

**F. Consent Agenda - Natural Resources Management
ITEM 1.**



**AGENDA REPORT
May 7, 2019**

Patrick Air Force Base Right of Entry for Mid Reach

SUBJECT:

Department of the Air Force Right of Entry to Use Property Located on Patrick Air Force Base for Construction Access and Staging Necessary for the Mid Reach of the Brevard County Shore Protection Project.

FISCAL IMPACT:

No direct Fiscal Impact, but execution of this Right of Entry Agreement prior to the Army Corps seeking project bids will likely lower project cost.

DEPT/OFFICE:

Natural Resources Management

REQUESTED ACTION:

It is requested that the Board: (1) Authorize the County Manager to execute the Department of the Air Force Right of Entry to Brevard County, Florida To Use Property Located on Patrick Air Force; (2) Direct staff that the Air Force site will not be utilized unless any contractor using the site holds appropriate insurance and executes an agreement with the County, to be prepared by the County Attorney's Office, addressing the County's right to sovereign immunity under Section 768.28 Florida Statutes; and (3) Authorize the County Manager to execute said agreement with the Contractor after County Attorney and Risk Management approval of the agreement.

SUMMARY EXPLANATION and BACKGROUND:

On August 31, 2016 the Board of County Commissioners entered into a Project Partnership Agreement with the US Army Corps of Engineers (Corps) to serve as the local sponsor for the Mid Reach Brevard County Shore Protection Project. The Corps plans to award a contract for sand placement in the Mid Reach during the summer of 2019 in order to begin construction of the beach as early as November 1, 2019. In order to minimize potential impact to nearshore rock reef habitat, sand placement in the Mid Reach will occur by truck rather than by hydraulic dredge.

Truck access points to deliver sand to the beach are key to project success. A site on the south east corner of Patrick Air Force Base (PAFB), at the east end of the Pineda Causeway, is ideal for use as an access point. PAFB is willing to provide the access through this site for the County's Mid Reach project and has provided a Right of Entry agreement for use of the site. The County Attorney's office has reviewed the agreement

and would prefer a statement regarding the County's right to sovereign immunity be added. Air Force legal staff have indicated this language is not allowable in an agreement with the federal government.

Use of the site provides great benefit to the County and we are not in a position to argue the sovereign immunity point with the Air Force, so staff has worked an alternate path acceptable to the County Attorney's Office. It is proposed the County execute the Air Force agreement as written. The County will address the issue by assuring any project contractor working on the site is adequately insured and executes an agreement with the County indemnifying the County and acknowledging the County's right to sovereign immunity under Section 768.28 Florida Statutes.

ATTACHMENTS:

Description

- ▢ **Right of Entry agreement**



Tammy Rowe, Clerk to the Board, 400 South Street • P.O. Box 999, Titusville, Florida 32781-0999

Telephone: (321) 637-2001
Fax: (321) 264-6972
Tammy.Rowe@brevardclerk.us

May 8, 2019

M E M O R A N D U M

TO: Virginia Barker, Natural Resources Management Director

RE: Item F.1., Patrick Air Force Base Right of Entry for Mid Reach

The Board of County Commissioners, in regular session on May 7, 2019, authorized the County Manager to execute the Department of the Air Force Right of Entry to Brevard County, Florida, to use property located on Patrick Air Force; directed staff that the Air Force site will not be utilized unless any contractor using the site holds appropriate insurance and executes an agreement with the County, to be prepared by the County Attorney's Office, addressing the County's right to sovereign immunity under Section 768.28 Florida Statutes; and authorized the County Manager to execute said agreement with the Contractor after County Attorney and Risk Management approval of the agreement. Enclosed is an executed copy of the Right of Entry.

Upon execution by the Secretary of the Air Force, please return a fully-executed Right of Entry to this office for inclusion in the official minutes.

Your continued cooperation is greatly appreciated.

