except in accordance with the terms of this Agreement, and the contingent commitment to refund to the Municipality the

SETTLEMENT AGREEMENT

[*EKLUTNA, INC. VS. MUNICIPALITY OF ANCHORAGE*, Case No. 3AN-13-09759 CI]

principal amount of the \$2,000,000 sum in the event of the occurrence of one of the Triggering Events as set out in Section 2.3 of this Agreement, there shall be no restrictions on Eklutna's authority to treat the \$2,000,000 sum as its own property at all times following Eklutna's receipt of the funds, including the authority to decide how to invest the sum and the unrestricted right to retain all interest, earnings, or investment returns generated from the investment of the \$2,000,000 sum. For avoidance of doubt, there shall be no restrictions on Eklutna's right to receive, expend or otherwise use, \$3,000,000 of the \$5,000,000 paid by the Municipality to Eklutna as set out in this Section 2.1.1, and there shall be no contingencies associated with or attached to that \$3,000,000 sum.

2.1.2. The Municipality and AWWU shall undertake diligent and best efforts to complete construction, within seven years after Closing, of all necessary water transmission and sewer trunk mains, lift stations, and other associated infrastructure improvements necessary to complete a functioning system to extend municipal water and sewer services to the proposed Powder Acres and Powder Hills subdivisions (the "Primary Trunk Lines") as depicted on Exhibit A ("Powder Acres" and "Powder Hills," respectively).

2.1.3. The Municipality and AWWU shall undertake diligent and best efforts to obtain all necessary approvals, including, without limitation, (a) approval of the Anchorage Assembly to submit to the Regulatory Commission of Alaska a tariff to permit AWWU to enter infrastructure coordination agreements ("ICAs") and pay upfront costs of construction of the Primary Trunk Lines; and (b) approval of the Regulatory Commission of Alaska for tariffs to permit AWWU to enter into ICAs and pay the upfront costs of construction of the Primary Trunk Lines; (c) approval of the Anchorage Assembly to submit to eligible property owners the question of whether to create an improvement district or districts that, in accordance with an RCA-approved tariff, would refund to AWWU upfront costs of construction of the Primary Trunk Lines; (d) approval by eligible property owners of the creation of an improvement district or districts that, in accordance with an RCA-approved tariff, would refund to AWWU the upfront costs of construction of the Primary Trunk Lines; and (e) approval of both Parties to an ICA allocating upfront costs for construction of the Primary Trunk Lines. Notwithstanding anything else in this Agreement to the contrary, neither the Municipality nor AWWU shall have any obligation to build the Primary Trunk Lines in the event that any of the above-listed approvals of the Anchorage Assembly, Regulatory Commission of Alaska, or eligible property owners is diligently requested in good faith, but denied by vote the Assembly, Regulatory Commission of Alaska, or eligible property owners, provided that the Municipality shall have exercised diligence and undertaken best efforts to obtain such approvals. For the avoidance of doubt, the obligation of AWWU to construct the Primary Trunk Lines is

expressly conditioned on its ability to recover upfront costs; provided, however, that nothing in this Agreement shall preclude the Municipality or AWWU from constructing the Primary Trunk Lines should any or all of the approvals set out in this section 2.1.3. not be obtained; and, provided further, if the requirements for construction of the Primary Trunk Lines can be and are met by other arrangements, such as by the developer up-fronting the costs, then the Municipality and AWWU shall undertake diligent and best efforts to complete construction of the Primary Trunk Lines within seven years after Closing.

2.1.4. The Parties to this Agreement recognize and agree that AWWU has no appropriation currently available to it to construct the Primary Trunk Lines as described in this Agreement and that the introduction and enactment of future legislation (including ordinance and resolutions) and appropriations by the Anchorage Municipal Assembly in the future remains in the sole discretion of the Anchorage Municipal Assembly. The Anchorage Municipal Assembly's failure to introduce or enact any future legislation, or to make any appropriation necessary to cause the completion of the construction of the Primary Trunk Lines by the end of the seventh year following Closing, shall entitle Eklutna to the exclusive remedy of retaining the \$2,000,000 that otherwise could be paid to the Municipality by operation of section 2.3, but otherwise creates no further liability or obligation of the Assembly.

