

Offered: 6/10/83

Original sponsor: Eliason

1 IN THE SENATE

BY THE RULES COMMITTEE

2

CS FOR SENATE BILL NO. 156 (Rules)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

THIRTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to the sale, lease, or grant of
7 state hatchery facilities."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 16.05.050 is amended by adding a new paragraph to
10 read:

11 (13) sell, lease, or grant a state hatchery facility to a
12 qualified regional aquaculture association formed under AS 16.10.380
13 or to a local nonprofit hatchery corporation if the sale, lease, or
14 grant is approved by the regional aquaculture association for the
15 region in which the hatchery facility is located.

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. SB 156
 Title Relating to state hatcheries
 Requested by House Finance Committee Date 6/17/83

II. FISCAL DETAIL

Agency Affected Department of Fish & Game
 Program Category Affected FRED Division
 BRU, Program, Or Subprogram(s) Affected _____
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		0				

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

IV. DATE 6/17/83 PREPARED BY Al Adams, Chair *BPA*
 AGENCY House Finance Committee
 Original: Legislative Finance PHONE 465-3706
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

The following individuals may testify on SB 156:

A representative of the Department of Fish & Game

Bill Sheffield, Governor

DEPARTMENT OF FISH AND GAME

P.O. Box 3-2000
Juneau, Alaska 99802

(907) 465-4160

December 24, 1982

Representative Bettisworth
P.O. Box 80288
College, Alaska 99708

Dear Representative Bettisworth:

The attached correspondence is related to the hatchery transfer issue and is in response to your request for an update on this issue. Shortly after the legislature adjourned last spring, we received the intent language (attached for your reference). Around this same time I was appointed Director of the FRED Division (6-1-82) and as soon as was practical I met with Armin Koenig of the Prince William Aquaculture Association and Ron Wendte of the Southern Southeast Regional Aquaculture Association. Also present was our Contracts and Lease Officer Ernest Greek. We discussed in fairly general terms the possible range of options that might be available for transfer of the public hatchery facilities to the private sector. My rough draft outline of the six areas we needed information about is attached. These are (1) biological, (2) legal, (3) land status, (4) economics, (5) public acceptance, (6) background summary of events.

The Commissioner approved this general approach and instructed me to prepare the information for consideration by the Hatchery Funding Steering Committee appointed by the Governor earlier in the year. The Commissioner indicated at the next Hatchery Funding Steering Committee meeting that he intended to comply with the legislative intent by providing information to the committee and that the committee would develop the options and recommendations and suggest a course of action to the Governor. It was assumed that if the Governor didn't deal with the issue by executive order, he would refer it to the 1983 legislature for consideration.

Shortly after my first meeting with Armin and Ron I received a progress report from Ernest Greek that outlined some of the options we had discussed previously and what was being done about them (memo attached 7-28-82). On July 29, the Governor's Hatchery Funding Steering Committee met again. We reported to the committee the progress being made on the things we were involved in. The Commissioner gave this report. A sub-committee of the Fish Council gave their report and the Executive Director of the United Fishermen of Alaska requested that public meetings be held in October and

November to discuss the issues with the fishermen and the general public. On July 30, the committee met again and made some assignments. The "white paper" (historical document) was to be the responsibility of the Department of Fish and Game. Commissioner Skoog assigned me the responsibility of completing that report. The Division of Policy, Development and Planning and Division of Budget and Management was to look at the policy development that led us to where we are and what the spending limit might do. I subsequently incorporated their work on the spending limit in the "white paper". The committee recommended that an issue paper be developed with recommendations and alternatives and be presented at several public meetings throughout the state. Feedbacks from these meetings was to be sent to the Governors office.

Returning to the outline I mentioned earlier, I'll give you a run down on what I know about the six general areas.