Sincerely yours,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

Tammy Rowe

Tammy Rowe, Deputy Clerk

/cmw

Encls. (2)

cc: Contracts Administration

DEPARTMENT OF THE AIR FORCE

RIGHT OF ENTRY

**TO
BREVARD COUNTY, FLORIDA**

**TO USE PROPERTY LOCATED ON
PATRICK AIR FORCE BASE**

PREAMBLE

THE SECRETARY OF THE AIR FORCE ("Air Force") hereby grants to Brevard County, Florida, a local government division of the state of Florida (the "Grantee"), for a period of 6 month beginning on 1 November, 2019 but revocable at the will of the Secretary of the Air Force, a Right of Entry to allow entry of Grantee, its officers, employees, agents, and invitees upon that certain property at Patrick AFB's beach's northern border, along the beach line to its southern beach border as described on **Exhibit A** and shown on **Exhibit B**, both attached hereto and made a part of this Right of Entry (the "Property"). This Right of Entry is to be used only for the purpose of the delivery and transfer of beach restoration material from highway dump trucks to off-road dump trucks then accessing the public beach through a dune cut at the base's south eastern border. The Air Force and the Grantee may be referred to as "Parties" or separately as a "Party."

THIS RIGHT OF ENTRY is granted subject to the following conditions:

1. The exercise of the privileges hereby granted shall be without cost or expense to the Air Force, under the general supervision and subject to the approval of the installation commander ("the Commander"), or their designated representative, and such reasonable rules and regulations as the Commander may prescribe from time to time.

2. This Right of Entry shall be exercised only at reasonable times and upon reasonable notice to the Commander's representative on site, currently 45 CES/CEIE Environmental

Conservation office. Prior to entering the Property, the Grantee will notify the Commander's representative by telephone (321) 853-6438. One or more of Grantee's employees, agents, or representatives shall accompany Grantee's invitees while such invitees are on the Property.

3. Any property of the Air Force damaged or destroyed by the Grantee, its officers, employees, agents, or invitees incident to the exercise of the privileges herein granted shall be promptly repaired or replaced by the Grantee to the satisfaction of the Commander, or in lieu of such repair or replacement, the Grantee shall, if so required by the Commander, pay to the Air Force money in an amount sufficient to compensate for the loss sustained by the Air Force by reason of such damage to or destruction of Air Force property. Notwithstanding the foregoing, in no case will the Grantee's liability under this agreement exceed that allowable under applicable law or available appropriations.

4. The Air Force shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the exercise of the privileges granted under this Right of Entry, or for damages to the property of the Grantee or for damages to the property or injuries to the person of the Grantee's officers, employees, agents, or others who may be on the Property at their invitation or the invitation of any one of them, arising from Air Force activities on the Property.

a. The Grantee agrees to assume all risks of loss or damage to property and injury or death to persons by reason of the exercise of the privileges granted herein and expressly waives all claims against the Air Force for any such loss, damage, personal injury or death occurring as a consequence of the conduct of Grantee's activities under this Right of Entry. This provision shall survive the expiration or termination or revocation of this Right of Entry.

b. The intent of this provision is to shield the appropriations of the Air Force from burdens that may result from use by the Grantee of the property under this Agreement. The Grantee, as an instrumentality of the United States, is limited by Federal law as to the assumption of liability for its acts or omissions. Within its legal limitations and limitations on appropriations, the Grantee agrees to the following: 1) to be responsible for all costs of damages and injuries to persons, personal property and land caused by the Grantee's operations or activities under the terms of this agreement and to retain the responsibility on behalf of the United States to process and defend any claims for personal injury, or property damage arising from the Grantee's acts or omissions; 2) to use its appropriations and resources as required to pay any awards or claims, and to repair any damages to the property resulting from the Grantee's acts or omissions; 3) to use its appropriations and resources to reimburse the Air Force for any amounts paid or liability incurred by the Air Force under any suits, claims, demands, or actions of any kind that are in any way related to or arising solely under the Grantee's use of the property including, but not limited to amounts paid or liability incurred under all suits, claims, demands, or enforcement actions under applicable environmental laws and other laws regarding trespass, nuisance, or similar causes of action; whether arising during the Grantee's use of the property or after such use has ended; and 4) to use its appropriations or resources to reimburse the Air Force for all expenditures incurred if the Air Force chooses to undertake any study or remedial action to address contamination on the property resulting solely from the acts or omissions of the

Grantee. To satisfy these obligations, the Grantee agrees to seek appropriations if none are available at the time responsibility arises.

