

HOUSE  
COMMITTEE REPORT

(11)

Date referred: 3/7/86

FURTHER REFERRALS:

DATE: 3/19/86

The FINANCE Committee has considered HB 605

"An Act establishing the Shuyak State Game Refuge."

and recommends:

- ~~[ ]~~ do pass
- [ ] do not pass
- [ ] do pass with attached amendment(s)
- [ ] no recommendation
- [X] replace with CS HB 605 (Fin) [X] same title
- [ ] new title

and recommends DO PASS

[ ] further referral to the \_\_\_\_\_ Committee

and attaches:

- [ ] letter of intent
- [ ] first fiscal note
- [ ] new fiscal note
- [X] zero fiscal note 2 ea. 3/4/86 + 2/28/86 (same F.N.'s)

SIGNING DO PASS:

*Robert H. Adams*  
*John Campbell*  
*Ray Duncan*  
*Ronald J. Jarm*  
*Pat Kourchot*  
*Rich Verly (DO PASS)*  
*Alvin Tiffin*  
*John [unclear]*

SIGNING OTHER RECOMMENDATIONS:

*Mike [unclear]*  
 NO REC. I DROPT  
 Sen. Galt NO REC

*Robert H. Adams*  
Chairman

STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date : \_\_\_\_\_

**REQUEST**

(Fin)

Bill/Resolution No. : CSHB 605 (700) No. 1  
Title : Shuyak State Game Refuge

Sponsor : Rep. Thompson  
Requestor : House Resources Committee  
Date of Request : March 3, 1986

**FISCAL DETAIL**

Agency Affected : Natural Resources  
BRU : Land Management

Components : \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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**FUNDING : (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

**POSITIONS :**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS :** Attach a separate page if necessary

Prepared by : Carol Wilson  
Division : Commissioner's Office

*Carol Wilson*

Phone : 465-2400  
Date : 3/4/86

Approved by Commissioner : *Wm D Arnold, Deputy*  
Agency : Natural Resources

Date : 3/4/86

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

# STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : \_\_\_\_\_

**REQUEST**

Bill Resolution No CS HB 605 (Res) No 2  
 Title : An act establishing Shuyak State Game Refuge

Sponsor : Representative Thompson  
 Requestor : Dept. of Fish and Game  
 Date of Request : \_\_\_\_\_

**FISCAL DETAIL**

Agency Affected : Dept. of Fish & Game  
 BRU : Habitat and Game Divisions

Components : Operating and Capital Budgets

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		-0-				
TRAVEL		-0-				
CONTRACTUAL		-0-				
SUPPLIES		-0-				
EQUIPMENT		-0-				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>		<b>-0-</b>				

CAPITAL		-0-				
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REVENUE						
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**FUNDING : (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

**POSITIONS :**

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Roland Shanks   
 Division : Commissioner's Office

Phone : 465-4100  
 Date : February 28, 1986

Approved by Commissioner : Donnell Polensworth  
 Agency : Department of Fish and Game

Date : 2-28-86

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Original sponsor: Thompson

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 605 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act establishing the Shuyak State Game Refuge."

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

8 \* Section 1. AS 16.20 is amended by adding a new section to read:

9 Sec. 16.20.035. SHUYAK STATE GAME REFUGE. (a) The following  
10 state-owned uplands and all uplands acquired by the state after the  
11 effective date of this Act lying within the area described in this  
12 subsection are established as the Shuyak State Game Refuge:

13 (1) Beginning at the E 1/16th corner common to Sections 23  
14 and 26, T18S, R19W, S.M.; then south-southwesterly approximately 8.86  
15 miles to the section corner common to Sections 31 and 32, T19S, R19W,  
16 S.M., and Sections 5 and 6, T20S, R19W, S.M.; then westerly along the  
17 township line between Townships 19 and 20S, Ranges 19 and 20W, S.M.,  
18 approximately 2.5 miles to the 1/4 corner common to Section 35, T19S,  
19 R20W, S.M., and Section 2, T20S, R20W, S.M.; then southerly along the  
20 north-south centerline of Section 2, T20S, R20W, S.M., approximately  
21 0.3 miles to the intersection of the mean high tide line of Shuyak  
22 Strait; then meandering in a counter-clockwise direction easterly,  
23 northerly, westerly, and southerly to the intersection of the mean  
24 high tide with the section line common to Sections 15 and 16, T18S,  
25 R19W, S.M.; then south approximately 1.25 miles to the section corner  
26 common to Sections 22, 27, 28 and 21, T18S, R19W, S.M.; then east 1.75  
27 miles between Sections 22 and 27, 23 and 26 to the E 1/16th corner  
28 common to Sections 23 and 26, T18S, R19W, S.M.; to the point of begin-  
29 ning; and

1 (2) Big Fort Island, Little Fort Island, the Perevalnie  
2 Islands and all other islands, islets, pinnacles and rocks lying  
3 easterly of and within one mile of the easterly shore of the lands  
4 described in (1) of this subsection.

5 (b) The Shuyak State Game Refuge is established to provide the  
6 following:

7 (1) protection and enhancement of habitat;

8 (2) continued opportunity for recreational uses, including  
9 fishing and hunting, and continued trapping and commercial fishing;

10 (3) opportunity to view, photograph, study, and enjoy the  
11 various species of plants and wildlife of the refuge.

12 (c) If the Kodiak Island Borough relinquishes to the state any  
13 state land selected by the borough within the following parcels, that  
14 land becomes part of the Shuyak State Game Refuge:

15 (1) Township 18 South, Range 19 West, Seward Meridian  
16 Sections 26 - 28

17 Sections 33 - 35

18 (2) Township 19 South, Range 19 West, Seward Meridian  
19 Section 3

20 Section 4

21 Section 6: S1/2

22 Sections 7 - 10

23 Sections 16 - 21

24 Sections 29 - 32

25 (3) Township 19 South, Range 20 West, Seward Meridian  
26 Section 1: S1/2

27 Section 2: S1/2

28 Section 10: SE1/4

29 Sections 11 - 16

1                   Sections 20 - 29

2                   Sections 32 - 36

3                   (4) Township 20 South, Range 20 West, Seward Meridian

4                   Section 2

5                   Section 3

6                   (d) Egress and ingress to and from private and borough property  
7 within or adjacent to land described in (a) of this section shall be  
8 provided through the reservation by the Department of Natural Re-  
9 sources of a 200-foot easement traversing Section 26, T18S, R19W,  
10 S.M.; Sections 15, 16, 21, and 22 of T19S, R19W, S.M.; and Section 32,  
11 T19S, R19W, S.M. The specific locations of the easements shall be  
12 agreed to by the Department of Fish and Game, the Department of Natu-  
13 ral Resources, and the Kodiak Island Borough. If land is conveyed to  
14 the state as provided in (c) of this section, the easements shall be  
15 reserved so as to continue through that land.

16                   (e) Management of the surface and subsurface estate is the  
17 responsibility of the Department of Natural Resources. Actions by the  
18 Department of Natural Resources that affect the habitat shall conform  
19 with a management plan proposed and adopted by the Department of Fish  
20 and Game in accordance with the Administrative Procedure Act (AS 44.-  
21 62), after public hearings and following consultation with the Kodiak  
22 Island Borough.

23                   (f) The Board of Fisheries and the Board of Game shall adopt  
24 regulations governing the taking of fish and game within the Shuyak  
25 State Game Refuge to implement (b) of this section.

26                   (g) To the extent that funds are available, the commissioner of  
27 natural resources shall identify the boundaries of the Shuyak State  
28 Game Refuge by surveying and posting each inland boundary described in  
29 (a)(1) of this section, or as added under (c) of this section, at its

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beginning and its end.



Amend CSRB 605 (Res)  
as follows...

Amendment proposed  
by Phil Holdsworth

Suggested language as a substitute for Sec. 16.20.035(e) -  
Pg. 3. Lines 16-19

(e) Management of the surface and subsurface estate is the responsibility of the Department of Natural Resources. Any actions by the Department of Natural Resources which affect the habitat shall be in conformity with a plan proposed and adopted by the Department of Fish and Game in accordance with the Alaska Administrative Procedure Act (AS 44.62), after public hearings and following consultation with the Kodiak Island Borough.



**STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
BILL ANALYSIS**

HB 605

DEPARTMENT <b>Fish and Game</b>	DIVISION <b>Habitat</b>	BILL NUMBER <b>HB 605</b>	SPONSOR <b>Representative Thompson</b>
DEPARTMENT POSITION <b>Support</b>			
PREPARED BY <b>Habitat Division</b>	DATE <b>2/25/86</b>	COMMISSIONER'S SIGNATURE <i>Don Callersworth</i>	DATE <b>2-28-86</b>

**SUMMARY**

OTHER AGENCIES AFFECTED BY BILL <b>DNR</b>	CONSTITUENT GROUP(S) AFFECTED BY BILL
ORGANIZATIONAL SUPPORT FOR BILL <b>Administration (see attached letters)</b>	ORGANIZATIONAL OPPOSITION TO BILL <b>None Known</b>

FISCAL IMPACT:       NONE       FISCAL NOTE ATTACHED

**BACKGROUND/LEGISLATIVE INTENT**

The purpose of creating the Shuyak State Game Refuge is to provide (1) protection and enhancement to fish and wildlife habitat, (2) continued opportunity for fishing, hunting, and trapping, and (3) other recreational opportunities.

**ANALYSIS OF BILL/PROGRAM EFFECTS**

The bill will:

1. Establish the Shuyak State Game Refuge.
2. Provide for the addition of lands relinquished by the borough to the refuge.
3. Ensure access to private and borough holdings.
4. Direct the preparation of a refuge management plan.
5. Require surveying the refuge boundary to the extent that funds are available.

**AMENDMENTS PROPOSED**

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

FEB 06 1986



# Kodiak Island Borough

710 MILL BAY ROAD  
KODIAK, ALASKA 99615-6340  
PHONE (907) 486-5736

January 30, 1986

The Honorable David W. Thompson  
House of Representatives  
Box V  
Juneau, Alaska 99811

Dear Mr. <sup>Dave</sup> ~~Thompson~~:

Enclosed please find a copy of Kodiak Island Borough Resolution No. 86-06-R requesting state legislation to create Shuyak State Game Refuge approved at the January regular meeting. Also enclosed is a letter from Neil C. Johannsen, Director, Division of Parks and Outdoor Recreation indicating the State's endorsement of the proposed game refuge.

If I can be of any further assistance, please let me know.

Sincerely,

KODIAK ISLAND BOROUGH

Jerome M. Selby  
Borough Mayor

Enclosures

mdd

BILL SHEFFIELD, GOVERNOR

**DEPARTMENT OF NATURAL RESOURCES**

**DIVISION OF PARKS AND OUTDOOR RECREATION**

225A CORDOVA STREET  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 276-2865

MAILING ADDRESS:  
POUCH 7001  
ANCHORAGE, ALASKA 99510

November 27, 1984

Re: Proposed Baranof State  
Game Refuge on Shuyak Island

Jerome Selby, Manager  
Kodiak Island Borough  
Box 1246  
Kodiak, Alaska 99615

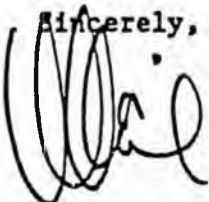
Dear Mr. Selby: *Jerome*

I recently learned of the Borough Assembly's resolution to seek legislation establishing the proposed Baranof State Game Refuge on Shuyak Island.

The Division of Parks and Outdoor Recreation supports the proposed state game refuge and believes it will be an important component of Kodiak's long-term outdoor recreation resources.

If there is anything I can do to assist in your efforts, please let me know.