2.2. Eklutna's contributions shall consist of:

2.2.1. By not later than three years following AWWU's final acceptance of construction of the Primary Trunk Lines, Eklutna, either itself or through others, shall have completed the development of Powder Acres providing for the development of a minimum of 45 housing units on two lots, as substantially depicted in Exhibit A. "Completed the development of" shall mean that all public improvements required by an approved subdivision agreement for Powder Acres shall have been constructed, inspected by the Municipality, and accepted for warranty in accordance with section 21.08.060 of the Code of Ordinances of the Municipality of Anchorage, and a final plat for Powder Acres shall have been submitted for approval in accordance with Section 21.03.200 of the Code of Ordinances of the Municipality of Anchorage.

2.2.2. By not later than five years following AWWU's final acceptance of construction of the Primary Trunk Lines, Eklutna, either itself or through others, shall have completed the development of Powder Hills providing for the development of a minimum of 63 single family residential lots, as substantially depicted in Exhibit A. "Completed the development of" shall mean that all public improvements required by an approved subdivision agreement for Powder Hills shall have been constructed, inspected by the Municipality, and accepted for

warranty in accordance with section 21.08.060 of the Code of Ordinances of the Municipality of Anchorage, and a final plat for Powder Hills shall have been submitted for approval in accordance with Section 21.03.200 of the Code of Ordinances of the Municipality of Anchorage.

2.3. In the event that any of the following events occurs (“Triggering Events”):

(a) After exercise of diligence and best efforts by the Municipality and AWWU, AWWU has not completed, by the end of the seventh year following Closing, construction of Primary Trunk Lines to extend municipal water and sewer services to Powder Acres and Powder Hills; or

(b) Eklutna has not, by the end of three years following AWWU’s completion of construction of operational Primary Trunk Lines to extend municipal water and sewer services to Powder Acres and Powder Hills, completed the development of Powder Acres; or

(c) Eklutna has not, by the end of five years following AWWU’s completion of construction of operational Primary Trunk Lines to extend municipal water and sewer services to Powder Acres and Powder Hills, completed the development of Powder Hills;

then, and if and only if a Triggering Event occurs, the occurrence of such an event shall trigger both of the following two consequences:

(y) Eklutna shall pay to the Municipality \$2,000,000, to approximate a refund to the Municipality the principal amount only, without interest or earnings, and without any offsetting losses, of the \$2,000,000 that Eklutna is required to deposit into its permanent fund investment account pursuant to Section 2.1.1 of this Agreement; and

(z) The Municipality shall thereupon be released from the obligations and requirements of Section IV.D.(4) of NALA as to 1,000 acres of “public interest lands” (within the meaning of that phrase in NALA). By notice to Eklutna, the Municipality shall designate, from time to time and possibly in fractional parts, which 1000 acres of public interest lands conveyed to it in accordance with NALA, or to be conveyed to it in accordance with NALA, shall not trigger Section IV.D.(4) obligations or requirements.

For avoidance of doubt, Section 2.3(b) and (c) shall constitute a Triggering Event only: (i) if the construction of Primary Trunk Lines to extend municipal water and sewer services to Powder Acres and Powder Hills is completed by the end of the seventh year following Closing; or (ii) if the construction of Primary Trunk Lines to extend municipal water and

sewer services to Powder Acres and Powder Hills is not completed by the end of the seventh year following Closing and the Municipality and AWWU exercised diligence and best efforts to cause the completion of the construction by the end of the seventh year following Closing. Said yet another way, if the construction of Primary Trunk Lines to extend municipal water and sewer services to Powder Acres and Powder Hills are not completed by the end of the seventh year following Closing due to a failure by the Municipality and AWWU to exercise diligence and best efforts to cause the completion of the construction by the end of the seventh year following Closing, then Eklutna shall be excused from the obligations under Section 2.3(b) and (c), and, in that event, Sections 2.3(b) and (c) shall not constitute Triggering Events.