5. No alterations or construction will be done by the Grantee under the privileges of this Right of Entry.

6. The routes of ingress and egress for the Grantee, its officers, employees, and agents, shall be under the supervision of the Air Force caretaker representative to ensure compliance with established security procedures.

7. The Grantee will comply with the provisions of all applicable Federal, State, and local laws, rules, and regulations.

8. The Grantee will be solely responsible for compliance with all applicable environmental laws or other legal requirements in conjunction with its exercise of the privileges granted under this Right of Entry, including any taxes, fees, permits, fines, penalties, or other requirements or costs associated with any environmental compliance or violations related to its operations. The Grantee shall promptly take all steps necessary to clean up, abate, remove, or remediate any contamination for which it is responsible, including proper notification to regulatory authorities, and will promptly notify the Commander of any such events.

9. The Grantee shall comply with the Patrick Air Force Base spill prevention control and countermeasure plan, and hazardous materials/wastes plan.

10. All tools, equipment, and other property taken upon or placed upon the Property by the Grantee shall remain the property of the Grantee and will be removed by the Grantee upon expiration of this Right of Entry in accordance with Paragraph 12 below. The Grantee shall be solely responsible for securing its tools, equipment, and other personal property on the Property.

11. This Right of Entry may be relinquished by the Grantee on two (2) business days written notice to the Commander.

12. On or before the date of expiration of this Right of Entry, or its revocation, or its relinquishment by the Grantee, the Grantee shall, within such reasonable time as the Secretary of the Air Force may designate, remove all its personal property therefrom. If the Grantee shall fail or neglect to remove its property, then at the option of the Secretary of the Air Force, such property shall either become the property of the Air Force without compensation therefor, or the Secretary of the Air Force may cause the property to be removed at the expense of the Grantee, and no claim for damages against the Air Force or its officers or agents shall be created by or made on account of such removal and restoration.

13. No written communication under this Right of Entry shall be of any effect unless it is signed by the duly authorized representative of the Party giving such communication and delivered to the appropriate Party recipient as shown below.

a. Written communications to the Grantee shall be delivered by hand or by regular mail addressed:

Brevard County Office of Natural Management
Judge Fran Jamieson Way Bldg A219
Viera FL 32940

b. Written communications to the Air Force shall be delivered by hand or by regular mail addressed:

45 CES/CEI
Attn: Real Property Officer
1224 Jupiter Street
Patrick AFB FL 32925-3343

14. Nothing in this Right of Entry shall be deemed to release the Air Force from any liability it may have for cleanup, abatement, removal, or remediation of existing environmental problems under any applicable Federal or State environmental laws or regulations or to obligate the Grantee to undertake such actions or make the Grantee liable therefor under this Right of Entry.

15. The Grantee has inspected and knows the condition of the Property. It is understood that the Air Force is granting this Right of Entry without any representation or obligation on the part of the Air Force to make any alterations, repairs, or improvements to the Property.

16. The Grantee will reimburse the Air Force for any utilities and services the Air Force provides to the Grantee during the existence of this Right of Entry. The Grantee acknowledges and agrees that the Air Force is under no obligation to furnish any utilities or services.

17. The Grantee shall not remove or disturb, or cause or permit to be removed or disturbed, any historical, archeological, architectural, or other cultural artifacts, relics, vestiges, remains, or objects of antiquity. In the event such items are discovered on the Property, the Grantee shall immediately notify the Commander and protect the site and the material from further disturbance until the Director gives written approval to proceed.

