

HB

424

SEP 21 '88 11:02 AM DEPT FISH & GAME JUNEAU

MEMORANDUM

State of Alaska
Department of Law

TO: Hon. Don Collinsworth
Commissioner
Department of Fish & Game

DATE: August 30, 1988

FILE NO.: 663-88-0308

TEL NO.: 465-3600

SUBJECT: Anchor River/Fritz Creek
critical habitat ~~management~~ ~~plan~~ ~~management~~ ~~plan~~ ~~management~~ ~~plan~~
management plan

FROM: Larri Irene Spengler
Assistant Attorney General
Natural Resources Section-Juneau

DEPARTMENT OF FISH AND GAME

You have inquired about the effect of a provision in the statute that created the Anchor River/Fritz Creek critical habitat area which states that the management plan that your department is mandated to develop "shall take effect when approved by act of the legislature." As discussed below, we believe that provision in AS 16.20.605(d) may be unconstitutional as a violation of the separation of powers doctrine. However, because we cannot predict with absolute certainty how a court would rule on that issue, and because failure to follow the statutory directive could render enforcement of the management plan legally vulnerable, we recommend, as discussed below, that you adhere to it as a matter of practicality.

POTENTIAL UNCONSTITUTIONALITY

Generally speaking, it is the legislature's duty to make laws, not enforce them. The United States Supreme Court has defined "legislative powers" as follows:

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint agents charged with such enforcement.

Springer v. Philippine Islands, 227 U.S. 198 (1928). Put another way:

Legislation consists in laying down laws or rules for the future; administration has to do with the carrying out of those laws into effect, their practical application to current affairs by way of management and oversight including investigation, regulation and control, in accordance with, and in execution of, the principles prescribed by the lawmaker ...

ALASKA DEPT. OF
FISH & GAME

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REGION II
HABITAT DIVISIONRECEIVED
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Mitchell Cole & Co. v. Pennsylvania R.R. Co., 230 U.S. 247 (1913)
 (Pierney, J., dissenting).

An impermissible assumption of power by a legislative body has been described as follows:

In other words, the general assembly not only passed an act -- that is, made a law -- but it made a joint committee of the Senate and the House as its executive agent to carry out that law. This is a clear and conspicuous attempt by the general assembly to confer executive power upon a collection of its own members.

Stockman v. Leddy, 129 P. 220, 223 (Col. 1912).

The Alaska Supreme Court has held that the doctrine of separation of powers, though not expressly set out in the Alaska Constitution, is clearly implied. Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975). Furthermore, the court has recognized that it was a purpose of the framers of the Alaska Constitution to create a strong executive branch of government. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976). See also State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980); Immigration and Naturalization Service v. Chadah, 462 U.S. 919 (1983); and 1976 Op. Att'y Gen. No. 28 (July 22).

This office has in other instances concluded that provisions similar to the legislative approval requirement in the Anchor River/Fritz Creek statute were probably unconstitutional, under the separation of powers doctrine. For example, our office has noted that a statute requiring legislative approval of an individual contract or a specific energy project was possibly constitutionally infirm. 1976 Inf. Op. Att'y Gen. (Feb. 11; Bnessa) ; 1981 Inf. Op. Att'y Gen. (Nov. 3; J66-159-82); 1985 Inf. Op. Att'y Gen. (Aug. 13; 166-065-86). Similarly, we opined that a proposed constitutional amendment which would have authorized the legislature to require by law that the disposal of state lands or interests therein be subject to legislative approval would have abrogated the separation of powers doctrine as it applied to the disposal of the state's resources. 1976 Inf. Op. Att'y Gen. (May 28; Fegues). As a further example, we have addressed proposals regarding possible legislative oversight of portions of the Alaska Coastal Management Program, and concluded that formal legislative oversight would raise serious separation of powers questions under the Alaska Constitution. 1980 Inf. Op. Att'y Gen. (Oct. 8; J66-019-81); 1987 Inf. Op. Att'y Gen. (April 1; 663-87-0392).