Sincerely,



Neil C. Johannsen  
Director

Kodiak Island Borough  
Kodiak, Alaska

RECEIVED

NOV 29 1984

7 8 9 10 11 12 1 2 3 4 5 6 P M

KODIAK ISLAND BOROUGH  
RESOLUTION NO. 86-06-R

A RESOLUTION OF THE KODIAK ISLAND BOROUGH ASSEMBLY REQUESTING  
STATE LEGISLATION TO CREATE THE SHUYAK STATE GAME REFUGE

WHEREAS, on August 14, 1981, the Superior Court ordered the Agreement of Consent Decree to effectively dismiss the appeals the Kodiak Island Borough brought against the Alaska Department of Natural Resources with regards to its lands selections; and

WHEREAS, a condition in the Agreement of Settlement and Consent Decree is that the Kodiak Island Borough is to use its best efforts to have legislation introduced to create a state park and state game refuge on Shuyak Island for those portions not to be conveyed to the Kodiak Island Borough; and

WHEREAS, the Shuyak State Game Refuge is to be established to protect fish and wildlife habitats and population of all fish and wildlife species, particularly deer and brown bear, feeding, wintering and migration areas as well as to provide public uses of fish and wildlife in their habitat for hunting, viewing, photography, and general recreation in a high quality environment; and

WHEREAS, the Kodiak Island Borough had caused to be prepared a proposed bill entitled "An Act Creating the Aleksandr Baranov State Game Refuge" for the 1981-82 legislature; and

WHEREAS, Bill HCSSB 51, "An Act Establishing the Shuyak Island State Park; and Providing for an Effective Date" was signed by Governor Sheffield on July 11, 1984; and

WHEREAS, nothing further has been done to establish a State Game Refuge.

NOW, THEREFORE, BE IT RESOLVED by the Kodiak Island Borough Assembly that legislation entitled "An Act Creating the Shuyak State Game Refuge" be introduced and assigned a number providing for the creation of said state game refuge.

IT FURTHER RESOLVED by the Kodiak Island Borough Assembly that the Borough adm. stration be directed to send this resolution to the Senator for District N, the Representative for House District 27, Governor Sheffield, the Alaska Department of Natural Resources, and the Alaska Department of Fish and Game and implore their assistance in the successful adoption of this legislation.

PASSED AND APPROVED THIS 2 DAY OF January, 1986.

KODIAK ISLAND BOROUGH

James A. Selby  
Borough Mayor

Gene E. White  
Presiding Officer

ATTEST:

Janice Vaughten CMC  
Borough Clerk

February 21, 1986

The Honorable Jerome Selby  
Mayor  
Kodiak Island Borough  
710 Mill Bay Road  
Kodiak, AK 99615-6340

Dear Mayor Selby:

Thank you for sending me Kodiak Island Borough Resolution No. 86-06-R supporting introduction of a bill to create Shuyak State Game Refuge. Shuyak is a very scenic island, with outstanding hunting and viewing opportunities. As you are aware, Representative Thompson has introduced a bill to establish such a refuge. I support the creation of Shuyak State Game Refuge in keeping with the out-of-court settlement between the borough and the state. By copy of this letter, I have asked the Commissioners of Fish and Game and Natural Resources to provide any necessary technical assistance to Representative Thompson on this bill.

I look forward to designation of the area as a state game refuge in the near future.

Sincerely,

/s/ Bill Sheffield

Bill Sheffield  
Governor

cc: Commissioner Don Collinworth  
Department of Fish and Game

Commissioner Esther Wunnicke  
Department of Natural Resources

The Honorable David Thompson  
Alaska State Legislature

BS/DWC/DC/tw  
CTS#86038HDC0029

FG3

LEG OFF  
413 605



Chenik

Point Bede Port Graham P.

Portlock

Cape Elizabeth

CHUGACH IS  
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Ushagat I

W Amatuli I

E Amatuli I

MT DOUGLAS  
7064

Cape Douglas 1495

BARREN ISLANDS

FOURPEAKED MTN - 6903

Stevenson Entrance

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Dark I

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MT DENISON - KUKARVOL  
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Tonki Cape

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AFOGNAK ISLAND

Marmot I

Steep C

AFOGNAK  
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Marmot Cape

Raspberry I

Mognak

Marmot Bay

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Spruce I

Guzinkie

SADDLE  
MTN

Port  
Lions  
2869

KODIAK

Uganik

Chiniak Bay

CENTER MTN

Cape Chiniak

KODIAK ISLAND

Larsen Bay

Narrow Cape

Karluk  
Lake

MT SHASTA  
3491

2436

Ugak I

Old Harbor

Ugak Bay  
Dangerous Cape

Cape

1827

AKHIOK

Sitkalidak I

Black Point

pe Alitak

2215

Two-Headed I

Kaguyak

Aiaktalik

Geese Is

P

A

BILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE  
SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 276-3550

1st NATIONAL CENTER  
100 CUSHMAN ST.  
SUITE 400  
FAIRBANKS, ALASKA 99701  
PHONE: (907) 452-1568

POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

**DEPARTMENT OF LAW**

OFFICE OF THE ATTORNEY GENERAL

November 8, 1985

Honorable Esther Wunnicke  
Commissioner  
Department of Natural Resources  
Pouch M  
Juneau, Alaska 99811

Honorable Don W. Collinsworth  
Commissioner  
Department of Fish and Game  
P.O. Box 3-2000  
Juneau, Alaska 99811

2  
MA  
11/15  
TIL 1.0

Re: Game refuges, game sanctuaries, and fish & game critical habitat areas: authorities of the Department of Natural Resources and the Department of Fish and Game  
Our files: 366-045-84 and 366-122-84

Dear Commissioners Wunnicke and Collinsworth:

I. INTRODUCTION

Both the Department of Natural Resources ("DNR") and the Department of Fish and Game ("ADF&G") have asked questions regarding their respective authorities in game refuges, game sanctuaries, and fish and game critical habitat areas (collectively referred to as "special areas"). Our analysis reveals that

A.	Consultation requirements	page 28
B.	Nature of separate, complementary authorities	page 30
C.	Separate, complementary authorities in sanctuaries	page 31
D.	Separate, complementary authorities in refuges and critical habitat areas	page 32
E.	Water appropriation and use	page 37
F.	Prohibition on transfer of state land out of refuges	page 39
G.	Summary and examples	page 42
V.	Specific questions from DNR and ADF&G	page 45
VI.	Conclusion	page 52
	Chart summarizing DNR/ADF&G authorities in special areas	attached

## II. THE STATUTORY FRAMEWORK

There are several different sets of statutory provisions relevant to this matter, and they will be discussed by category: those setting up the special areas, those setting out DNR's general authorities, those setting out DNR's authorities specific to special areas, those setting out ADF&G's authorities in special areas, and those describing the coastal zone consistency review procedure.

### A. Special areas

In AS 16.20, the legislature created three categories of special geographic areas which are the main subject of the related questions posed by DNR and ADF&G: game refuges, game

Hon. Esther Wunnicke  
Commissioner, DNR  
Hon. Don W. Collinsworth  
Commissioner, ADF&G  
File 366-045-S4 & 366-122-S4

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sanctuaries, and fish and game critical habitat areas. Each has similar purposes, but the statutory provisions establishing each vary somewhat.

The purpose of state game refuges 2/ is to "protect and preserve the natural habitat and game population[s] in certain designated areas of the state." AS 16.20.020. 3/

Two game sanctuaries have been established, the Walrus Islands state game sanctuary and the McNeil River state game sanctuary, both consisting of the land described in the statute and adjacent state waters. AS 16.20.110 and AS 16.20.160. 4/ The purpose of the sanctuaries is "to protect" the game found

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2/ The state game refuges include 17 units which had been in the national wildlife refuge system at the time Alaska achieved statehood, and the tide and submerged land adjacent to two of the units. AS 16.20.030(a). Seven other units are also encompassed, comprised of the state-owned land and adjacent water in the Potter Point state game refuge, AS 16.20.030(b), the Goose Bay state game refuge, AS 16.20.030(c), the Palmer Hay Flats state game refuge, AS 16.20.032, the Mendenhall Wetlands state game refuge, AS 16.20.034, the Susitna Flats state game refuge, AS 16.20.036, the Trading Bay state game refuge, AS 16.20.038, and Creamer's Field migratory waterfowl refuge, AS 16.20.039.

3/ The legislature established additional purposes for three of the refuges: to protect specific fish and wildlife populations and habitats, and also to protect public uses, including viewing, photography, and recreation in a high quality environment. AS 16.20.036(b) (Susitna Flats), AS 16.20.038(b) (Trading Bay), and AS 16.20.039(c) (Creamer's Field).

4/ We are informed that the land described in the two sanctuaries is all state owned.

Hon. Esther Wunnicke  
Commissioner, DNR  
Hon. Don W. Collinsworth  
Commissioner, ADF&G  
File 366-045-84 & 366-122-84

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therein, and their "vital habitat ... so that these resources may be preserved for scientific, esthetic and educational purposes." AS 16.20.100; sec. 1, ch. 108, SLA 1967.

The purpose of fish and game critical habitat areas is "to protect and preserve habitat areas especially crucial to the perpetuation of fish and wildlife, and to restrict all other uses not compatible with that primary purpose." AS 16.20.220. 5/

Although the stated purposes for the special areas specify protection and preservation of fish and wildlife 6/ and their habitat, the legislature clearly did not intend them to remain untouched and unused. For game refuges, a number of approved uses are specifically listed in the statutes. 7/ Within game sanctuaries, oil and mineral exploration and

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5/ Twelve fish and game critical habitat areas are established in AS 16.20.230: Port Moller, Port Heiden, Cinder River, Egegik, Pilot Point, Kalgin Island, Fox River Flats, Chilkat River, Kachemak Bay, Clam Gulch, Copper River Delta, and Anchor River and Fritz Creek. Except for the most recently designated fish and game critical habitat area, all land, including privately owned land, within the described areas is included. Anchor River/Fritz Creek critical habitat area is the exception and contains only the state land and water within the described area. AS 16.20.230(12).

6/ The terms "game" (used in reference to refuges, AS 16.20.020, and sanctuaries, AS 16.20.100) and "wildlife" (used in reference to critical habitat areas, AS 16.20.220) appear to mean the same thing. The definition of "game" in AS 16.05.940(14) is very broad, encompassing virtually "any species of bird, reptile, and mammal... found or introduced in the state."

7/ For example, in the Mendenhall Wetlands state game refuge,  
(Footnote continued)

Hon. Esther Wunnicke  
Commissioner, DNR  
Hon. Don W. Collinsworth  
Commissioner, ADF&G  
File 366-045-84 & 366-122-84

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development are authorized, subject to certain requirements and limitations which will be discussed later. AS 16.20.130, AS 16.20.140, and AS 16.20.170. Within the most recently established fish and game critical habitat area, Anchor River/Fritz Creek, the use and appropriation of water rights for a municipal and community water source are specifically protected, and the possibility of constructing a dam and reservoir is specifically reserved. AS 16.20.230(b).

In summary, the legislature created the special areas to protect fish and game and their habitat, but not to exclude all other uses of the areas.

B. DNR general authorities

The Alaska Land Act, AS 38.05, grants to DNR a number of responsibilities and authorities over land in the state. The

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(Footnote continued)

hunting and recreational activities are "expressly permitted," if consistent with a plan adopted by ADF&G, and authorized by the Board of Game. AS 16.20.034(e) and (f). Gravel extraction is also allowed, subject to the ADF&G plan. AS 16.20.034(h). Acquisition by the City and Borough of Juneau of refuge land for expansion of the municipal airport, establishment of additional transportation corridors, and establishment of publicly owned and operated docking facilities, is provided for. AS 16.20.034(i). In the Susitna Flats state game refuge, entry for exploration and development of oil and gas resources is permitted if compatible with protection and public uses of fish and wildlife habitat and populations. AS 16.20.036(b) and (c). Similar provisions apply to the Trading Bay state game refuge. AS 16.20.038(b) and (c). In the Creamer's Field migratory waterfowl refuge, recreational and agricultural activities are expressly permitted if consistent with ADF&G's plan to promote the protection and enhancement of habitat for migratory birds and opportunities for viewing. AS 16.20.039(c) and (d).