1. Biological - The department assumes that whatever biological goals and constraints are set they will be negotiated between the leasee and the State. We have never questioned the private sectors ability to run hatcheries. Soon after we received the legislature intent, I took inventory at the three hatcheries in question and sent a letter to the associations concerned and assured them that if they took over the facilities that it could be done with the inventory as of 6-1-82. This was done to alleviate their expressed fears that the FRED Division would strip the facilities since we might be losing them. Also, I had to operate these facilities as if they would not be transferred and didn't want to have my motives questioned every time a piece of equipment was moved.
2. Legal - On July 28, Ernest Greek requested assistance from the Attorney Generals office and that correspondence is attached.
3. Land Status- We checked with the land owners of the facilities in question and it is our perception at this time that all permits, rights, leases and other problems in this general area will be no deterrent to the transfer.
4. Economic Questions - This of course is none of Fish and Games business. We assume someone who wants the hatchery will be able to pay for them and also fund the operational cost. If the money is to be provided by the State, the Department of Commerce would be involved in this question.
5. Public Opinion - No public meetings were held. The election, change in administration, resignation of the Executive Director of UFA and numerous other events collectively prevented any public meetings from being held. In my travels this past six months I have picked up some feedback which I have passed on to interested parties. A combination of the legislature, the UFA, the administration and the association hoping to receive the facilities will have to address this issue at some point.

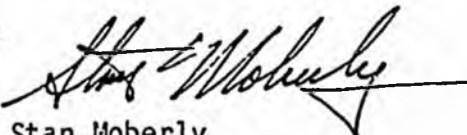
6. "White Paper" - The "white paper" is complete and I assume the Commissioner's office will distribute it in early January in draft form for comments. The Fish Council members received draft copies of the report the 23rd of November and as of this date we have recieved no constructive criticism.

I was informed December 23 that Senator Eliason has prefiled legislation concerning the transfer of public hatcheries to the private sector. With a change in administration and the resignation of Commissioner Skoog, I do not know the status of the Hatchery Funding Steering Committee. I believe what needs to be done at this point is for some "group" to bring all the elements together so they have structure and continuity. This will help the legislature deal with the issue. The Department has not recommended options concerning the transfer but has instead scoped out those public policy questions we feel will need to be addressed if the transfer issue is to be resolved. That brings you up to date on the events that have transpired in the past six months.

The Legislature also requested that the Administration coordinate a review and overall re-evaluation of the relationship of State operated hatcheries and Private nonprofit hatcheries and to propose a overall state policy to present to the 1983 legislature. I do not know what was done by the Administration in this regard. We in the Department and especially the FRED Division would welcome a further definition of roles. The rehabilitation and enhancement program has come a long way in the last decade, and I recognize as do my top managers that we need more definition of roles the state and private sectors are intended to play.

I hope you won't mind my sending copies of this letter to the Regional Association and others concerned. They also have requested an update on this issue.

Sincerely,



Stan Moberly
Director
Division of Fisheries Rehabilitation,
Enhancement and Development

cc: Armin Koenig
Peter Esquire - NSAA
Ron Wendte - SSAA
Tom Mears - Cook Inlet
Cass Parsons - Executive Director, UFA
Senator Eliason

RESOLUTION
OF THE
ALASKA FISHERIES COUNCIL
November 23, 1982

WHEREAS, the Fisheries Rehabilitation, Enhancement & Development Division of the Alaska Department of Fish and Game has played a vital role in the State of Alaska's Salmon Enhancement Program; and

WHEREAS, the Fisheries Rehabilitation, Enhancement & Development Division shall continue to play a vital role in the support of the Salmon Enhancement Program by providing technical services such as pathology, genetics, and limnology, as well as to produce fish in areas not suited for cost recovery for the benefit of all Alaskans, be they subsistence, sport, or commercial users, and continue to develop new biotechnology; and

WHEREAS, the People of the State of Alaska have expressed their edict by imposing a spending limit as an amendment to the Constitution of the State of Alaska; and