18. The Grantee shall not discriminate against any person because of race, color, age, sex, religion, handicap, or national origin in the conduct of its activities hereunder.

19. This Right of Entry is effective only insofar as the rights of the Air Force in the property involved is concerned, and the Grantee shall obtain such permission as may be necessary on account of any other existing rights.

20. The Air Force may authorize use of the Property by others, subject to all of the terms and conditions of this Right of Entry. The Grantee may not authorize use of the Property by others. Use of the Property by others shall not relieve the Grantee of any of its obligations hereunder.

21. This Right of Entry may only be extended, modified, or amended by mutual agreement of the Parties in writing and signed by a duly authorized representative of each of the respective Parties hereto.

22. This Right of Entry may not be transferred or assigned except as expressly provided otherwise herein.

This Right of Entry is not subject to Title 10 U.S.C. § 2662.

(Remainder of this page intentionally left blank)

IN WITNESS WHEREOF, I have hereunto set my hand by direction of the Secretary of the Air Force this _____ day of _____, 20__.

THE UNITED STATES OF AMERICA
by the Secretary of the Air Force

By: _____
THOMAS E. PHILLIPS, GS-12
Real Property Accountable Officer

This Right of Entry, together with all its terms and conditions, is hereby accepted this
2 day of May, 2019

Brevard County

By: 
FRANK ABBATE
County Manager
Brevard County, Florida

As approved by Board 5/7/19

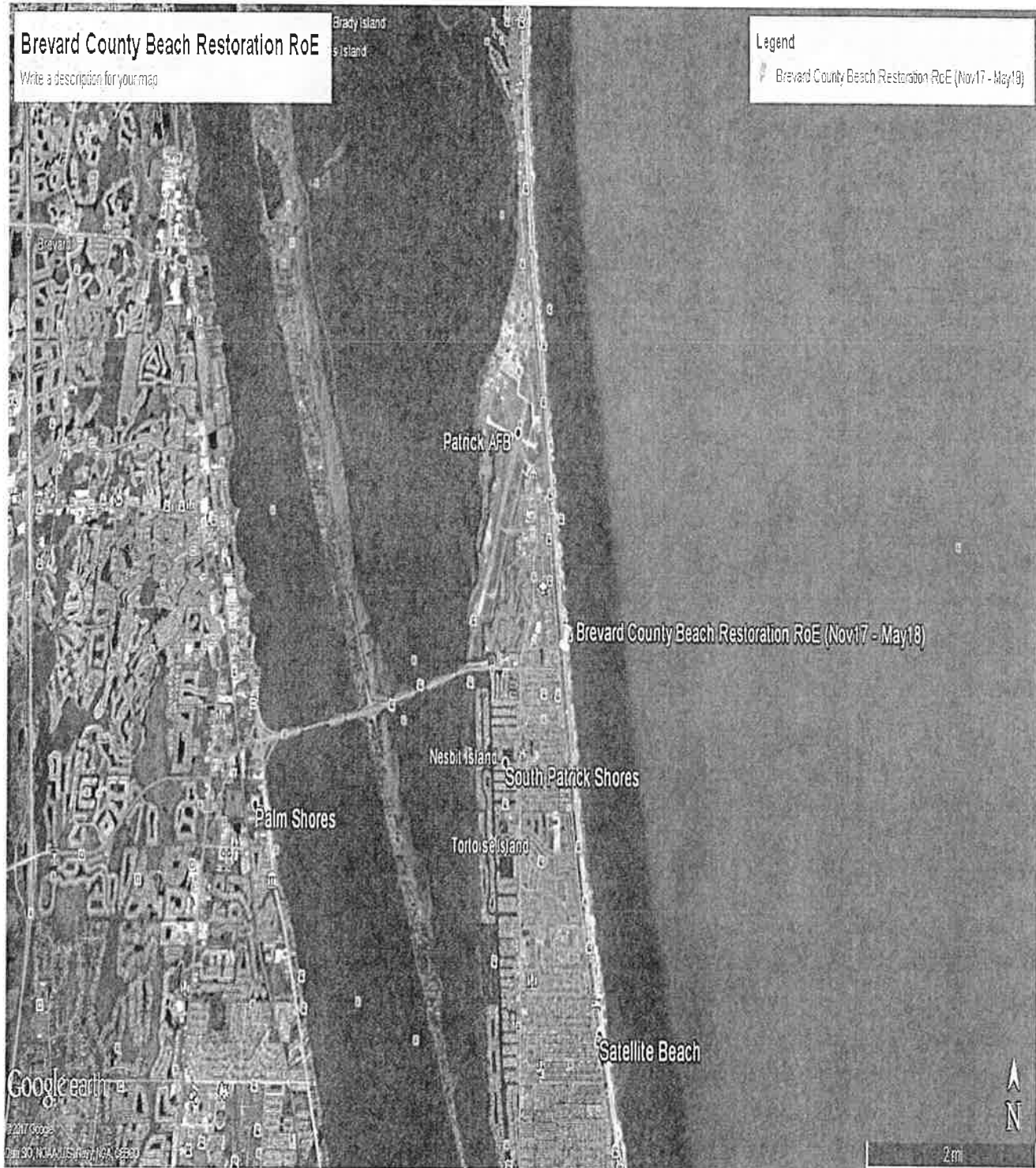
EXHIBITS

EXHIBIT A— DESCRIPTION OF PREMISES

The location requested by Brevard County Natural Resources Office is within Patrick AFB South Beach adjacent to SR 404, Pineda Causeway and SR A1A. Refer to the associated maps and photographs documenting the existing conditions (October 2017). The site described is a portion of disturbed beach/dune complex and coastal upland. This location has been used for this purpose under past Rights of Entry and a License for similar staging of beach/dune restoration equipment/sand, and beach access through dune cuts. The dune that will be cut under this Right of Entry has been re-planted several times with sea grape and sea oats after each use. The coastal upland is covered in mixed grasses and low-lying herbaceous vegetation that are periodically mowed. The overall physical condition of the site can be described as disturbed but comprised of healthy immature dune vegetation and maintained grasses.