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The provision contained in the statute in question similarly requires legislative action before an executive action becomes effective, thus arguably in essence making the legislature into an executive agent. Consequently, we believe that the requirement may similarly be constitutionally infirm. However, we cannot predict with absolute certainty how a court would rule on that issue. In addition, because the management plan will form the basis for issuing, conditioning, and denying permits by the Department of Fish and Game in the critical habitat area, its validity may be a key to later enforcement actions with respect to activities in that critical habitat area. Failure to follow the statutory directive to obtain legislative approval could render the plan vulnerable to legal challenge, and thus undercut later enforcement actions. Therefore, we recommend that as a matter of practicality you comply with the provision in question, or seek its repeal. Some suggestions with respect to that compliance are set out below.

RECOMMENDED APPROACH

Under AS 16.20.520 and AS 16.20.530, the Department of Fish and Game and the Boards of Fisheries and Game are given authority to regulate activities in critical habitat areas which the agencies determine may affect fish or game or their habitat. 1985 Opin. Att'y Gen. No. 4 (Nov. 8). With respect to its similar authority in state game refuges, AS 16.20.050 and AS 16.20.060, the department develops management plans, and then adopts by reference into regulation the portions of the plans upon which permitting decisions will rest. See, for example, 5 AAC 95.500. It is our understanding that the Department of Fish and Game and the Boards of Fisheries and Game intend to follow the same procedure with respect to management plans for critical habitat areas, and indeed such a process is required if agency decisions which will affect the public are going to be made relying on particular guidelines in the plans. Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897 (Alaska 1981).

Normally, the department and the boards would develop a draft plan, publish notice with respect to the adoption of that plan, receive public comment, and then finalize the plan, and incorporate the relevant portions of it into regulation by reference. In this instance, however, the requirement that the

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management plan "shall take effect when approved by act of the legislature" */ complicatas that approach somewhat.

We recommend that the department and board prepare the plan and the regulation which would incorporate the relevant portions of the plan by reference, follow the Administrative Procedure Act process up to but not including the point of actual adoption, and then submit a short bill to the legislature which, if enacted, would approve the plan as developed. If the legislature enacted the bill, the agencies could take the final step in adopting the regulation. If the legislature enacted the bill, but amended it to modify portions of the plan, as long as the modifications still fall within the original legal notice given for the adoption of the regulation, the agencies could make similar amendments and adopt the plan as amended into regulation. In order to minimize confusion on the part of the public as to when the plan becomes effective, we recommend that the plan contain a provision that it will take effect after approval by the legislature and final adoption by the agencies.

You have also inquired whether future amendments to the plan would have to be implemented through act of the legislature, or through the Administrative Procedure Act processes. The answer to that question is not clear from the statute. However, the question could be obviated if the plan as developed contains a provision that future amendments would occur under the Administrative Procedure Act, without need for legislative approval. If that language is included in the plan, and the plan is approved by the legislature, there will be no need to return to the legislature for approval of future amendments.

Of course, an alternative--or perhaps a parallel--track to the above would be to submit a bill to the legislature amending AS 16.20.605(d) to excise the sentence in question. Whether you choose to follow one or both of those courses of action will, of course, depend on your assessment of the overall likelihood of

*/ You have inquired whether action by resolution would suffice. Under State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), legislative action by resolution would not be sufficient. The legislature would have to, as stated in the statute, approve the measure by act. The enactment would not necessarily have to modify the statute, but instead could simply become part of the session laws for the relevant year.

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success, and the advantages and disadvantages to trying only one, or both, approaches.

If this office can be of any further assistance to you, please let us know.