WHEREAS, the provisions of the spending limit may cause funding problems that jeopardize the statutorily required and other vital contributions of the Fisheries Rehabilitation, Development & and Enhancement Division to the Alaska Salmon Enhancement Program; and

WHEREAS, the policy of the State is to promote enhancement of the State's salmon fisheries through private, non-profit regional aquaculture associations comprised of all of the various user groups, thereby furthering a valid public purpose; and

WHEREAS, the search for viable options has been exhaustive and but one found; NOW THEREFORE BE IT

RESOLVED that the Alaska Fisheries Council respectfully recommends to the Governor of the State of Alaska that legislation be introduced by his hand to grant authority to the Commissioner of the Department of Fish and Game to sell or lease State-owned salmon hatcheries to Qualified Regional Aquaculture Associations, and further be it

RESOLVED that the Alaska Fisheries Council respectfully recommends to the Legislature of the State of Alaska that said legislation be enacted into law, and further be it

RESOLVED that the Commissioner of the Department of Fish and Game initiate sincere negotiations with those Qualified Regional Aquaculture Associations who apply to lease or buy state-owned salmon hatcheries within their respective regions and that said negotiations be concluded in a timely fashion.

Signed,

Curt Kerns, Chairman
Alaska Fisheries Council



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

MEMORANDUM

To: The Honorable Bill Sheffield
Governor

From: Curt Kerns, Chairman *Curt Kerns*
Alaska Fisheries Council
Office of the Governor

Subject: AFC Resolution of November 23, 1982

Date: January 3, 1983

The Alaska Fisheries Council respectfully requests your consideration of the enclosed resolution and accompanying draft legislation.

The resolution and legislation are the cumulation of work first begun in July of 1981 when Budget and Management first flagged FRED Division operating and maintenance funding as an area of potential problems, given the imposition of the spending limit. A cabinet-level steering committee and then a working group were formed. A number of options were reviewed; the steering committee narrowed the list to five. After additional study, the Alaska Fisheries Council met to review the options. Four have significant constitutional or political problems. The remaining option -- selected transfer -- while not free of objections, was judged worthy of your consideration.

Should your administration make the decision to introduce the enclosed legislation, passage of the bill and subsequent transfer of selected FRED production facilities to the private sector will not be a panacea in that FRED budgetary requirements will not be reduced. Future increases, however, will not grow as rapidly without transfer. If Alaska is to have a competitive and healthy salmon industry on into the future, FRED will need to be funded at a rate commensurate with other A.D.F. & G. divisions.

A plethora of background materials are available. If your office requires further input, please contact us.

Enclosures

Curt's Copy

MEMORANDUM

State of Alaska

TO: Earnest Creek
 Contracts & Facilities Office
 Division of Administration
 Department of Fish & Game

DATE: September 8, 1982

FILE NO: 365-106-13

TELEPHONE NO: 465-2605

FROM: WILSON L. CONDON
 ATTORNEY GENERAL

SUBJECT: Authority to Transfer Hatcheries

By: John B. Gagnier
 Assistant Attorney General
 Department of Law

RECEIVED
 SEP 14 1982

You have asked several questions regarding the Department of Fish and Game's proposed transfer of three state hatcheries to non-profit regional aquaculture associations. Specifically, you wish to know whether there is any bar to a negotiated transfer to a selected transferee, and what types of transfer are permissible. We conclude that Fish and Game currently may not undertake any type of transfer, since no statutory authority for a transfer now exists. If the legislature does grant the necessary power to Fish and Game, it will be able to do a negotiated transfer, but will not be able to give up ownership without receiving fair value for the facilities.

Lack of statutory authority. Fish and Game has no specific authority to dispose of property. AS 16.05.050(3) authorizes the commissioner to "design and construct" hatcheries, but not to lease or sell them. Similarly, both AS 16.05.020, the statute listing the commissioner's broad functions, and AS 16.05.092, the statute broadly defining the powers of the FRED division (which runs the hatcheries), are silent as to Fish and Game's and/or FRED's power to dispose of them. There is no Alaska constitutional provision or judicial decision expressly requiring that an executive department have explicit statutory authority before it may dispose of state property. But this is the general rule of law followed elsewhere, and one must presume that the rule applies in Alaska, too.