EXHIBIT B—MAP OF PREMISES

B.1. Brevard County Beach Restoration RoE High View



Form approved by
SAF/GCN 9 Jan 14
Previous versions are obsolete

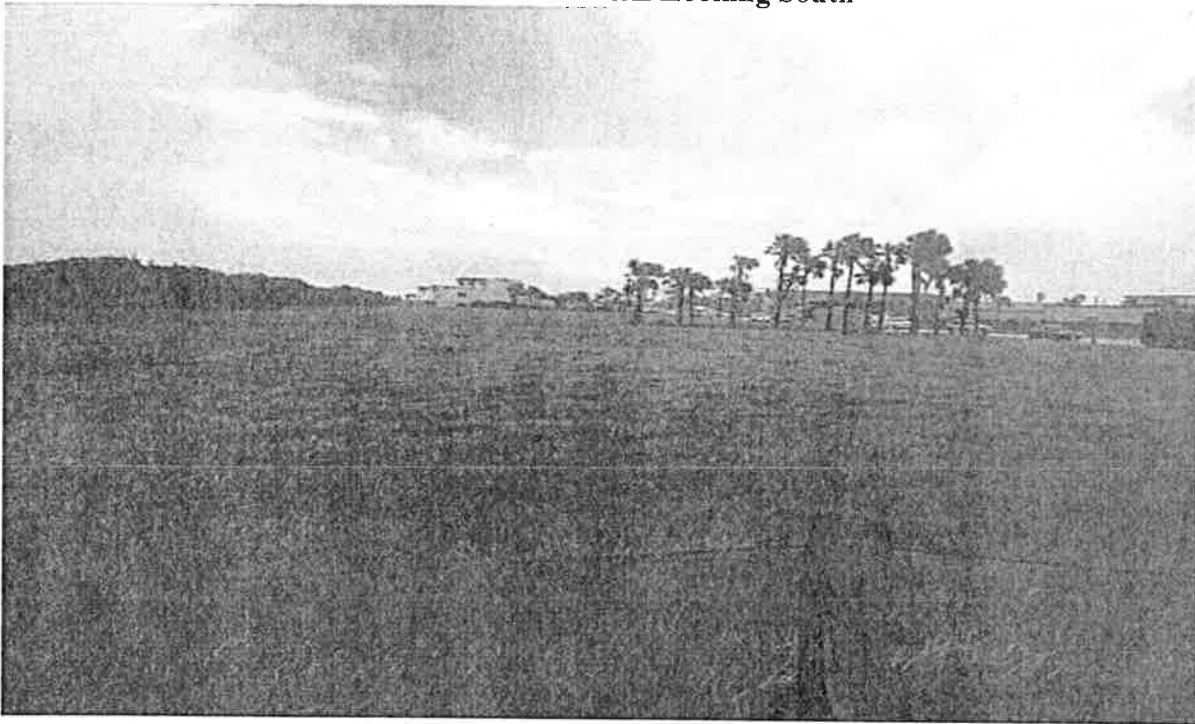
B.2. Brevard County Beach Restoration RoE Close View



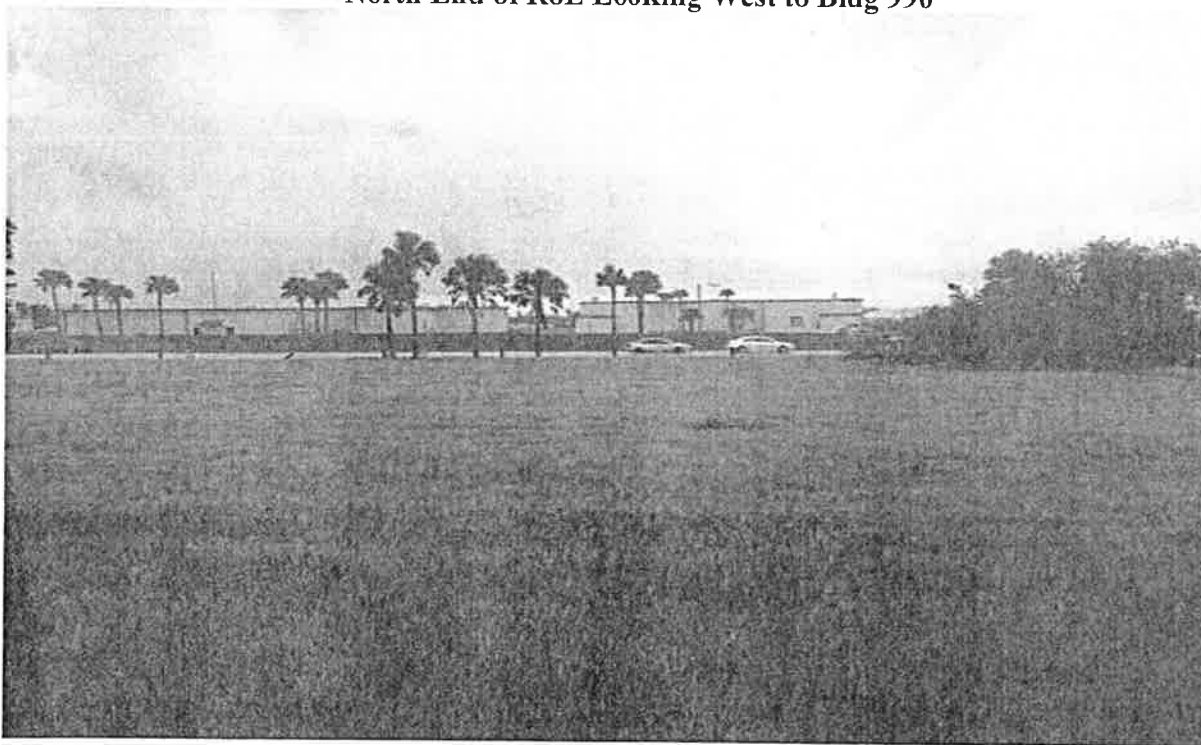
Form approved by
SAF/GCN 9 Jan 14
Previous versions are obsolete

