

HB 52 – Tutka Bay Lagoon Hatchery – Sponsored by Rep. Vance

Briefing Paper

HB 52 – Land Summary

The bill removes approximately 123.45 acres from Kachemak Bay State Park (KBSP) that includes uplands surrounding the Tutka Bay Lagoon Hatchery (TBLH) and portions of Tutka Bay Lagoon. The bill adds three parcels (A-C on the map) totaling approximately 266.67 acres to KBSP in the Cottonwood-Eastland unit of the park. These parcels are contiguous with a portion of KBSP on the north side of Kachemak Bay about 17 miles northeast of Homer near East End Road. Parcel A would provide much needed road-based access to the underutilized Cottonwood Eastland unit of the park offering enhanced recreational opportunities. Parcels B and C would connect adjacent portions of KBSP harmonizing park management objectives.

The Disposal Issue

When the Alaska Legislature created KBSP in 1970 these lands were withdrawn from the public domain and designated as special purpose sites under Article VIII, section 7 of the Alaska Constitution. KBSP was created “in order to protect and preserve this land and water for its unique and exceptional scenic value”¹ and mandated that the lands and waters be managed as a scenic park. Being legislatively designated lands, the executive branch is prohibited from disposing of any real property interests, including granting leases and easements.²

State land disposal case law has developed over the last twenty years. These cases reveal a fact intensive inquiry to determine whether an agreement constitutes an unconstitutional disposal:

1. In 2000, the Alaska Supreme Court in *Northern Alaska Environmental Center v. State, Dep’t of Natural Resources*, adopted the functionally irrevocable test.³ The test does not focus on the wording of the permit or agreement, but instead considers “the likelihood of revocation” and “the long-term and harmful character of the environmental impact.” A significant investment in a project and the need for the project to continue to generate revenue pursuant to that investment means there is a low “likelihood of revocation” of any agreement related to that facility.
2. In 2013, the Alaska Supreme Court in *SOP, Inc. v. State*⁴ held that a “non-revocable ATV permit” created an easement and thus constituted an unconstitutional disposal of legislatively designated lands.

¹ AS 41.21.131(a)

² See *SOP, Inc. v. State*, 310 P.3d 962, 966-967 (Alaska 2013) [“This provision allowing the legislature to reserved recreational lands for public use, means that those lands cannot be conveyed by the executive branch for private use.”]

³ 2 P.3d 629 (Alaska 2000).

⁴ 310 P.3d 962 (Alaska 2013).

3. In the 2015 case *Nunamta Aulukestai v. State, Dept. of Natural Resources*, the Alaska Supreme Court determined boreholes represented a “long-term and harmful” impact to state lands under the functionally irrevocable test.⁵
4. Most recently, in 2020, in *SEAAC v. State of Alaska*, the above legal precedents and case law on land disposal were reaffirmed and further expanded suggesting that certain agreements between agencies may constitute a disposal.⁶

Applying the functionally irrevocable test, the TBLH, as operated by the Cook Inlet Aquaculture Association (CIAA), constitutes a disposal of legislatively withdrawn lands for the following reasons:

1. The plain language of ADF&G’s 2014 agreement with CIAA suggests a lease – and thus a disposal – of these lands. The agreement allows CIAA to operate the TBLH for twenty years. The agreement states that the parties would work towards transferring the TBLH facilities to CIAA.
2. DCCED has invested \$16.1 million to CIAA to operate the hatchery. DCCED wants a return on that \$16.1 million investment.
3. Similarly, the hatchery’s operational expenses are funded through cost recovery. This means the hatchery must continue to operate to ensure cost recovery.
4. To the extent boreholes have a long-term effect, the buildings and the operations within the lagoon have a long-term effect on those state park lands and waters.

To summarize, the terms of the ADF&G agreement, the use of cost recovery, and DCCED’s investment in the TBLH all suggest ADF&G cannot revoke at will its agreement with CIAA. Therefore, under the functionally irrevocable test, the TBLH constitutes an impermissible disposal of state park lands.

The KBSP Plan lists TBLH as incompatible because of this disposal problem. To acknowledge TBLH constitutes a disposal of legislatively withdrawn lands but is compatible would be inconsistent.