Hon. Esther Wunnicke  
Commissioner, DNR  
Hon. Don W. Collinsworth  
Commissioner, ADF&G  
File 366-045-84 & 366-122-64

November 3, 1985  
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The Alaska Land Act, AS 38.05, grants to DNR a number of responsibilities and authorities over land in the state. The authority of the commissioner of DNR includes the power to establish procedures and adopt necessary regulations, enter into agreements, review orders or actions of the division of land and water management (originally the "division of lands"), and exercise other powers and do other acts necessary under the Alaska Land Act. AS 38.05.020. Under AS 38.05.005, the commissioner of DNR controls and supervises the division of land and water management, which has, under AS 38.05.035, a number of mandatory and discretionary duties 3/ regarding the overall

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8/ The mandatory duties are described in AS 38.05.035(a) and include the responsibility to:

(2) manage, inspect and control state land and improvements on it belonging to the state and under the jurisdiction of the division;

...  
(4) prescribe application procedures and practices for the sale, lease or other disposition of available land, resources, property, or interest in them;

...  
(6) ... issue deeds, leases or other conveyances disposing of available land, resources, property or any interests in them;

(7) have jurisdiction over state land, except  
(Footnote continued)

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management, retention, and disposal of state land. In addition, the Alaska Land Act contains other specific provisions relating

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(Footnote continued)

that land acquired by the Alaska World War II Veterans Board and the Agricultural Loan Board or other departments or agencies succeeding to their respective functions through the foreclosure or default; to this end the director possesses the powers and, with the approval of the commissioner, shall perform the duties necessary to protect the state's rights and interests in state lands, including the taking of all necessary action to protect and enforce the state's contractual or other property rights;

...

(9) maintain such records as the commissioner considers necessary...

...

(12) be the certifying agent of the state to select, accept and secure by whatever action is necessary in the name of the state, by deed, sale, gift, devise, judgment, operation of law, or other means any land, of whatever nature or interest, available to the state; and be the certifying agent of the state, to select, accept or secure by whatever action is necessary in the name of the state any land, or title or interest to land available, granted, or subject to being transferred to the state for any purpose ....

The discretionary duties include granting preference rights for lease or purchase of state land in certain circumstances, selling and disposing of land by lottery in certain circumstances, and quit-claiming land to the federal government if it was erroneously conveyed from the federal government to the state. AS 38.05.035(b).

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to DNR's duties and authorities. 9/

The Water Use Act, AS 46.15, grants to DNR the authority to determine and adjudicate rights in state waters, and in its appropriation and distribution. AS 46.15.010. This responsibility is accompanied by a mandate to adopt necessary procedural and substantive regulations, taking into account the statutory responsibilities of ADF&G and the Department of Environmental Conservation. AS 46.15.020. The statutes set out a number of guidelines which direct how DNR handles water appropriation. 10/

Thus, the Water Use Act and the Alaska Land Act grant DNR many authorities over state water and land. 11/ These authorities must be exercised in a manner consistent with the

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9/ For example, sale of land is covered by AS 38.05.045 -- AS 38.05.069. Leasing of lands other than for extraction of natural resources is governed by AS 38.05.070 -- AS 38.05.105, disposal of timber and materials by AS 38.05.110 -- AS 38.05.120, leasing of mineral lands by AS 38.05.135 -- AS 38.05.184, and mining rights by AS 38.05.185 -- AS 38.05.275.

10/ For example, the determination of priority is generally governed by AS 46.15.050, existing rights by AS 46.15.060 and AS 46.15.065, criteria for permit issuance by AS 46.15.080, preferred uses by AS 46.15.090 and AS 46.15.150, and transfers of appropriations by AS 46.15.160 and AS 46.15.170.

11/ The Department of Transportation and Public Facilities and the Board of Regents of the University of Alaska are specifically excepted from the provisions of the Alaska Land Act and can acquire, use, lease, dispose of, or exchange real property independently from DNR, to the extent permitted by their own enabling legislation. AS 38.05.030.

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state constitution and with the guidelines set out in the statutes. For example, AS 28.05.235 mandates that disposal and use of state land shall conform to the state constitution and "the principles of multiple purpose use consistent with the public interest." Although "multiple purpose use" is not defined, "multiple use" is defined in AS 28.04.910(4) as

the management of state land and its various resource values so that it is used in the combination that will best meet the present and future needs of the people of Alaska, making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; it includes

(A) the use of some land for less than all of the resources, and

(B) a combination of balanced and diverse resource uses that takes into account the short-term and long-term needs of present and future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historic values . . . .

The requirement that disposal and use of state land take into account the present and future needs for natural resources is consistent with article VIII, sections 1 and 2, of the Alaska Constitution, which declare that the state's policy is to encourage settlement of land and development of resources by "making them available for maximum use consistent with the public interest," and that the legislature shall provide for the

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utilization, development and conservation of state land "for the maximum benefit" of Alaskans. These sections are augmented by article VIII, section 4, which directs that fish and wildlife be "utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."

There are other relevant provisions of the state constitution that affect the exercise of DNR's (and ADF&G's) authority. For example, article VIII, section 7, provides that the legislature may reserve from the public domain "areas of natural beauty or of historic, cultural, recreational, or scientific value" for the "use, enjoyment, and welfare of the people." Another example is article VIII, section 13, which mandates that, except for the public water supply, "an appropriation of water shall be ... subject ... to the general reservation of fish and wildlife."

In setting out DNR's authorities, the legislature has recognized Alaska's unique constitutional mandates regarding fish and wildlife and their habitat. For example, in AS 38.04.005(b), the legislature directs that, in making state land available for private use, adverse effects on significant resources, including wildlife and fishery resources, must be minimized. Further, in AS 38.04.015 the legislature lists protection of "critical wildlife habitat and areas of special scenic, recreational, scientific, or other environmental concern" as one of the five

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primary public interests in retaining areas of state land in public ownership. In carrying out its responsibility to classify state land, DNR has recognized this concern and has established "wildlife habitat land" as one of the classification categories. Described in 11 AAC 55.230, wildlife habitat land is land primarily valuable for fish and wildlife production or "a unique or rare assemblage" of one or more species. With regard to water, DNR must always consider the effect on fish and game resources in making its public interest determination as a component of reviewing water appropriation permit applications. AS 46.15.080 (b)(3). This is consistent with article VIII, section 13, and is in addition to the ability of DNR, after adjudicating a request from ADF&G, to reserve a specified instream flow or level of water under AS 46.15.145 for protection of fish and wildlife habitat, migration, and propagation, which in adjudicating later claims is treated by DNR as a prior appropriation under AS 46.15-.080(a)(1).

Thus, DNR has broad authority over almost all state-owned land, including the authority to acquire, hold, and transfer. These authorities are to be exercised not in a vacuum, but under constitutional and statutory directives to promote various policies. For example, as discussed above, (1) all natural resources, including land, wildlife and fisheries, shall be available for the maximum use consistent with the public

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bodies of water adjacent to the Juneau municipal airport runway to eliminate sites attractive to waterfowl which could create hazards to aircraft. AS 16.20.034(h). Any deed, contract of sale, lease, or other instrument evidencing disposition by DNR of land in the Mendenhall Wetlands game refuge must include a condition that the land is restricted for three specified purposes (airport expansion, transportation corridors, and docking facilities). AS 16.20.034(i). Finally, DNR and ADF&G are to jointly evaluate any offer of proof by the City and Borough of Juneau that there is a superior public need for use of land within the Mendenhall Wetlands game refuge, other than as refuge land. AS 16.20.034(j).

With regard to the two state game sanctuaries, there are also explicit references to DNR authority. DNR may not sell sanctuary land, and may lease it only as mineral land pursuant to DNR regulations. AS 16.20.140 and AS 16.20.170. DNR and ADF&G are authorized to jointly determine limitations additional to state or federal laws and regulations on oil and mineral exploration and development in the sanctuaries, to assure compatible multiple land use practices. AS 16.20.130 and AS 16.20.170.

There is one direct reference to DNR in the statutes governing critical habitat areas. In the recently established Anchor River/Fritz Creek critical habitat area, ADF&G is to develop, in consultation with DNR, a plan for the area to be

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interest, (2) natural resources shall be utilized for the maximum benefit of the people of the state, (3) the value of fish and wildlife shall be recognized and maintained, and (4) adverse effects upon them shall be minimized. DNR must balance competing interests and policies and, in disposing of any interest in land, is required to determine if the disposal is in the best interest of the state. AS 38.05.035(e).

C. DNR authorities specific to special areas

Apart from DNR's general authorities and responsibilities with regard to state-owned land, a number of specific provisions in AS 16.20 address DNR's authority in special areas.

DNR may adopt zoning regulations for private land contained within the Potter Point, Goose Bay, Palmer Hay Flats, Susitna Flats, and Trading Bay game refuges. AS 16.20.030(b) and (d), AS 16.20.032(d), AS 16.20.036(e), and AS 16.20.038(e). Access corridors to and from private property within the Goose Bay, Susitna Flats, and Trading Bay game refuges are to be established through agreement between DNR, ADF&G, and the private property owners involved. AS 16.20.030(e), AS 16.20.036(f), and AS 16.20.038(f). In the Mendenhall Wetlands game refuge, management of the surface and subsurface estate is explicitly delegated to DNR, although any DNR actions which affect the habitat must conform to a plan adopted by ADF&G. AS 16.20.034(g). DNR and ADF&G are both required to assist the City and Borough of Juneau in filling

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submitted to the legislature.

Thus, in addition to its general powers, DNR is specifically mentioned in the statutes governing special areas. Some of those specific references assign particular tasks, some grant discretionary authority, and others limit the general authorities.

D. ADF&G authorities in special areas

In the special areas, the legislature has in AS 16.20 given certain authorities to ADF&G and the Boards of Fisheries and Game ("boards"). The authorities for each type of special area are set out somewhat differently.

In game refuges, the Board of Game is to adopt regulations governing the taking of game for "conservation and protection purposes." AS 16.20.040. On the other hand, ADF&G is delegated a different kind of authority. AS 16.20.050 provides:

Where the use, lease or disposal of real property in state game refuges created by AS 16.20.010 -- 16.20.080 is under the control or jurisdiction of the state, whether through federal permit or state ownership, the responsible state department or agency shall notify the commissioner of fish and game before initiating any use, lease or disposal of real property. The commissioner shall acknowledge receipt of notice by return mail.

The purpose of this notice is clarified by AS 16.20.060, which

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grants authority 12/ to ADF&G to ensure protection of fish and game:

If the commissioner so determines, the commissioner shall, in the letter of acknowledgment, require the person or governmental agency to submit full plans for the anticipated use, full plans and specifications of proposed construction work, complete plans and specifications for the proper protection of fish and game, and the approximate date when the construction work is to commence, and shall require the person or governmental agency to obtain the written approval of the commissioner as to the sufficiency of the plans or specifications before construction is commenced. The commissioner shall abide by the principle which recognizes preferences among beneficial uses as more particularly set forth in art. VIII of the state constitution.

As discussed in detail in section IV below, this provision gives ADF&G permit authority over any activity on refuge lands which ADF&G determines may affect fish or wildlife or their habitat. 13/ This authority is separate from and in

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12/ In addition to the provisions of AS 16.20.050 and AS 16.20.060, which apply to all the refuges, in at least two of the refuges ADF&G is mandated to develop a plan to further the purposes of the refuges. The plan is to be used to determine whether certain activities are consistent with those purposes. AS 16.20.034(g) (Mendenhall Wetlands) and AS 16.20.039(c) (Creamer's Field).

13/ In this opinion, terms like "may affect" will be used to refer to ADF&G's authority to require plans, which is triggered by a determination of possible effects on fish, game, or habitat. Permit restrictions or denials by ADF&G must be based on facts supporting a conclusion that there is a reasonably likely connection between an activity and probable adverse effects on fish, game, or habitat.

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addition to any review and approval responsibilities held by DNR.