This general rule is reflected in the myriad of cases concerning disposition of state property (generally land) by sale or lease, virtually all of which discuss the statutory basis for the transfer. Many of these cases can be found under West's Key Number States 89. "It is a well settled principle of law that title to government property may pass only in the manner prescribed by the duly constituted legislative body and that title to any such property may not be forfeited through the oversight, carelessness, negligence or even intentional conduct of any of the agents of the government." State v. West, 229 S.E.2d 826, 831-32 (N.C. App. 1976), aff'd, 235 S.E.2d 150 (N.C. 1977). See also Finch v. State, 124 So.2d 875, 877 (Ala. 1960) (within

*Contract for
 Acquisition
 Contract for
 going to
 Selma*

Earnest Creek
Contracts & Facilities Officer
Department of Fish & Game
366-086-83

September 9, 1982
Page 2

constitutional limitations, legislature has power to provide for leasing of state property, and may set limits on length of leases and determine general policy concerning them); State Land Board v. Heuber, 548 P.2d 1323, 1328 (Or. App. 1976) (conveyance by state is valid only if done with proper statutory authority); 5B G. Thompson, Real Property § 2720 (1978 repl. ed.) (state may dispose of lands through the legislature; state officers may act only in accordance with constitution and statutes); 72 Am. Jur.2d States §§ 66, 67 (1974).

The necessary statutory authority to sell or lease cannot be found in general grants of power made by the legislature to state officials. Samsell v State Line Development Co., Inc., 174 S.E.2d 318 (W.Va. 1970), invalidated a mineral lease made in 1962 by the state director of natural resources. The legislature had in 1961 vested title to state land in the Public Land Corporation, of which the natural resources director was secretary, and the corporation had not ratified the lease. The court declined an invitation to uphold the lease on the basis of a general statute allowing the director to execute contracts and agreements in the name of the state.

Another instructive case is Central Advertising Co. v. Michigan State Highway Commission, 172 N.W.2d 432 (Mich. 1969). There the highway commission attempted to place a restrictive covenant banning roadside advertising on some excess land it was selling. In the absence of any statutory authority for this covenant, the court found, its inclusion was beyond the commission's power. Again the court declined to find the requisite authority for the covenant in the statute conferring general powers on the commission.

We would conclude, then, that before Fish and Game can transfer operation of its hatcheries to an aquaculture association, either by sale or lease, the legislature must specifically authorize Fish and Game to make such a transfer. Perhaps an amendment could be proposed to AS 16.05.050(3), which would allow the commissioner to lease or sell the "hatcheries, pipe lines, rearing ponds, fishways, and other projects beneficial for the fish and game resources of the state" that the subsection now empowers him to construct.

Incidentally, if the hatcheries could be regarded as surplus property, then the Department of Administration currently has the power to dispose of them, by sale or lease, under AS 44.71.010. If, say, the FRED division were unable to operate them because of manpower shortages caused by budget constraints, the hatcheries might be properly regarded as surplus property.

and disposition under AS 44.71.010 might be appropriate. When, however, the decision to transfer operations to the aquaculture associations reflects a department policy determination, invocation of AS 44.71.010 would not in our opinion be proper.

Negotiated transfer. On this question, we refer you to a May 28, 1980 informal opinion of this office, which is attached to this memorandum. While that opinion is directly concerned with disposal of surplus property under AS 44.71.010 (discussed above), the principle is the same. Competitive bidding is required only when specified by statute. Since there is no statute here mandating such bidding, a negotiated transfer is permissible. We would repeat the observation contained in the 1980 informal opinion, though: any transfer agreement (assuming that the requisite statutory authority is obtained) should state why Fish and Game believes the transfer to be in the state's best interest.