B.3. Brevard County Beach Restoration RoE Detail View

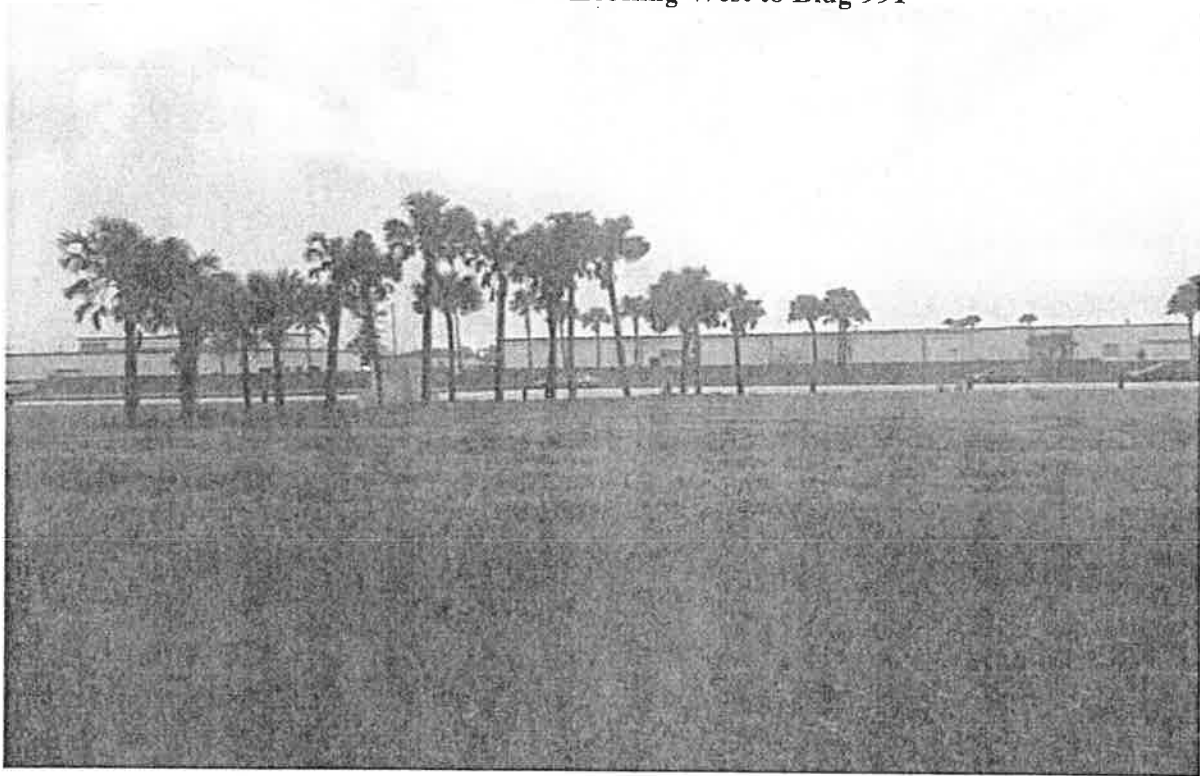
North End of RoE Looking South



North End of RoE Looking West to Bldg 990



Mid-Section of RoE Looking West to Bldg 991



South End of RoE Looking West to Pineda Causeway



South End of RoE Looking North