The authorities in critical habitat areas are similar to those in refuges. Under AS 16.20.240, the boards are to adopt regulations governing taking of fish and game for "conservation and protection purposes." As for refuges, ADF&G is to receive notice of any anticipated use, lease, or other disposal of land; 14/ but unlike in refuges, land in private ownership is included in critical habitat areas, and activities involving private land as well as state land must be brought to the attention of ADF&G. Further, while in refuges ADF&G determines if additional information should be submitted, in critical habitat areas the boards have that authority. 15/

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14/ Under AS 16.20.250:

Before the use, lease or other disposal of land under private ownership or state jurisdiction and control, within state fish and game critical habitat areas created under this chapter, the person or responsible state department or agency shall notify the commissioner of fish and game. The commissioner shall acknowledge receipt of notice by return mail.

15/ AS 16.20.260 provides:

(a) When a board determines that the following information is required, it shall instruct the commissioner, in the letter of acknowledgment, to require the person or governmental agency to submit:

(Footnote continued)

The two statutory procedures for notice and submission of additional plans and specifications for game refuges and for critical habitat areas are similar to the structure established for ADF&G's review of projects in anadromous fish streams. 16/

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(Footnote continued)

- (1) Full plans for the anticipated use;
- (2) full plans and specifications of proposed construction work;
- (3) complete plans and specifications for the proper protection of fish and game; and
- (4) the approximate date when the construction or work is to commence.

(b) The board shall require the person or governmental agency to obtain the written approval of the commissioner as to the sufficiency of the plans or specifications before construction is commenced.

16/ AS 16.05.870 provides:

(a) The commissioner shall, in accordance with the Administrative Procedure Act (AS 44.62), specify the various rivers, lakes and streams or parts of them that are important for the spawning, rearing or migration of anadromous fish.

(b) If a person or governmental agency desires to construct a hydraulic project, or use, divert, obstruct, pollute, or change the natural flow or bed of a specified river, lake, or stream, or to use wheeled, tracked, or excavating equipment or log-dragging equipment in the bed of a specified river, lake, or stream, the person or governmental agency shall notify the commissioner of this intention before the beginning of the construction or use.

(Footnote continued)

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Under AS 16.05.870, a person desiring to use an unadromous fish stream in certain specified ways must notify ADF&G, which can require additional information. The plans and specifications are then evaluated to determine whether they are sufficient for proper protection of fish and game. Just as in refuges and

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(Footnote continued)

(c) The commissioner shall acknowledge receiving the notice by return first class mail. If the commissioner determines that the following information is required, the letter of acknowledgement shall require the person or governmental agency to submit to the commissioner:

(1) full plans and specifications of the proposed construction or work;

(2) complete plans and specifications for the proper protection of fish and game in connection with the construction or work, or in connection with the use; and

(3) the approximate date the construction, work, or use will begin.

(d) The commissioner shall approve the proposed construction, work, or use in writing unless the commissioner finds the plans and specifications insufficient for the proper protection of fish and game. Upon a finding that the plans and specifications are insufficient for the proper protection of fish and game, the commissioner shall notify the person or governmental agency which submitted the plans and specifications of that finding by first class mail. The person or governmental agency may, within 90 days of receiving the notice, initiate a hearing under AS 44.62.370. The hearing is subject to AS 44.62.330 -- 44.-62.630.

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critical habitat areas, written approval is required before the activity can commence.

In refuges and critical habitat areas, as well as for anadromous streams, ADF&G's conditioning or denial of a permit is limited to the probability of adverse impacts on fish, game or habitat. In contrast, DNR must balance effects on fish, game, or habitat as one of many, sometimes competing, factors in deciding under AS 38.05.035(e) whether a land disposal best serves the state's interests, a policy decision subject to very limited judicial review. Hammond v. North Slope Borough, 645 P.2d 750, 758 - 759 (Alaska 1982).

For sanctuaries, the statutory framework is quite different. The legislature in AS 16.20.120 delegated to the boards the broader authority to adopt regulations for sanctuaries governing

entry, development, construction, hunting, fishing, and all other uses or activities not in conflict with AS 16.20.130 and 16.20.140 for the purpose of preserving the natural habitat and the fish and the game of the Walrus Islands State Game Sanctuary.

This also applies to the other sanctuary, at McNeil River, AS 16.20.170. Land in neither sanctuary may be sold, and under AS 16.20.140 may be leased only as mineral land, as authorized in DNR regulations. Oil and mineral exploration and development are subject to state and federal laws and regulations and additional

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limitations jointly determined by ADF&G and DNR. 17/ (In developing additional limitations, ADF&G is governed by its statutory charge with regard to fish, game, or their habitat, while DNR again operates under the best-interest-of-the-state standard in AS 38.05.035(e).)

E. Coastal zone consistency review

Any exercise of authority by a state agency in the state's coastal zone 18/ must be consistent with the Alaska Coastal Management Program. AS 46.40.090(a). 46.40.100(a). For activities occurring in the state's coastal zone for which two or more state permits (or a federal permit or authorization) are required, a process is in place for coordinating permit applications between or among the relevant state agencies and

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17/ AS 16.20.130 provides:

Oil and mineral exploration and development is permitted on the Walrus Islands State Game Sanctuary in accordance with state or federal laws and regulations, subject to the limitations of AS 16.20.140 and to additional limitations jointly determined by the commissioner of natural resources and the commissioner of fish and game to assure compatible multiple land use practices.

18/ Pursuant to 6 AAC 85.040, the boundaries of the coastal zone are initially based on Biophysical Boundaries of Alaska's Coastal Zone, incorporated by reference and described in the regulation, including the zones of direct interaction and direct influence, and may be modified consistent with specified guidelines by each coastal resource district in an approved district plan.

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rendering an overall determination, after which the state permits are either all issued (with appropriate conditions) or denied by the respective state agencies. 6 AAC 50. This procedure applies, then, to any activity in the coastal zone over which both DNR and ADF&G have permitting authority.

The Alaska Coastal Management Program ("ACMP") is, in effect, pursuant to AS 46.40.010 -- AS 46.40.210 and the federal Coastal Zone Management Act, 16 USC § 1451 et seq., and governs activities or uses located in or possibly affecting the coastal zone. The objectives of the ACMP include ensuring "the use, management, restoration and enhancement of the overall quality of the coastal environment," "the orderly, balanced utilization and protection of the resources of the coastal area consistent with sound conservation and sustained yield principles," and "the full and fair evaluation of all demands on the land and water in the coastal area." AS 46.40.020(1), (3), and (8).

The ACMP consists of standards contained in 6 AAC 80 and the district coastal plans formulated and approved under AS 46.40 and 6 AAC 85, and covering subjects such as coastal development, recreation, habitats, and air, land, and water quality. Permits may not be issued for activities in or affecting the coastal zone that are inconsistent with the ACMP. AS 46.40.200, 6 AAC 80.010.

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Interagency review of activities under the ACMP occurs in the context of an entire project, which may require several separate permits. The Office of Management and Budget ("OMB") is responsible for rendering a conclusive consistency determination for projects requiring two or more permits, leases, or authorizations. AS 44.19.145(a)(11), 6 AAC 50.020.

The procedures controlling this coordination are set out in 6 AAC 50 and are designed to facilitate inter-agency communication and consensus, with provisions for elevating consideration of a project from the regional to the directors' level, and on to the commissioners' level, if necessary. 6 AAC 50.070. OMB is closely involved in the review and discussions, and is ultimately responsible for rendering a final consistency decision. 6 AAC 50.070 and 6 AAC 50.120. <sup>19/</sup> Within five days after that determination, the agencies must issue relevant permits (except leases), which must contain any conditions required by the consistency determination. 6 AAC 50.130.

ADF&G and the boards in combination have been given specific authorities in special areas, the significance and scope

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<sup>19/</sup> If only permits from a single state agency, and no federal permits, are required, that agency takes the place of OMB in coordinating state review and rendering a final consistency determination. 6 AAC 50.030, 6 AAC 50.120. In that role, the agency is charged by 6 AAC 50.070 with encouraging and facilitating discussion among the state resource agencies, listed in 6 AAC 50.190 as including the Department of Environmental Conservation as well as DNR and ADF&G.

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of which are discussed in more detail in sections III, IV, and V below. Where special areas are in the coastal zone, the ACMP and the consistency review procedures would apply to the exercise of those authorities, and provide a mechanism for inter-departmental coordination.

### III. PRIOR ATTORNEY GENERAL OPINIONS

Over the last 10 years, this office has analyzed and commented upon DNR and ADF&G responsibilities within special areas in several informal and one formal opinion. A review of those opinions provides a background to the present analysis.

In 1976, Assistant Attorney General Peter Froehlich discussed the legal requirements necessary for ADF&G to grant or deny approval of a proposed use on a state game refuge. 1976 Inf. Op. Att'y Gen. (Oct 25; J-66-045-77). The memorandum concluded that, under the facts addressed, ADF&G had acted legally in disapproving plans for a proposed transmission line across the Palmer Hay Flats, state game refuge.

In 1979, Assistant Attorney General Thomas Meacham evaluated a preference right within the Kalgin Island critical habitat area that was granted by DNR without notification to and approval by ADF&G. 1979 Inf. Op. Att'y Gen. (Dec 27; A-66-254-80). The opinion concludes that the grant of the preference right could not be considered complete until ADF&G had been

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notified under AS 16.20.250. 20/

In 1980, Assistant Attorney General Thomas Mencham evaluated whether a land exchange between DNR and private land holders which resulted in state-owned land within the Letter Marsh state game refuge entering private ownership was invalid because ADF&G had not been notified under AS 16.20.250. 1980 Inf. Op. Att'y Gen. (Oct 9; A-66-022-81). The memorandum notes that apparently DNR was not aware at the time of the exchange that the lands were "under the jurisdiction" of ADF&G and thus completed the exchange without giving the required notice. The mistake was not discovered until nearly two years later. The opinion concludes that the private party held the status of a bona fide purchaser, and that equity would not allow the exchange to be overturned because of a jurisdictional mistake made by a state agency which was in no way the fault of the private party.

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20/ The opinion also notes in passing that the possible requirement for submission and approval of plans under AS 16.20.260 before construction is commenced would not bar the preference right and the conveyance. That observation may not be correct in all cases, since the requirement of notice to ADF&G in AS 16.20.250 would provide the opportunity for comment by ADF&G to DNR. Such statutorily mandated opportunities are not to be considered as merely a pro forma step that can be viewed lightly and avoided without consequence. See 1985 Inf. Op. Att'y Gen. (Sep. 11; 366-105-86), which discusses the need in each such situation to balance a number of factors, including the possibility of curing the neglected consultation and the relative potential harms, in determining the consequences of such a default.

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Thus, the analysis determined that ADF&G review was no longer authorized because the land had from the private party's perspective, apparently become private two years earlier, and only state-owned lands are included in refuges. 21/

In 1981, Assistant Attorney General Douglas Mertz noted that, in the Mendenhall Wetlands state game refuge, DNR and ADF&G both have "primary management authority, and hence necessarily decisionmaking authority," under AS 16.20.035(j). 1981 Inf. Op. Att'y Gen. (Nov 9; J-66-274-82). The memorandum addressed the fact that AS 16.20.034(j) specifies that both departments are granted final decision making authority over a request by the City and Borough of Juneau to use refuge land for another purpose.

In 1982, Assistant Attorney General Jonathan Tillinghast wrote a formal attorney general's opinion that discusses the authority of ADF&G and the boards to protect habitat. 1982 Op. Att'y Gen. No. 1 (Mar. 4). Most of that opinion deals with ADF&G's permit authority over anadromous streams, set out in AS 16.05.870, but the opinion also discusses permit jurisdiction in refuges, sanctuaries, and critical habitat

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21/ As the more detailed analysis in section IV below concludes, in fact state land in refuges cannot be transferred in fee out of state ownership without specific legislative action.

areas. At pages 3 through 4, the similar statutory format used for anadromous streams, refuges, and critical habitat areas is described. The analysis concludes that the notice and written approval provisions are clearly licensing statutes and that they had been regarded as such by the Department of Law for at least the preceding 18 years. The opinion notes that the statutory format is somewhat cumbersome and, at pages 9 through 12, concludes that the boards and ADF&G have the implied authority to adopt regulations implementing their respective permit programs. For anadromous streams, refuges, and critical habitat areas, that conclusion is based on implied powers. 22/ In sanctuaries, as noted in section II D above, the boards have explicit authority to adopt regulations "governing entry, development, construction, hunting, fishing, and all other uses or activities...." AS 16-20.120. Thus, for the sanctuaries, there is express authority to adopt regulations, which necessarily includes the authority to require permits before entry.