2.4. Upon the completion, at any time within seven years following Closing, of construction of the Primary Trunk Lines, Eklutna shall be entitled to withdraw the \$2,000,000 sum from its permanent fund investment account for the sole purpose of paying for the costs of developing Powder Acres and Powder Hills; however, Eklutna shall continue to be subject to the obligation to refund the principal sum of \$2,000,000 pursuant to Section 2.3, above, upon the occurrence of a Triggering Event.

2.5. Upon the occurrence of either of the following events (“Releasing Events”), Eklutna shall be released from the provisions of Section 2.3 (y) and (z):

(i) Completion of Eklutna’s section 2.2.1 and 2.2.2 contributions, resulting in Eklutna, either itself or through others, having completed the development of Powder Acres, providing for the development of a minimum of 45 housing units on two lots, within three years following final acceptance of the Primary Trunk Lines, and having completed the development of Powder Hills, providing for the development of a minimum of 63 single family residential lots, within five years following final acceptance of construction of the Primary Trunk Lines; or

(ii) The construction of the Primary Trunk Lines not being completed by the end of the seventh year of this Agreement due to the failure by the Municipality and AWWU to undertake diligent and best efforts to complete the construction within that timeframe.

Upon the occurrence of either of the Releasing Events, the provisions of Section 2.3 (y) and (z) shall be nullified, Eklutna shall be released from all obligations relating to the \$2,000,000 sum received from the Municipality pursuant to this Agreement, and the provisions of Section IV.D.(4) of NALA shall continue to apply to any and all public interest lands conveyed to the Municipality pursuant to NALA, except as provided in section 4. For avoidance of doubt, Eklutna shall, upon the occurrence of either of the Releasing Events and thereafter, have no contingent obligation to return the principal amount of the \$2,000,000.

3. **Public Apology.** At a date, time, and place mutually selected by the Municipality and Eklutna, the Anchorage Mayor shall express his personal regret that the Municipality failed to engage with Eklutna in a constructive way regarding the Municipality's development of the landfill gas to energy project at the ARL, and express his personal commitment that the Municipality faithfully comply with NALA.

4. **Eklutna Release of Claims.**

4.1. **Eklutna Release of Claims to the Landfill Gas.** Eklutna hereby releases all claims that it has or may at any time in the future have pursuant to Section IV.D.(4) of NALA to any portion of the proceeds from sales or other dispositions of the landfill gas that has been or may be generated at the ARL, and any landfill gas that may exist or may be generated upon or from any expansion of the ARL outside of the boundaries of the existing 273-acre parcel of public interest lands, or other parcels of public interest lands that the Municipality may, in the future, receive. Nothing in this Section 4.1 shall be construed as releasing the Municipality from any other obligation it now has or may at any time in the future have arising from Section IV.D.(4) of NALA.

4.2. **Fossil Creek Substation/Switchyard and Related Transmission Lines and Facilities.** Eklutna hereby waives and releases all claims it now has or at any time in the future may have pursuant to NALA, including section IV.D(4), and Section 1425(b) of ANILCA arising out of or related to the conveyance to: (a) the Municipality doing business as Municipal Light and Power (ML&P), (b) the Eklutna Purchasers consisting of ML&P, Chugach Electric Association, Inc., and Matanuska Electric Association, Inc. (Eklutna Purchasers), (c) a Railbelt transmission company (Transco), or (d) some combination of ML&P, Eklutna Purchasers and Transco, or their assigns and successors, of non-ownership interests encumbering an estimated 300 acres of "military base lands" (as defined in NALA) solely for the following purposes: (x) to construct, operate, maintain and upgrade the proposed "Fossil Creek Substation-Switchyard," (y) to construct, operate, maintain and upgrade multi-phase high voltage electric power and telecommunications and (z) to construct, operate, maintain and upgrade an omni-directional radio communications tower, including improvements related to the generation, transmission or distribution of electricity. For purposes hereof, a "non-ownership interest" excludes interests in title, such as ownership in fee simple or as a tenant-in-common, but includes possessory and nonpossessory interests, such as, without limitation, easements, licenses, permits, and leaseholds. At such time that the Fossil Creek Parcels or any portion of them becomes available for conveyance under NALA:

4.2.1. The Municipality, at its election, may either (i) relinquish such non-ownership interest to the extent it encumbers the Fossil Creek Parcels that have become available for conveyance, (ii) select and receive conveyance of some or all of Fossil Creek Parcels that have become available for conveyance as "public interest lands" under NALA, in which case the acreage of the land so selected and

received shall be charged against the 3,000 acre cap of public interest lands pursuant to NALA, or (iii) purchase Eklutna's interests in some or all of the Fossil Creek Parcels that have become available for conveyance (including any right to receive an interest in title thereof under NALA) for a purchase price equal to the then fair market value of those interests; and

4.2.2. Eklutna Purchasers and Transco, at their election, exercised separately, may either (i) relinquish such non-ownership interest to the extent it encumbers the Fossil Creek Parcels that have become available for conveyance, ,” or (ii) purchase Eklutna's interests in some or all of the Fossil Creek Parcels that have become available for conveyance (including any right to receive an interest in title thereof under NALA) for a purchase price equal to the then fair market value of those interests.

4.3. Forty-Nine Acre Gravel Storage Parcel Adjacent to the ARL. Eklutna hereby waives and releases all claims that it now has or at any time in the future may have pursuant to NALA, including section IV.D(4), and Section 1425(b) of ANILCA arising out of or related to the conveyance of a non-ownership interest encumbering approximately 49 acres of “military base lands” adjacent to the ARL for the purpose of gravel storage and removal (“Gravel Storage Parcel”). At such time that any of such 49 acres becomes available for conveyance under NALA, the Municipality, at its election, may either (i) relinquish its non-ownership interest to the extent it encumbers any portion of the Gravel Storage Parcel that has become available for conveyance, (ii) select and receive conveyance of some or all of any portion of the Gravel Storage Parcel that has become available for conveyance as “public interest lands” under NALA, in which case the acreage of the land so selected and received shall be charged against the 3,000 acre cap of public interest lands pursuant to NALA, or (iii) purchase Eklutna's interests in some or all of any portion of the Gravel Storage Parcel that has become available for conveyance (including any right to receive an interest in title thereof under NALA) for a purchase price equal to the then fair market value of those interests.

4.4. Notification to Eklutna of Conveyance of Fossil Creek Parcels and Gravel Storage Parcel. The Municipality shall provide Eklutna with reasonable notice of any agreement it may enter with JBER concerning the Fossil Creek Parcels or Gravel Storage Parcel and shall provide Eklutna with copies of the executed agreements. Any military base lands encumbered by a non-ownership interest as a result of such an agreement shall be described, and the number of acres so encumbered, shall be set out in a document provided to Eklutna.

5. Dismissal With Prejudice of the Lawsuit. The Parties agree to dismiss the Lawsuit with prejudice with each party to bear its own costs and fees. At Closing, the attorneys for the Parties shall sign and immediately thereafter file with the court an appropriate stipulation.

6. **Closing.** The Parties agree to consummate the terms of this Agreement, including the payment of the sums required and the execution of a stipulation for dismissal of the Lawsuit with prejudice with each party to bear its own costs and fees, not later than ten business days after the Anchorage Assembly approves a resolution appropriating not less than \$5,000,000 to enable the Municipality to meet its obligations under section 2.1.1 of this Agreement. The Parties expressly recognize that all terms of this Agreement, other than section 7 below, are contingent on the Anchorage Assembly's future approval of a resolution appropriating not less than \$5,000,000 to enable the Municipality to meet its obligations under section 2.1.1 of this Agreement.