Permissible types of transfer. On this question, too, we refer you to another recent informal opinion, this one dated March 30, 1982, and dealing with the very issue of hatchery transfers. That opinion is also attached to this memorandum, and we believe answers the question you pose. In addition, we note that any transfer without compensation of the hatcheries, either as an outright grant or under a "performance purchase" agreement (automatic transfer after a number of years of successful operation by the aquaculture association), would seem to be inconsistent with AS 16.10.500-.620, the fisheries enhancement loan program. AS 16.10.510 authorizes loans (not grants) to certified aquaculture associations to construct hatcheries (under AS 16.10.375-.475). It would be difficult to square this legislative directive with a Fish and Game decision to turn over gratis to the associations hatcheries that Fish and Game built with its own funds. While the legislature has made direct appropriations to aquaculture associations (e.g., § 3, ch. 42, SLA 1982), these grants have not been specifically for the purpose of constructing hatcheries. Of course, the legislature (subject only to constitutional public interest requirements) could authorize a transfer at less than fair market value.

To sum up, then, we believe that the three hatcheries cannot at present be either sold or leased by Fish and Game, because of the lack of statutory authority for hatchery transfer. If the legislature sees fit to confer such authority, then Fish and Game will be able to lease the hatcheries or sell them for fair value to an aquaculture association with which Fish and Game

Earnest Creek
Contracts & Facilities Officer
Department of Fish & Game
366-086-83

September 9, 1987
Page 4

has negotiated an agreement. However, the department will not be able to transfer the hatcheries at less than fair market value in the absence of specific legislative authority to do so.

Please feel free to contact us if you have additional questions.

JBG:d1m

Attachments

MEMORANDUM

State of Alaska

TO: Officer of the Attorney General
Department of Law
Juneau

DATE: July 28, 1982

FILE NO:

ATTENTION: G. Thomas Koester

TELEPHONE NO:

465-4120

FROM: Earnest Creek
Contracts & Facilities Officer
Division of Administration
Department of Fish and Game

SUBJECT:

Hatcheries Transfer

We are anticipating in the near future the decision to transfer the Cannery Creek and Main Bay Hatcheries to Prince William Sound Aquaculture Corporation, and the Beaver Falls Hatchery to Southern Southeastern Regional Aquaculture Association, Inc.

Consequently, we need your opinion re:

1. State's ability to transfer property to a selected transfer;
2. Fish and Game's authority to transfer by:
 - (a) Sublease
 - (b) Performance Purchase (pass title after successful operation for 5 to 10 years)
 - (c) Grant.

Thank you for your help.

ERG/hb

MEMORANDUM

State of Alaska

The Honorable William R. Hudson DATE May 28, 1980
Commissioner
Department of Administration FILE NO J-66-737-80

TELEPHONE NO

FROM AVRUM M. GROSS SUBJECT Negotiated sale of excess
ATTORNEY GENERAL or surplus housing

By:
Rodger W. Pegues
Assistant Attorney General

You have asked whether you may dispose of surplus housing to employee-residents by negotiation.

No statute requires disposal by bid, and the applicable statute, AS 44.71.010, expressly allows for disposition "on the terms [you] consider for the best interests of the state." Some record of how the chosen terms serve the best interests of the state should be a part of the file. Otherwise, there are no other requirements.

The applicable regulations, 2 AAC 20.010(a)(1), allows either a negotiated or competitive sale.

There is no constitutional requirement for a competitive sale. Such requirements as exist are to be found in the statute. Libby v. City of Dillingham, P.2d _____ (Alaska Sup. Ct. Op. No. 2097, May 23, 1980). Here, it is the best interests of the state which must be served.