#### IV. INTERACTION BETWEEN DNR AND ADF&G AUTHORITIES

From the similar questions we have been asked by DNR and ADF&G, and from other contact with the two agencies, it is apparent that considerable confusion exists over the interaction

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22/ The Administrative Procedure Act recognizes in AS 44.62.030 that regulatory authority may be express or implied.

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between DNR and ADF&G authorities in special areas. Administrators are seeking guidance on when they are required to consult with their counterparts in the other department before making a decision. Further, they seek clarification of when they may make an independent decision for their department which is controlling, and when an independent decision from the other department is necessary as well for an activity to occur.

A. Consultation requirements

As discussed in section II B above, DNR has various statutory authorities and responsibilities with respect to state-owned land, such as acquisition, lease, and sale. In exercising those powers, DNR makes its own decisions. However, in some cases when making its decisions DNR is required by statute to consult with ADF&G regarding the proposed action, although the ultimate decision rests with DNR. For example, under AS 38.50.010, DNR is authorized to exchange state land or interests in state land for other land, interest in land, or other consideration. However, "if land under the jurisdiction of a state agency other than the Department of Natural Resources may be involved," AS 38.50.090(a) requires DNR to "afford the head of that agency an opportunity to participate in the discussions respecting the lands." The Department of Law has previously concluded that this provision requires consultation with ADF&G when exchanges of interest in refuge land are being considered. 1980 Inf. Op.

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Att'y Gen. (Oct 9: A-66-022-81). 23/ Another example is the requirement that DNR "provide for meaningful participation in the planning process" by affected state agencies in developing land use plans by regions or areas. AS 38.04.065(b)(8). Further, before classification, zoning, or disposal actions, AS 38.05.945 requires notification of parties "known or likely to be affected."

In other cases, the duty to consult with ADF&G has been set out in regulation. For example, a 1981 memorandum by Assistant Attorney General G. Thomas Roester discussed DNR's authority to incorporate restrictions requested by ADF&G in a multiple land-use permit. 1981 Inf. Op. Att'y Gen. (Dec 15: J-66-352-82). That opinion discussed the then current version of 5 AAC 55.230, which allowed land classified as wildlife habitat to be used for mineral exploration "subject to restrictions which may be imposed by the commissioner [of DNR] at the request of the Commissioner of the Department of Fish and Game." The regulation further stated that lands classified as wildlife habitat could be leased and the disposal of timber and materials allowed if approved by DNR "after consultation with the Commissioner of the Department

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23/ As discussed later in this section, land in refuges and sanctuaries cannot be transferred in fee out of state ownership without specific legislative authorization.

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of Fish and Game."

In addition to instances of mandatory consultation, we assume that DNR and ADF&G regularly consult about matters of mutual concern where either agency may be contemplating exercising one of its authorities or responsibilities.

B. Nature of separate, complementary authorities

With respect to special areas, ADF&G and the boards have some authorities and responsibilities which are independent of DNR's and some which overlap. If someone wishes to conduct an activity in a special area, often both DNR and ADF&G have separate rights of review and decision. In those cases, an affirmative decision by each agency would be needed before the activity could begin. This is similar to the situation discussed by Assistant Attorney General Jeffery Lowenfels in a 1981 memorandum evaluating AS 38.05.030(a). 24/ 1981 Inf. Op. Att'y Gen. (Mar. 20; A-66-303-81). That provision specified that the disposal of university lands was to be made by DNR, but that "no sale, lease, exchange or other disposal of university lands may be made without the approval of the Board of Regents of the University of Alaska." The opinion concludes at page 3 that the issuance of a mining lease or mineral patent by DNR on university lands is

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24/ This section was subsequently repealed by ch. 152, SLA 1984.

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prohibited unless expressly approved by the Board of Regents. Thus, absent a "classification prohibiting staking which would cover all or part of the university grant lands ... such lands are open to mineral entry, i.e., claim staking, but removal of minerals without prior issuance of a Board of Regents approved lease would not be lawful." Id.

Similarly, in each of the three special areas, DNR and ADF&G have certain dual authorities, not identical in scope, which call for independent review; each agencies' approval is equally necessary for certain activities to occur.

C. Separate, complementary authorities in sanctuaries

In game sanctuaries, governed by AS 16.20.090 -- AS 16.20.170, the authorities given to ADF&G and the boards are set out in a format different from the format for refuges and critical habitat areas, and are much broader. As discussed in section II D above, in sanctuaries the boards are given broad regulatory authority over "entry, development, construction, hunting, fishing, and all other activities or uses...." AS 16.20.120 and AS 16.20.170. These regulations must be for the "purpose of preserving the natural habitat and fish and game ...." Id. The only other restriction is that they shall not be inconsistent with AS 16.20.130 and AS 16.20.140, which in concert with AS 16.20.170 prohibit the sale of sanctuary land and allow leasing only as mineral land under DNR regulations.

Thus, the boards' regulations under AS 16.20.120 could not prohibit authorized oil and mineral exploration and development but could condition it as long as the conditions were not inconsistent with federal and state laws and regulations, nor with other limitations determined jointly by DNR and ADF&G. AS 16.20.130. Additionally, the boards can in all other respects govern uses and activities so as to preserve the habitat or fish or game of the area. 25/ As discussed in section III above, this authority includes permitting authority. In sanctuaries, then, DNR's role is limited to regulation and limitation of oil and mineral exploration and development.

D. Separate, complementary authorities in refuges and critical habitat areas

For refuges and critical habitat areas, as discussed in section II D above, the statutory framework which gives authority to ADF&G and the boards differs from the one just reviewed for sanctuaries, and the standard under which the authority is exercised is limited to possible effects on fish, game or their habitat. The powers and duties of ADF&G and the boards in those two types of special areas are quite similar.

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25/ Therefore, activities inconsistent with preserving the habitat could not be authorized by the boards, and we see no occasion for board regulations to conflict with general land management statutes.

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ADF&G is given a general permitting authority for refuges 26/ and shares that authority with the boards for critical habitat areas. Whenever the "use, lease or disposal of real property" in refuges is "under the control or jurisdiction of the state," AS 16.20.050 requires the responsible state department (in many cases, DNR) to notify ADF&G before "initiating" the use, lease or disposal. Under AS 16.20.250, in critical habitat areas private land as well as state-owned land is subject to the requirement, 27/ and thus, the statute imposes the duty to notify ADF&G upon the private party as well as the responsible state agency.

After notice is received by ADF&G, the person or governmental agency may be required to submit full plans and specifications. For refuges, ADF&G makes that decision, and for critical habitat areas, the boards decide. AS 16.20.060 and AS 16.20.260. The description of what can be required is identical

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26/ In addition, with respect to game refuges, ADF&G has a further statutory mandate. For the Mendenhall Wetlands state game refuge and Creamer's Field migratory waterfowl refuge, ADF&G is explicitly directed to develop a plan to promote the purposes of the refuges, and activities in those refuges are permitted only if compatible with the overall plan. AS 16.20.034(e), (f), (g) and (i), and AS 16.20.039(d).

27/ As discussed in section II C above, DNR is authorized but not required to adopt zoning regulations on private land contained within five of the refuges. AS 16.20.030(b) and (d), AS 16.20.032(d), AS 16.20.036(e), and AS 16.20.038(e).

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for refuges and critical habitat areas: full plans and specifications for the anticipated use, for the proposed construction work, and for the proper protection of fish and game, as well as the approximate date when the construction or work is to commence. Id. Further, ADF&G (for refuges) and the boards (for critical habitat areas) are given the authority to require the person or governmental agency to obtain written approval from ADF&G "as to the sufficiency of the plans and specifications before construction is commenced." Id. As discussed in section III above, written approval that is a prerequisite to commencement of an activity has been determined previously by this office to be a permit. 1982 Op. Att'y Gen. No. 1 (Mar. 4). The legislature has thus required that the impact on fish and game in these areas, specifically established to protect and preserve the natural habitat and to perpetuate fish and wildlife, be evaluated by the agency charged with fish and game management, ADF&G.

Although the requirement in AS 16.20.060 and AS 16.20-.260 for approval before "construction is commenced" can be interpreted several ways, 28/ we believe the most supportable reading encompasses the commencement or continuation of any

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28/ "Construct" means "to form, make, or create by combining parts or elements." Webster's Third New International Dictionary, 489. (1976).

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activity which ADF&G determines is likely to affect fish or wildlife or their habitat. In Alaska, a sliding scale for construction of statutes has been established. State v. City of Haines, 627 P.2d 1047, 1049, n.e (Alaska 1981); accord State v. Alex, 646 P.2d 203, 208-09, n.4 (Alaska 1982). Alaska courts will now construe a statute in light of the overall purposes of the legislation as a whole and will not construe a statute in a manner inconsistent with the express objective of that very legislation. Anchorage Municipal Employment Association v. Municipality of Anchorage, 618 P.2d 575, 580 (Alaska 1980). As detailed in section II A above, the express purpose of refuges and critical habitat areas is to "protect and preserve" the natural habitats and fish and wildlife populations. AS 16.20.020 and AS 16.20.220. Further, for critical habitat areas, the objectives include restricting "all other uses not compatible with" that protection and preservation. AS 16.20.220. Thus, it is most likely that the legislature intended ADF&G's review and approval function in legislatively designated areas to be triggered by the likelihood of impact on fish or game or their habitat.

A narrower reading -- that the written approval applies only to the actual nailing of boards, digging of holes, or building of dikes, and not to cutting down trees or driving heavy vehicles across fragile tundra -- would be inconsistent with the

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clearly articulated legislative concern for the habitat and fish and game in special areas, and with the explicit review provided for the "anticipated use." It is unlikely that the legislature intended the notice and approval statutes to be so narrowly construed as to undermine fish and game protection.

However, we do not believe that an extremely broad reading -- under which ADF&G could require an ADF&G permit for any use, lease, or disposal of land in special areas -- is supportable. The language of AS 16.20.050, AS 16.20.060, AS 16.20.250 and AS 16.20.260 precludes an interpretation which would grant ADF&G permit authority over transactions which are not likely to affect fish or game or their habitat.

Consequently, we believe that the most logical reading of AS 16.20.060 and AS 16.20.260 gives ADF&G permit authority in special areas over any activity which ADF&G determines may affect fish or game or their habitat. That interpretation is consistent with the language of the statutes and the general rule articulated by the Alaska Supreme Court that "conservation laws such as fish and game laws should be liberally construed to achieve their intended purpose." Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897, 903 (Alaska 1981). It is reasonable to assume that the legislature intended to give meaningful review authority in refuges and critical habitat areas to the agency primarily responsible for fish and

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game conservation -- ADF&G. (In order to further clarify what activities are encompassed by ADF&G permit authority under AS 16.20.060 and AS 16.20.260, it would be strongly advisable for ADF&G to adopt a regulation identifying activities it has determined may affect fish or wildlife or their habitat in special areas.) 29/

For a use, lease, or disposal that will not affect fish or wildlife or their habitat, AS 16.20.050 and AS 16.20.250 still require that ADF&G be notified. The purpose of that notification is to provide ADF&G the opportunity to comment on the lease or disposal to DNR or other relevant agencies and, in critical habitat areas, the private land owner. That consultation may be very important to DNR or the private person in evaluating the wisdom of the transfer; for example, if ADF&G anticipates that it would not be able to permit the eventual use to which the land would be put, those involved are likely to benefit from that knowledge.

E. Water appropriation and use

DNR has the authority to adjudicate water rights among competing claimants and to issue water appropriation permits, as discussed in section II B above. AS 46.15. In doing

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29/ See discussion of the need for regulations in section V, under question B, below.