7. **Stay of Proceedings Pending Assembly Action; Termination of Agreement.** As soon as is practical after execution of this Agreement, the parties shall jointly move to stay all proceedings and deadlines in the lawsuit. Not later than 30 days after execution of this Agreement, the Mayor shall seek from the Anchorage Assembly a resolution appropriating not less than \$5,000,000 to be used by the Municipality to fulfill its obligations under section 2.1.1 of this Agreement. In the event that the Assembly has not approved such an appropriation by March 1, 2017, this Agreement shall terminate, Eklutna shall return to the Municipality the \$750,000 payment required by section 1, and either party may request that proceedings in the lawsuit continue.

8. General Provisions.

8.1. **Benefits/Burdens.** This Agreement shall inure to the benefit of and be binding upon the heirs, devisees, executors, administrators, assigns, beneficiaries, agents, attorneys, successors and successors in interest to and of each Party.

8.2. **Headings.** The titles and headings of this Agreement are intended to be for reference and for the sake of convenience only and shall not be construed to narrow or broaden the scope, interpretation or construction that would otherwise be given to the plain and ordinary meanings of the words in this Agreement.

8.3. **Independent Counsel.** Each Party acknowledges that it has enjoyed the advice and representation of competent independent legal counsel in negotiating, entering into, executing and delivering this Agreement or had the opportunity to do so; and the fact that this Agreement may have been drafted in whole or in part by one such Party's counsel shall not cause all or any part of this Agreement to be construed against such Party.

8.4. **Relationship of Agreement to NALA.** This Agreement is fully integrated and represents the entire agreement with respect to the Litigation. However, this Agreement shall not be construed to modify, amend, replace, or supersede NALA and the subsequent amendments to NALA in any way, except as expressly provided in sections 2.3 and 4.

8.5. **Representatives/Agents/Attorneys.** Each person who executes this Agreement on behalf of a Party as its agent or representative acknowledges, represents and warrants that he or she has the full right, power and authority lawfully to, and by such signature does, bind such party to this Agreement.

8.6. **Counterparts.** This Agreement may be executed in counterparts, including facsimile counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement effective as of the date of the last signature affixed hereto.

For Eklutna, Incorporated



MICHAEL E. CURRY
President

1-9-17
Date:

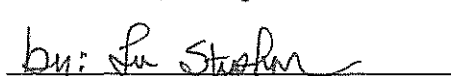
For the Municipality of Anchorage



ETHAN BERKOWITZ
Mayor

1-6-17
Date:

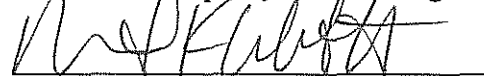
For Eklutna, Incorporated

by: 

LEE S. STEPHAN
Secretary

1/9/17
Date:

For the Municipality of Anchorage



MICHAEL K. ABBOTT
Municipal Manager

1-6-17
Date:

For Eklutna, Incorporated

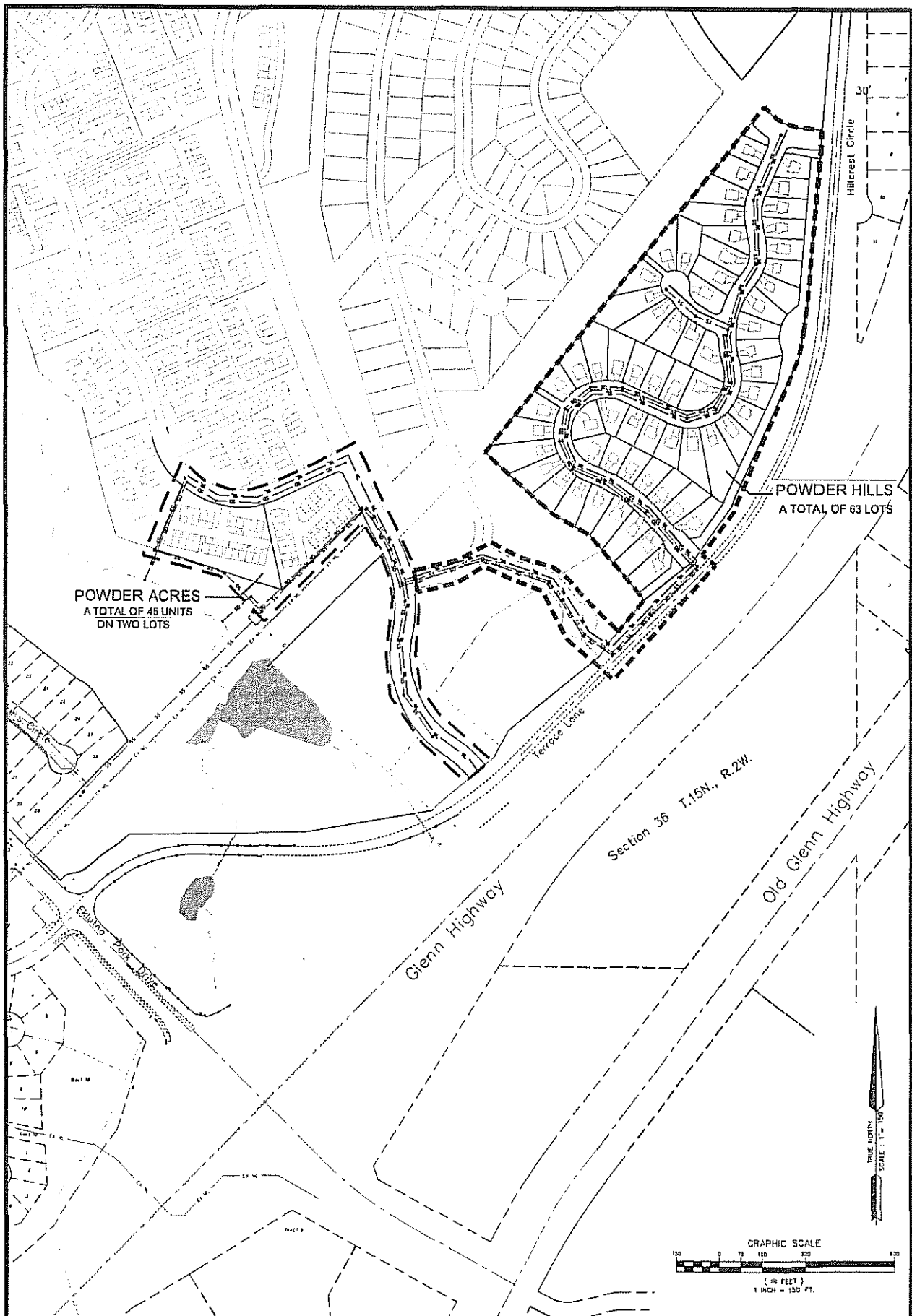


CURTIS J. McQUEEN
Chief Executive Officer

SETTLEMENT AGREEMENT

[EKLUTNA, INC. VS. MUNICIPALITY OF ANCHORAGE, Case No. 3AN-13-09759 CI]

Page 9 of 9



SHEET	DESIGNED	DRAWN	CHECKED	DATE	REVISIONS	BY/CHK
1	FILE: POWDER RESERVE					
OF	JOB NO. 24881	DATE: NOV 2013				
1	SCALE: HORIZ: N/A	VERT: N/A				

POWDER RESERVE
POWDER HILLS: 62 LOTS
POWDER ACRES: 45 UNITS

TRIAD
ENGINEERING

P.O. Box 310890
Amherst, MA 01001
(413) 541-4237