Conclusion

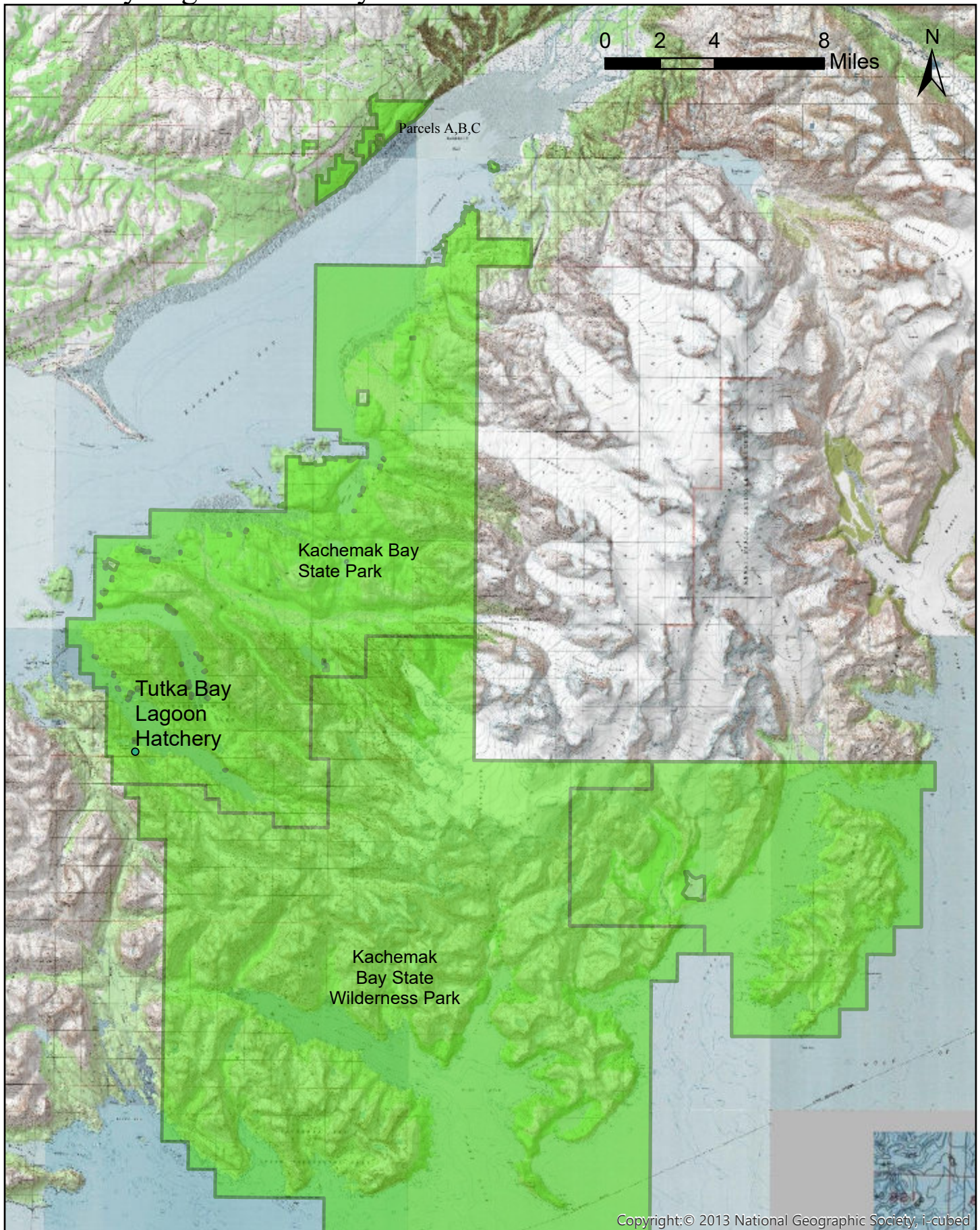
By legislatively removing TBLH from KBSP, HB 52 cures the disposal of these legislatively designated lands. Hatcheries, and in particular the applicability of the AS 16.05 programs, are not part of this bill. Whether TBLH should remain – on state public domain lands – is a separate issue.

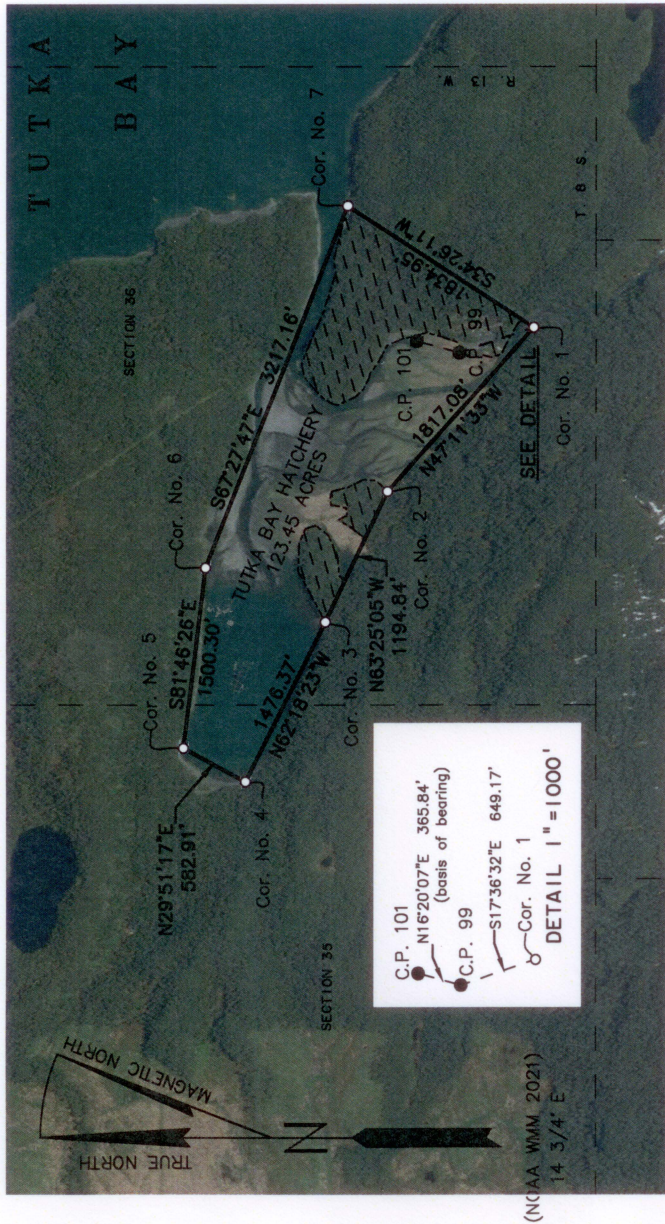
⁵ *Nunamta Aulukestai v. State, Dept. of Natural Resources*, 351 P.3d 1041 (Alaska 2015).