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so, DNR is to consider a number of factors, including the effect on fish and game. AS 46.15.080(b)(2); Alaska Const. art. VIII, § 13. ADF&G, on the other hand, has no authority to appropriate water to particular individuals, although it has a role in commenting to DNR on permit applications and providing information which will assist DNR in fulfilling its constitutional and statutory responsibility to consider fish and game.

However, before use can be made of water appropriated by DNR to a particular claimant, in certain instances a permit must also be issued by ADF&G. If the water is from an anadromous fish stream, the procedures of AS 16.05.870, described in section II D above, must be followed, which may affect how the water appropriated by DNR can be taken. Similarly, if the water appropriated is in a special area, the provisions discussed in section IV C and D above apply. If the method of taking or the use within the special area may affect fish or game or their habitat in a refuge or a critical habitat area, ADF&G has permit authority under AS 16.20.060 and AS 16.20.260. If the use is in a sanctuary, the ADF&G permit authority is found in AS 16.20.120 and AS 16.20.170.

This distribution of complementary DNR and ADF&G authorities over water is analogous to those over land. For example, as discussed in section IV D above, DNR has the power to lease a piece of refuge land, as it has to appropriate water in a

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refuge. However, in this example, ADF&G has permit authority over any use of the leased land that might affect fish or game or their habitat, as it has over use of the appropriated water which could have those effects.

Given the related DNR and ADF&G water appropriation and use authorities over special areas and anadromous fish streams, it is very important that the two departments cooperate and communicate during the water permitting processes. This will ensure that an applicant is not accidentally misled into assuming that only DNR has permitting authority. Further, comment to DNR by ADF&G early in the DNR permitting process will ensure that an applicant is aware of ADF&G's separate and additional AS 16 permitting structures.

F. Prohibition on transfer of state land out of refuges

In refuges, a change in land status out of state ownership could threaten the overall legislative purposes for the refuge by virtue of the different statutory standards that come into play. 30/ In refuges, if state land were conveyed in fee out of state ownership, the land would no longer be refuge land and ADF&G would be unable to require review and approval of later

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30/ This discussion does not apply to those refuges which have been incorporated by reference from the national wildlife refuge system, since they do not consist of state land. AS 16.20.030(a).

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use of the transferred parcel, regardless of the effect on fish, game or habitat. This result would do violence to the statutory scheme as a whole.

Moreover, if DNR had the authority to effectively extinguish a legislatively created refuge by transferring state land in fee, it would be contrary to the separation of powers doctrine. The doctrine of separation of powers is implicit in the Alaska Constitution, and precludes one branch of government from interfering with the proper functioning of another branch. State v. Williams, 681 P.2d 310, 315 n.2 (Alaska 1984). This doctrine places primary responsibility for the conduct of legislative activities upon the legislature. Van Brunt v. State, 653 P.2d 343, 346 (Alaska App. 1982). Thus, the executive branch (here, DNR) cannot undo (by transferring state land in refuges out of state ownership) the legislature's actions (providing certain protections for fish and game and their habitat on refuge lands).

Further, it is a fundamental principle of statutory construction that statutes are to be read as a whole, in context, and in a manner that avoids absurdities and carries out legislative intent. 2A N. Singer, Sutherland Statutory Construction §§ 45.12 and 46.05 (4th ed. 1984). We believe that, under those guidelines, refuge land may not be transferred in fee out of state ownership unless such transfer is specifically authorized

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by the legislature, as, for example, in AS 16.20.034(i), which provides for acquisition by the City and Borough of Juneau of state land in the Mendenhall Wetlands refuge for three specified purposes.

Critical habitat areas, unlike refuges, include both private and state land (except for the Anchor River/Prize Creek area, which includes only state lands). AS 16.20.200. This fact probably reflects legislative recognition that statutory protections in critical habitat areas should extend beyond just state lands, and that multiple land ownership exists in these areas.

Because the legislature specified that the purposes for critical habitat areas include restricting all other uses not compatible with the primary purpose of protecting and preserving the habitat (AS 16.20.220), the legislature must not have intended to allow unrestricted conveyances (in fee) of land out of critical habitat status -- i.e., to federal or municipal entities that are not subject to the notice and permit requirements of AS 16.20.250 and AS 16.20.260. The legislature did not prohibit conveyances per se, but based on the same separation of powers principles articulated above, we interpret AS 16.05.220 as requiring that any fee transfers of state lands in critical habitat areas to private, municipal, or federal ownership, be subject to covenants running with the land that make the land subject to the protections of AS 16.20.240 -- AS 16.20.270.

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Without such protections, DNR could effectively dissolve legislatively created critical habitat areas.

The necessity for including protective covenants in conveyances in fee of state land does not apply to land held in private ownership at the time the critical habitat area was established, because private citizens are not subject to the separation of powers principle and their actions cannot be restricted based on this doctrine. Moreover, had the legislature intended to prohibit or restrict alienability of privately held lands in critical habitat areas, it would presumably have so stated in the legislation. Thus, a private landowner must give ADF&G notice of intent to convey land in fee under AS 16.20.250, but the restrictions of AS 16.20.260 do not apply, and there is no basis for requiring covenants in such private conveyances.

G. Summary and examples

Thus, we believe state land in refuges, as well as sanctuaries, 31/ cannot be conveyed in fee out of state ownership absent legislative authorization. Further, we believe that ADF&G and the boards in combination have permit authority over certain activities within refuges (consisting of state owned land) and critical habitat areas (consisting in almost all cases

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31/ AS 16.20.140 and AS 16.20.170.

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of both private and state owned land). It is clear from both AS 16.20.060 and AS 16.20.260 that plans for any anticipated use are reviewable and that under the most supportable interpretation, they must be approved before the use can proceed if ADF&G determines that it would be likely to affect fish or wildlife or their habitat. This does not supplant DNR's separate authorities discussed in sections II B and C above, but it is, rather, in addition to them. 32/ Some examples may be helpful.

If an individual wished to lease a piece of refuge land and to construct on it a boat-launching facility, DNR could evaluate the conveyance under the relevant statutes and regulations, giving notice to ADF&G as required by AS 16.20.050, and determine whether or not under the relevant ENR provisions the lease is in the state's best interest and could be approved. In doing so, DNR could consider any input from ADF&G, but would not be bound by it. However, ADF&G would at the same time be reviewing the proposed plans and specifications for the boat-launching facility to evaluate possible impact on fish, game, or their habitat. If a permit were not issued by ADF&G, the individual would not

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32/ We do not mean to suggest that DNR and ADF&G may not work together and make their decisions simultaneously. Indeed, such an approach would be consistent with the Administration's ongoing efforts at "permit reform" and, as discussed in section II E above, is provided for currently in the coastal zone consistency review process established in 6 AAC 50.

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construct the facility on the land, even if the lease were approved by DNR. If an individual wanted to commercially harvest trees on refuge land, ADF&G would be again notified under AS 16.20.050 and could require a permit under AS 16.20.060. Meanwhile, DNR would be reviewing the proposal under its own authority, such as AS 38.05.115. Approval from both agencies, each operating under its separate statutory standard, would be necessary. If the activity were to be located in or were to affect the coastal zone, the consistency review procedures in 6 AAC 50 would apply.

If an owner of private land in a critical habitat area wished to sell or lease his parcel to another individual, the owner would be required to notify ADF&G under AS 16.20.250, but ADF&G approval would not be required. (Similarly, DNR would notify ADF&G if it were considering a sale or lease of state land in critical habitat areas, but ADF&G approval would not be required.) If, however, the land owner wished to cut down all the trees on his parcel to achieve a better view of the nearby mountains, he would again notify ADF&G under AS 16.20.250, but in this instance, since something more than a change in paper status is involved, and if ADF&G determined that fish or wildlife or their habitat could be affected, ADF&G could require that he not proceed without a permit under AS 16.20.260.

If a tour guide wanted to set up expeditions into a

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sanctuary, he could be required by the boards to obtain a permit under AS 16.20.120 and AS 16.20.170, and DNR would not be involved. If a company, on the other hand, wanted to lease sanctuary land for oil exploration, the lease would be governed by DNR regulations under AS 16.20.140, and the exploration would be subject to state and federal laws and limitations jointly determined by DNR and ADF&G under AS 16.20.130. The boards could also impose requirements not inconsistent with those laws and limitations under AS 16.20.120 and AS 16.20.170.

V. SPECIFIC QUESTIONS FROM DNR AND ADF&G

Both DNR and ADF&G have posed specific questions about their complementary authorities in special areas. 33/ Although

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33/ In addition, DNR has asked what authorities it holds in yet a fourth type of legislatively created area, state range areas. State range areas are set out in AS 16.20.300 through AS 16.20.360, and two are established. The Delta Junction Bison Range Area is described in AS 16.20.300, and the Matanuska Valley Moose Range is described in AS 16.20.360.

For the Delta Junction Bison Range Area, ADF&G is directed by AS 16.20.310 to develop a plan for bison which includes activities such as planting grains and other wild forage, altering existing plant cover, and tilling in order to produce forage. ADF&G is directed by the statute to "coordinate as closely as possible" with "the activities of the Agricultural Development Authority, Department of Natural Resources, relating to the Big Delta Agricultural Project." (No other reference to this "Authority" appears to be contained in the Alaska statutes.)

The Matanuska Valley Moose Range is established for several purposes, including improving and enhancing moose population.  
(Footnote continued)

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the answers are largely provided above, the questions (somewhat paraphrased) and specific answers are set out here.

Question A: Is the authority exercised by ADF&G under AS 16.20.050 and AS 16.20.060 on state game refuges exclusive of the authority of DNR under Title 38 on state lands? Does DNR retain its traditional role as lessor of interests in land and permitter of certain activities in special areas, while ADF&G holds a veto over the actual exercise of these activities within refuges, critical habitat areas and sanctuaries? Do ADF&G or the boards have the authority to give controlling approval, conditional approval, or denial to a use, lease, or disposal of real property otherwise allowed by DNR in state refuges, critical habitat areas, and game sanctuaries?

Answer: As discussed in section IV above, the statutory authorities of ADF&G and the boards in relation to the

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(Footnote continued),  
lations and habitat and perpetuating public multiple use of the area through fishing, grazing, forest management, hunting, trapping, and mineral and coal entry and development. AS 16.20.340. The management of fish and game resources in the range is the responsibility of ADF&G, under AS 16.20.350(a). Management of the surface and subsurface estate is the responsibility of DNR, which is directed to adopt a management plan for the range that reflects the concurrence of ADF&G. AS 16.20.350(b). DNR is authorized by AS 16.20.250(c) to adopt regulations governing the public use of the area and is specifically directed to consult with ADF&G before the adoption. Thus, the DNR plan for the area must be approved by ADF&G, but the regulations may be adopted after consultation with ADF&G, even (presumably) if agreement cannot be reached between the two departments.

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authorities of DNR are of several kinds. Some authorities must be exercised after consultation, some are joint authorities requiring concurrence, and some are separate and may be independently exercised (although public policy would often best be served by cooperative joint decision making).

ADF&G, in combination with the boards, does have permit authority to approve, condition, or deny activities which could affect fish or game on their habitat in those special areas, whether or not approved by DNR. Similarly, DNR has certain authorities within those areas, and even if a use were one which ADF&G would approve, if DNR also had jurisdiction and for some separate reason did not approve it, it could not be carried out. Thus, it is misleading to characterize ADF&G's authority as a "veto" over DNR's authority, just as it would be inaccurate to characterize DNR's authority as a "veto" over ADF&G's authority. Each is necessary and each is to be exercised independently, under the relevant statutory authorities and standards.

Question B: Do ADF&G or the boards have the authority to adopt regulations setting guidelines for the issuance of their permits in state refuges, critical habitat areas and sanctuaries? Do ADF&G or the boards have the authority to adopt plans for state refuges, critical habitat areas, and game sanctuaries for the purpose of guiding the agency in making permit decisions, species enhancement decisions, species harvest decisions,

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scientific investigations, and decisions designating specific geographic areas as appropriate locations for particular uses?