RWP:cb

MEMORANDUM

State of Alaska

TO W.I. "Bob" Palmer, Coordinator
Office of Special Projects
Office of the Governor

DATE: March 30, 1982

FILE NO: J66-197-82

TELEPHONE NO: 465-3600

FROM WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Transfer of operation
of state hatcheries

By: *L. Davis*
Laura L. Davis
Assistant Attorney General

This will confirm our telephone conversation in response to your memorandum of September 9, 1981. We see no problem with the transfer of responsibility for operation of state-owned fish hatcheries to the private nonprofit aquaculture associations whose membership is directly benefitted by the hatcheries' work. However, if ownership of the hatcheries is transferred, the state must receive fair value for the facilities. If the associations are unable to purchase the facilities, the state may lease them for a nominal fee and provide that the associations shall operate and maintain them. Our opinion is based upon the following legal principles and reasoning.

The Alaska Constitution prohibits the transfer of public property except for a public purpose. Alaska Const., art. IX, § 6. Generally, this requires that the state receive fair value for property which it disposes of. The Department of Administration is by statute responsible for disposing of surplus or obsolete property on terms which are "in the best interests of the state." AS 44.71.010.

The value of a salmon hatchery is in its ability to enhance the supply of fish to be caught by commercial and sport fishermen. Since the ownership of hatchery-produced fish is not retained after they leave the hatchery, the market value of a hatchery is difficult to determine. The establishment of a hatchery serves a public purpose by supporting both commercial and recreational fishing in the state. See Wright v. City of Palmer, 468 P.2d 326 (Alaska 1970), holding that encouraging industrial development is a public purpose. As a hatchery becomes productive, its economic benefit is realized directly by fishermen. In transferring responsibility for a hatchery to the people directly benefitted, the public purpose clause requires that the state obtain terms which recover as much of the public contribution as is reasonable under the circumstances.

We conclude that a simple transfer of ownership without compensation to the state would be suspect. If ownership

W.I. "Bob" Palmer, Coordinator
Office of Special Projects

March 26, 1982
Page #2

is transferred, the state should receive reasonable compensation for its costs. As an alternative, a lease of the hatchery for a nominal fee with the lessee paying for operation and maintenance and indemnifying the state from liability for any harm arising from operation of the hatchery would be consistent with the public purpose clause. See Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963), regarding a similar lease of a public hospital to a nonprofit corporation.

We note that the general obligation bonds which were issued to pay for the hatcheries do not require the state to continue ownership or operation of the hatcheries. 1974 Alaska Sess. L., ch. 133; 1976 Alaska Sess. L., ch. 214; 1978 Alaska Sess. L., ch. 140; 1980 Alaska Sess. L., ch. 91. However, the money received from those bond issues may not be spent for any other purpose without an appropriation. There is a legal question as to whether money received from a bond issue but not spent for the purposes for which the bonds were authorized may be reappropriated for another public purpose or must be used to redeem the bonds. We will defer addressing this question until it is directly presented. We hope that this answers your questions.

LLD/pjg

cc: Hon. Jim Duncan
House of Representatives

Offered: 3/29/83
Referred: Finance

Original sponsor: Eliason

1 IN THE SENATE

BY THE RESOURCES COMMITTEE

2

CS FOR SENATE BILL NO. 156 (Resources)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

THIRTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

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For an Act entitled: "An Act relating to the sale, lease, or grant of
state hatchery facilities."

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* Section 1. AS 16.05.050 is amended by adding a new paragraph to

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(13) sell, lease, or grant a state hatchery facility to a

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Introduced: 3/1/83
Referred: Resources
and Finance

1 IN THE SENATE

BY ELIASON

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SENATE BILL NO. 156

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

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Offered: 6/1/83
Referred: Rules

Original sponsor: Eliason

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2 CS FOR SENATE BILL NO. 156 (Finance)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 THIRTEENTH LEGISLATURE - FIRST SESSION
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Amendments suggested by
Jerry McCutcheon

Offered: 6/10/83

Original sponsor: Eliason

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if each sale, lease or grant is approved by the legislature
by law.