⁶ *SEAAC v. State of Alaska*, 470 P.3d 129, 136-141 (Alaska 2020).

Kachemak Bay State Park & State Wilderness Park Tutka Bay Lagoon Hatchery

Map for HB52





COORDINATE TABLE		
NAD83, STATE PLANE, ZONE 4, ALASKA		
CORNER #	LATITUDE	LONGITUDE
Cor. No. 1	59° 26' 03.12" NORTH	151° 24' 48.60" WEST
Cor. No. 2	59° 26' 15.00" NORTH	151° 25' 14.88" WEST
Cor. No. 3	59° 26' 20.04" NORTH	151° 25' 35.76" WEST
Cor. No. 4	59° 26' 26.52" NORTH	151° 26' 01.32" WEST
Cor. No. 5	59° 26' 31.56" NORTH	151° 25' 55.92" WEST
Cor. No. 6	59° 26' 29.76" NORTH	151° 25' 27.12" WEST
Cor. No. 7	59° 26' 18.24" NORTH	151° 24' 28.16" WEST
C.P. 99	59° 26' 08.172" NORTH	151° 24' 52.651" WEST
C.P. 101	59° 26' 12.651" NORTH	151° 24' 50.806" WEST

SEE TOPO DRAWING DATED 6-25-2012 FOR CP (CONTROL POINT) LOCATIONS

DATE OF SURVEY: SURVEYOR: MULLIKIN SURVEYS
 BEGINNING: NA P.O. Box 790, 381 E. Bonanza Ave.
 ENDING: NA Homer, AK 99603-0790
 (907)235-8975

STATE OF ALASKA
 DEPARTMENT OF NATURAL RESOURCES
 DIVISION OF MINING, LAND AND WATER
 ANCHORAGE, ALASKA

LEGAL DESCRIPTION EXHIBIT A

TUTKA BAY HATCHERY

LOCATED WITHIN
 PROTRACTED SECTIONS 35 & 36
 TOWNSHIP 8 SOUTH, RANGE 13 WEST
 SEWARD MERIDIAN, ALASKA

Containing 123.45 Acres more or less

SELDOVIA RECORDING DISTRICT

APPROVAL RECOMMENDED

DRAWN BY: M.R.S.
 DATE: 04/15/2021

STATEWIDE PLATTING SUPERVISOR DATE
 CHECKED: FILE No.:
 C, D, & JM EPF 20210012

SCALE: 1" = 1000'

NOTE:

PROPERTY CORNER LOCATIONS WERE DETERMINED UTILIZING GEO-REFERENCED SATELLITE IMAGERY. BEARINGS, DISTANCES AND COORDINATES ARE REPORTED USING THE NAD83 ALASKA STATE PLANE ZONE 4 COORDINATE SYSTEM.

BASIS OF BEARING IS FROM CP 99 TO CP 101.

PARCEL AREAS

UPLANDS: 38.28 Acres
 NON-UPLANDS: 85.17 Acres
 TOTAL PARCEL: 123.45 Acres

LEGEND

- CONTROL POINT - 2" AL. CAP ON 5/8" REBAR, LS 4469, 2012
- PROPERTY CORNER NOT MONUMENTED





Kachemak Bay State Park

- State Park (AS 41.21.131)
- State Wilderness Park (AS 41.21.140)
- State Park Managed Areas
- State Land
- Federal Land
- Native Land
- Borough / Municipal Land
- Private Land
- Roads



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Created: August 2020
 IJE, DNR, DMLW, RADS
 Projected Coordinate System: NAD 1983
 UTM Zone 6 North



0 0.075 0.15 0.3 0.45 0.6 Miles