Answer: As discussed in section III above, this office has already concluded that ADF&G and the boards have implied authority to adopt regulations governing issuance of permits in refuges and critical habitat areas and more explicit authority in sanctuaries. 1982 Op. Att'y Gen. No.1 (Mar. 4). If guidelines are to be used in evaluating permit applications rather than a case-by-case assessment directly under the statute, the guidelines must be contained in regulations. In Kenai Peninsula Fisherman's Cooperative Association Inc. v. State, 628 P. 2d 897, 906 (Alaska 1981), the court discussed the broad definition of "regulation" contained in AS 44.62.640(a)(2), noting that it includes manuals, policies, instructions, guides to enforcement, interpretive bulletins, interpretations, and the like. Id. at 904-05.

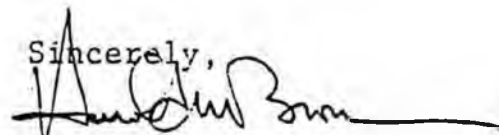
One indicator of a regulation is that it "implements, interprets or makes specific the law enforced or administered by the state agency," and another is that it "affects the public or is used by the agency in dealing with the public." Id. at 905. General guidelines for issuing permits in special areas would indeed fit both those descriptions, and thus should be adopted by "

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two departments which are separate yet complementary. The Department of Natural Resources has many general authorities with regard to state-owned land, as well as specific authorities in state game refuges and sanctuaries. Some of those authorities must be exercised in conjunction with the Department of Fish and Game, some must be exercised after consulting with the Department of Fish and Game, and some may be independently exercised. The Department of Fish and Game and the Boards of Fisheries and Game have specific authorities in state game refuges, game sanctuaries, and critical habitat areas. Some of the authorities are to be exercised in conjunction with DNR, but for the three types of special areas, the Department of Fish and Game and the Boards of Fisheries and Game have separate permit authority which may be exercised independently of the Department of Natural Resources. In any event, any departmental actions which may affect the coastal zone must be consistent with the ACMP, and the consistency review process established in 6 AAC 50 is an example of inter-departmental coordination that might be useful statewide.

Sincerely,



Harold M. Brown  
Attorney General

Attachment

SUMMARY OF DNR/ADF&G  
 AUTHORITIES IN SPECIAL AREAS  
 (AG # 366-045-84 and 366-122-84)

	Refuges	Critical habitat areas	Sanctuaries
Consists of state land only	X*	.	X
Consists of state and private land		X**	
State land cannot be transferred in fee without specific legislative authorization	X		X
Land can be leased only for oil and mineral exploration and development (by DNR)			X
Oil and mineral exploration and development governed by state and federal laws and regulations, and by limitations jointly determined by DNR & ADF&G			X
Boards may regulate all activities and uses not inconsistent with oil and mineral exploration and development			X
Leases and other paper changes of state land status executed by DNR, but ADF&G must be notified first	X		
Sales, leases, and other paper changes of land status executed by private land owner or DNR, but ADF&G must be notified first		X***	
ADF&G and boards may regulate those activities which they determine may affect fish, game or their habitat	X	X	X

\* Except for the units which have incorporated by reference from the national wildlife refuge system. AS 16.20.030(a).

\*\* Except for the Anchor River/Fritz Creek critical habitat area, which consists of state land only.

\*\*\* Transfers of state land must be subject to covenants running with the land that make it subject to the protections of AS 16.20.240 -- AS 16.20.270

the two departments 1/ have complementary statutory authorities in that each has separate, independent permitting authority, as well as other responsibilities which are to be carried out in conjunction with or after consultation with the other department. (The attached chart summarizes the authorities of DNR and ADF&G in special areas.) In addition, for activities located in or affecting the coastal zone, both departments must implement their authorities in a manner consistent with the Alaska Coastal Management Program. This opinion follows the following outline:

I.	Introduction	page 1
II.	The statutory framework	page 3
	A. Special areas	page 3
	B. DNR general authorities	page 6
	C. DNR authorities specific to special areas	page 13
	D. ADF&G authorities in special areas	page 15
	E. Coastal zone consistency review	page 21
III.	Prior attorney general opinions	page 24
IV.	Interaction between DNR and ADF&G authorities	page 27

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1/ As discussed later in this memorandum, ADF&G and the Boards of Fisheries and Game each have been delegated slightly different authorities in special areas. Those will be outlined in detail, but throughout this opinion, the combined authorities will be generally referred to as belonging to ADF&G. In addition, the Commissioner of ADF&G will be referred to as "ADF&G."

§ 41.21.022

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PUBLIC RESOURCES

§ 41.21.172

Article 2. State Parks.

Section

124. [Repealed]

133. [Repealed]

143. [Repealed]

170. Declaration of purpose

172. Designated state land and water

Section

174. Designation of management respon-  
sibility

176. Compatibility of uses

178. Additions to park

*Sec. 41.21.124. Discharge of firearms. [Repealed, § 2 ch 126 SLA 1984.]*

*Sec. 41.21.133. Discharge of firearms. [Repealed, § 2 ch 126 SLA 1984.]*

*Sec. 41.21.143. Discharge of firearms. [Repealed, § 2 ch 126 SLA 1984.]*

**Sec. 41.21.170. Declaration of purpose.** (a) The purpose of AS 41.21.170 — 41.21.178 is to establish, subject to valid existing rights, the state-owned or acquired uplands and freshwater bodies described in AS 41.21.172 as the Shuyak Island State Park. The primary purposes of establishing the Shuyak Island State Park are to protect the area's recreational and scenic resources, to protect the area's fish and wildlife habitat, and to preserve and enhance the continued use of the area for sport and subsistence hunting and fishing, trapping, and recreational activities.

(b) Under the provisions of AS 38.05.300, state land, water, or land and water containing more than 640 acres may be closed to multiple purpose use only by act of the legislature. Because the area described in AS 41.21.172 exceeds 640 acres, AS 41.21.170 — 41.21.178 are intended to close the described land and water to multiple purpose use in conformity with AS 38.05.300 and to dedicate them as a special purpose site in accordance with art. VIII, sec. 7, Constitution of the State of Alaska. (§ 1 ch 167 SLA 1984)

**Sec. 41.21.172. Designated state land and water.** The uplands and freshwater bodies owned or acquired by the state within the following described parcel are designated as the Shuyak Island State Park: all uplands, including Dark Island and other islands, islets, pinnacles, and rocks within the Shuyak Island complex lying easterly of Shelikof Strait, south of Stevenson Entrance, north of Shuyak Strait, and lying westerly and northerly of the following described boundary line (all sections of unsurveyed land are protracted): Beginning at the section corner common to sections 13 and 24 of T19S, R21W, S.M. and sections 18 and 19 of T19S, R20W, S.M., then

northerly and easterly approximately 2.8 miles along a line dividing the east and west sides of Neketa Bay (the island in the SW 1/4 of section 17, T19S, R20W, S.M. is on the east side of Neketa Bay for the purpose of this description) to the center of the isthmus dividing Neketa Bay and Big Bay located in the SW 1/4 of section 9, T19S, R20W, S.M., then northeasterly approximately 25 feet to the mean high tide line of Big Bay; then meandering easterly and northerly in a counter-clockwise direction along the mean high tide line of Shuyak Island to a point common to the W 1/16th line in the north half of the north half of Section 10, T19S, R20W, S.M.; then north along the W 1/16th line approximately 150 feet to the section line common to Sections 3 and 10, T19S, R20W, S.M.; then east 0.5 miles between Sections 3 and 10 to the E 1/16th corner of Sections 3 and 10, T19S, R20W, S.M.; then north 0.5 miles along the E 1/16th line of Section 3 to the C-E 1/16th corner of Section 3, T19S, R20W, S.M.; then west 0.25 miles along the E-W 1/4 line of Section 3 to the C 1/4 corner of Section 3, T19S, R20W, S.M.; then north 0.25 miles along the NS 1/4 line of Section 3 to the C-N 1/16th corner of Section 3, T19S, R20W, S.M.; then north-northeasterly approximately 1.65 miles to the C-E-W-SW 1/125th corner of Section 26, T18S, R20W, S.M.; then east 0.80 miles along the S 1/16th line of Section 26 to the S 1/16th corner of Sections 25 and 26, T18S, R20W, S.M.; then south 0.25 miles between Sections 25 and 26 to the corner common to Sections 25, 26, 35, and 36, T18S, R20W, S.M.; then east between Sections 25 and 36, T18S, R20W, S.M. and Sections 30 and 31, T18S, R19W, S.M. approximately 1.75 miles to the intersection with the mean high tide line on the west shore of the unnamed bay that connects to Shangin Bay; then meandering southerly and easterly along the mean high tide line of that unnamed bay to Shangin Bay and then continuing southerly, easterly, and northerly along the mean high tide line of Shangin Bay to a point common to the N 1/16th line of Section 32, T18S, R19W, S.M.; then east along the N 1/16th line of Sections 32 and 33 approximately 0.3 miles to the NW 1/16th corner of Section 33, T18S, R19W, S.M.; then northeasterly approximately 1.5 miles to the section corner common to Sections 22, 27, 28, and 21, T18S, R19W, S.M.; then north along the west boundary of Sections 22 and 15, T18S, R19W, S.M., to the point of mean high tide in Shangin Bay. (§ 1 ch 167 SLA 1984)

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**Sec. 41.21.174. Designation of management responsibility.** (a) The state uplands and freshwater bodies described in AS 41.21.172 are assigned to the Department of Natural Resources for control, maintenance, and development consistent with the purposes and provisions of AS 41.21.170 — 41.21.178.

(b) The Department of Fish and Game is responsible for the management of fish and game resources in the Shuyak Island State Park, consistent with the sustained yield principle and the purposes and provisions of this chapter. The Board of Fisheries, the Board of Game and the commissioner of fish and game are responsible for adopting regulations governing uses of fish and game in accordance with AS 16. The fish and game habitat and breeding areas shall be managed to ensure that the fish and game resources of the park continue on a sustained yield basis.

(c) The Department of Natural Resources shall consult with the Department of Fish and Game before adoption of regulations governing public use of the Shuyak Island State Park.

(d) The Department of Fish and Game shall consult with the Department of Natural Resources before adoption of regulations governing fish and game management in Shuyak Island State Park.

(e) The regulations established under this section shall be adopted in accordance with the Administrative Procedure Act (AS 44.62).

(f) The commissioner of natural resources shall permit reasonable camping within the Shuyak Island State Park on an extended basis on request.

(g) Nothing in AS 41.21.170 — 41.21.178 prohibits the Department of Fish and Game from engaging in stream rehabilitation enhancement and development under AS 16.05.092 on land within the Shuyak Island State Park.

(h) The Department of Public Safety and the Department of Fish and Game shall have necessary access for fish and game management, research, and enforcement purposes. (§ 1 ch 167 SLA 1984)

**Sec. 41.21.176. Compatibility of uses.** (a) The commissioner of natural resources may designate by regulation incompatible uses within the park uplands and freshwater bodies.

(b) Use of a weapon in the Shuyak Island State Park shall be allowed except in unique areas that may be closed for purposes of public safety by regulation by the commissioner of natural resources.

(c) The regulations governing public use of the Shuyak Island State Park shall provide ample access for legal sport and subsistence hunting and fishing, trapping, and recreational uses. Except to protect public safety the commissioner of natural resources may not restrict

the exercise of sport or subsistence fishing or hunting, or trapping permitted under law or under a regulation of the Board of Fisheries or the Board of Game within the Shuyak Island State Park. (§ 1 ch 167 SLA 1984)

**Sec. 41.21.178. Additions to park.** Land may be added to the Shuyak Island State Park only by an act of the legislature. The commissioner of natural resources may not acquire land within the boundaries of the Shuyak Island State Park by eminent domain. (§ 1 ch 167 SLA 1984)

**Editor's notes.** — Section 2, ch. 167, SLA 1984, provides: "(a) The commissioner of natural resources shall seek an amendment to the Agreement of Settlement and Consent Decree of June 19, 1981, between the state and the Kodiak Island Borough to make the following uplands that were retained by the state under that agreement of settlement available to the Kodiak Island Borough under AS 29.18.201 — 29.18.213:

"T19S, R20W, S.M.

"Sec. 16

"Sec. 17

"Secs. 19 — 21

"Sec. 29

"Sec. 30

"(b) The commissioner of natural resources shall seek a relinquishment of borough land selections under AS 29.18.201 — 29.18.213 and an amendment to the Agreement of Settlement and Consent Decree of June 19, 1981, between the state and the Kodiak Island Borough to include the following described land of an equal acreage to that land described in sec. 2(a) in the Shuyak Island State Park:

"T18S, R20W, S.M.

"Sec. 26

"Secs. 34 — 36

"T18S, R19W, S.M.

"Sec. 31

"(c) Subsections (a) and (b) of this section are repealed six months from July 12, 1984 if the Agreement of Settlement and Consent Decree of June 19, 1981, is not amended as proposed in (a) and (b) of this section.

"(d) If the Agreement of Settlement and Consent Decree of June 19, 1981, is amended as proposed in (b) and (c) of this section, the uplands within the following described lands are added to the Shuyak Island State Park:

"T19S, R20W, S.M.

"Sec. 8, SE1/4, SE1/4, SE1/4

"Sec. 9"

Section 3, ch. 167, SLA 1984, provides: "Subject to the availability of funds, the Department of Natural Resources shall construct public use cabins within the Shuyak Island State Park."

Section 4, ch. 167, SLA 1984, provides: "The commissioner of natural resources shall identify the boundaries of the Shuyak Island State Park by posting each inland boundary described in AS 41.21.172 as enacted in sec. 1 of this Act or as added under sec. 2 of this Act at its beginning and its end and not less often than each one-eighth of a mile."

Section 5, ch. 167, SLA 1984, provides: "The commissioner of natural resources shall identify and offer for sale to the public 500 acres of state-owned land within the Kodiak Island Borough under AS 38 within five years of July 12, 1984. The land offered for sale under this section shall be reasonably accessible to residents of the City of Kodiak, shall be land of good quality, and may not include land proposed as of February 1, 1984 by the Department of Natural Resources for sale by the department during fiscal years 1984, 1985, or 1986. The disposals of the land shall be held in the City of Kodiak. The commissioner of natural resources shall submit to the legislature not later than the 10th day of the Second Regular Session of the Sixteenth Alaska State Legislature a report on the compliance by the Department of Natural Resources with this section."

Section 6, ch. 167, SLA 1984, provides: "AS 41.21.170 — 41.21.178 enacted by sec. 1 of this Act is repealed July 1, 1990, if the commissioner of natural resources does not report to the legislature under sec. 5 of this Act that the Department of Natural Resources has identified and offered for sale 500 acres of state-owned land within the Kodiak Island Borough under AS 38 within five years after July 12, 1984."

Offered: 3/7/86  
Referred: Finance

Original sponsor: Thompson

1 IN THE HOUSE

BY THE RESOURCES COMMITTEE

2

CS FOR HOUSE BILL NO. 605 (Resources)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act establishing the Shuyak State Game Refuge."

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

8 \* Section 1. AS 16.20 is amended by adding a new section to read:

9           Sec. 16.20.035. SHUYAK STATE GAME REFUGE. (a) The following  
10 state-owned uplands and all uplands acquired by the state after the  
11 effective date of this Act lying within the area described in this  
12 subsection are established as the Shuyak State Game Refuge:

13           (1) Beginning at the E 1/16th corner common to Sections 23  
14 and 26, T18S, R19W, S.M.; then south-southwesterly approximately 8.86  
15 miles to the section corner common to Sections 31 and 32, T19S, R19W,  
16 S.M., and Sections 5 and 6, T20S, R19W, S.M.; then westerly along the  
17 township line between Townships 19 and 20S, Ranges 19 and 20W, S.M.,  
18 approximately 2.5 miles to the 1/4 corner common to Section 35, T19S,  
19 R20W, S.M., and Section 2, T20S, R20W, S.M.; then southerly along the  
20 north-south centerline of Section 2, T20S, R20W, S.M., approximately  
21 0.3 miles to the intersection of the mean high tide line of Shuyak  
22 Strait; then meandering in a counter-clockwise direction easterly,  
23 northerly, westerly, and southerly to the intersection of the mean  
24 high tide with the section line common to Sections 15 and 16, T18S;  
25 R19W, S.M.; then south approximately 1.25 miles to the section corner  
26 common to Sections 22, 27, 28 and 21, T18S, R19W, S.M.; then east 1.75  
27 miles between Sections 22 and 27, 23 and 26 to the E 1/16th corner  
28 common to Sections 23 and 26, T18S, R19W, S.M.; to the point of begin-  
29 ning; and

1           (2) Big Fort Island, Little Fort Island, the Perevalnie  
2 Islands and all other islands, islets, pinnacles and rocks lying  
3 easterly of and within one mile of the easterly shore of the lands  
4 described in (1) of this subsection.

5           (b) The Shuyak State Game Refuge is established to provide the  
6 following:

7           (1) protection and enhancement of habitat;

8           (2) continued opportunity for recreational uses, including  
9 fishing and hunting, and continued trapping and commercial fishing;

10          (3) opportunity to view, photograph, study, and enjoy the  
11 various species of plants and wildlife of the refuge.

12          (c) If the Kodiak Island Borough relinquishes to the state any  
13 state land selected by the borough within the following parcels, that  
14 land becomes part of the Shuyak State Game Refuge:

15          (1) T18S, R19W, S.M.

16               Sections 26 - 28

17               Sections 33 - 35

18          (2) T19S, R19W, S.M.

19               Section 3

20               Section 4

21               Section 6: S1/2

22               Sections 7 - 10

23               Sections 16 - 21

24               Sections 29 - 32

25          (3) T19S, R20W, S.M.

26               Section 1: S1/2

27               Section 2: S1/2

28               Section 10: SE1/4

29               Sections 11 - 16

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Sections 20 - 29

Sections 32 - 36

(4) T20S, R20W, S.M.

Section 2

Section 3

(d) Egress and ingress to and from private and borough property within or adjacent to land described in (a) of this section shall be provided through the reservation by the Department of Natural Resources of a 200-foot easement traversing Section 26, T18S, R19W, S.M.; Sections 15, 16, 21, and 22 of T19S, R19W, S.M.; and Section 32, T19S, R19W, S.M. The specific locations of the easements shall be agreed to by the Department of Fish and Game, the Department of Natural Resources, and the Kodiak Island Borough. If land is conveyed to the state as provided in (c) of this section, the easements shall be reserved so as to continue through that land.

(e) The Shuyak State Game Refuge shall be managed in accordance with a management plan prepared by the Department of Fish and Game. The management plan shall be adopted in accordance with the Alaska Administrative Procedure Act (AS 44.62).

(f) The Board of Fisheries and the Board of Game shall adopt regulations governing the taking of fish and game within the Shuyak State Game Refuge to implement (b) of this section.

(g) To the extent that funds are available, the commissioner of natural resources shall identify the boundaries of the Shuyak State Game Refuge by surveying and posting each inland boundary described in (a)(1) of this section, or as added under (c) of this section, at its beginning and its end.

Introduced: 2/14/86  
Referred: Resources  
and Finance

1 IN THE HOUSE

BY THOMPSON

2

HOUSE BILL NO.605

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act establishing the Shuyak State Game Refuge."

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

8 \* Section 1. AS 16.20 is amended by adding a new section to read:

9           Sec. 16.20.035. SHUYAK STATE GAME REFUGE. (a) The following  
10 state-owned uplands and all uplands acquired by the state after the  
11 effective date of this Act lying within the area described in this  
12 subsection are established as the Shuyak State Game Refuge:

13           (1) Beginning at the E 1/16th corner common to Sections 23  
14 and 26, T18S, R19W, S.M.; then south-southwesterly approximately 8.86  
15 miles to the section corner common to Sections 31 and 32, T19S, R19W,  
16 S.M., and Sections 5 and 6, T20S, R19W, S.M.; then westerly along the  
17 township line between Townships 19 and 20S, Ranges 19 and 20W, S.M.,  
18 approximately 2.5 miles to the 1/4 corner common to Section 35, T19S,  
19 R20W, S.M., and Section 2, T20S, R20W, S.M.; then southerly along the  
20 north-south centerline of Section 2, T20S, R20W, S.M., approximately  
21 0.3 miles to the intersection of the mean high tide line of Shuyak  
22 Strait; then meandering in a counter-clockwise direction easterly,  
23 northerly, westerly, and southerly to the intersection of the mean  
24 high tide with the section line common to Sections 15 and 16, T18S;  
25 R19W, S.M.; then south approximately 1.25 miles to the section corner  
26 common to Sections 22, 27, 28 and 21, T18S, R19W, S.M.; then east 1.75  
27 miles between Sections 22 and 27, 23 and 26 to the E 1/16th corner  
28 common to Sections 23 and 26, T18S, R19W, S.M.; to the point of begin-  
29 ning; and

1                   (2) Big Fort Island, Little Fort Island, the Perevalnie  
2 Islands and all other islands, islets, pinnacles and rocks lying  
3 easterly of and within one mile of the easterly shore of the lands  
4 described in (1) of this subsection.

5                   (b) The Shuyak State Game Refuge is established to provide the  
6 following:

7                   (1) protection and enhancement of habitat;

8                   (2) continued opportunity for recreational uses, including  
9 fishing and hunting, and continued trapping and commercial fishing;

10                   (3) opportunity to view, photograph, study, and enjoy the  
11 various species of plants and wildlife of the refuge.

12                   (c) If the Kodiak Island Borough relinquishes to the state any  
13 state land selected by the borough within the following parcels, that  
14 land becomes part of the Shuyak State Game Refuge:

15                   (1) T18S, R19W, S.M.

16                   Sections 26 - 28

17                   Sections 33 - 35

18                   (2) T19S, R19W, S.M.

19                   Section 3

20                   Section 4

21                   Section 6: S1/2

22                   Sections 7 - 10

23                   Sections 16 - 21

24                   Sections 29 - 32

25                   (3) T19S, R20W, S.M.

26                   Section 1: S1/2

27                   Section 2: S1/2

28                   Section 10: SE1/4

29                   Sections 11 - 16

- 1                   Sections 20 - 29
- 2                   Sections 32 - 36
- 3                   (4) T20S, R20W, S.M.
- 4                   Section 2
- 5                   Section 3

6                   (d) Egress and ingress to and from private and borough property  
7 within or adjacent to land described in (a) of this section shall be  
8 provided through the reservation by the Department of Natural Re-  
9 sources of a 200-foot easement traversing Section 26, T18S, R19W,  
10 S.M.; Sections 15, 16, 21, and 22 of T19S, R19W, S.M.; and Section 32,  
11 T19S, R19W, S.M. The specific locations of the easements shall be  
12 agreed to by the Department of Fish and Game, the Department of  
13 Natural Resources, and the Kodiak Island Borough. If land is conveyed  
14 to the state as provided in (c) of this section, the easements shall  
15 be reserved so as to continue through that land.

16                   (e) The Shuyak State Game Refuge shall be managed in accordance  
17 with a management plan prepared by the Department of Fish and Game.  
18 The management plan shall be adopted in accordance with the Alaska  
19 Administrative Procedure Act (AS 44.62).

20                   (f) The Board of Fisheries and the Board of Game shall adopt  
21 regulations governing the taking of fish and game within the Shuyak  
22 State Game Refuge to implement (b) of this section.

23                   (g) To the extent that funds are available, the commissioner of  
24 fish and game shall identify the boundaries of the Shuyak State Game  
25 Refuge by surveying and posting each inland boundary described in  
26 (a)(1) of this section, or as added under (c) of this section, at its  
27 beginning and its end and not less often than each one-eighth of a  
28 mile.