LIS:jf

cc: Norman Cohen
Frank Rua
Debbie Clauson
Department of Fish and Game

Liza McCracken
Anchorage AGO

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

November 20, 1989

STEVE COWPER, GOVERNOR

P O BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE (907) 465-3800

M E M O R A N D U M

TO: Honorable Steve Cowper
Governor

FROM: *Arthur H. Peterson*
for Douglas B. Baily
Attorney General

RE: Attached final version of bill on
Anchor River/Fritz Creek Management Plan
Our file: 773-90-0019

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At the request of your legislative liaison, Bob Evans, relayed to us by your legislative staff assistant, Shari Kochman, in her November 15, 1989 memo to this department, the final version of this bill is attached. It is identical to the October 2, 1989 draft. We have prepared it for introduction in the House, as requested by Shari.

No change is required in the October 2, 1989 draft transmittal letter, so no new draft transmittal letter is attached.

DBB:AHP:cb

cc w/enc.: Honorable Don Collinsworth, Commissioner, ADFG
Honorable Lennie Gorsuch, Commissioner, DNR
Warren Wiley, Assist. Comm'r, ADFG
Frank Rue, Director, Habitat Division, ADFG
Alison Elgee, Director, Div. of Budget Review, OMB
Mary Halloren, Director, Division of Policy, OMB
Larri Irene Spengler, Assist. Att'y Gen'l, Juneau

go00190h

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE HOUSE

2 HOUSE BILL NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the Anchor River and Fritz Creek
7 Critical Habitat Area management plan; and providing
8 for an effective date."

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

10 * Section 1. AS 16.20.605(d) is repealed and reenacted to read:

11 (d) The Anchor River and Fritz Creek Critical Habitat Area
12 management plan adopted by the Department of Fish and Game and dated
13 June 1989 is approved. Amendments of the goals and policies of the
14 management plan shall be accomplished through the Administrative
15 Procedure Act, AS 44.62.

16 * Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

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Anchor River Fritz Creek Critical Habitat Area
Management Plan

- ° On the initiative of local citizens and a grass roots effort, the Anchor River Fritz Creek Critical Habitat Area was established in 1985 to protect and preserve habitat and fish and wildlife populations, especially moose.
- ° The statute creating the critical habitat area directed that a management plan be prepared. The purpose of the plan is to provide consistent, long range direction in managing the critical habitat area.
- ° The planning process began with a public meeting held in December, 1987 to identify the issues that should be addressed in the plan.
- ° Department staff prepared a resource inventory of fish and wildlife and their habitats; public access; land use; and land ownership.
- ° The planning team composed of state, federal and local agency representatives with authority on critical habitat area lands developed the draft management plan based on the issues identified at the public meeting, critical habitat area resource values, the purpose for which the critical habitat area was established and other guidance provided in law.
- ° The draft management plan was sent out for public review and a public hearing was held to solicit comments.
- ° The final plan was prepared based on comments received during the public review period.
- ° The plan does not address harvest regulations, which are the authority of the Boards of Fish and Game.
- ° The plan applies only to state lands within the critical habitat area. (There are several private inholdings).
- ° The management plan is now awaiting implementation by Act of the legislature, as specified in statute.

To	HABITAT	INITIALS
	DIRECTOR	
	DEPUTY DIR	
	HAB. BIOL	
	Admin. Asst.	
	Secretary	
	REG. SUP. 1	
	REG. SUP. 2	
	REG. SUP. 3	



KENAI PENINSULA BOROUGH

144 N. BINKLEY • SOLDOTNA, ALASKA 99669
PHONE (907) 262-4441

DON GILMAN
MAYOR

January 4, 1990

Debra Clausen
Department of Fish & Game
Habitat Division
333 Raspberry Road
Anchorage, Alaska 99518-1599

Dear Ms. Clausen,

I have reviewed the final draft of the Anchor River/ Fritz Creek Critical Habitat Area Plan and support adoption of this plan by the legislature.

The plan is consistent with the Borough's Concept Approved Coastal Management Program, and includes a good balance between environmental protection and human use and enjoyment of the area.

The Borough has requested relinquishment of the municipal selections in T5S, R13W as recommended in the plan.

Thank you for the opportunity to comment.

Sincerely,

Sylvia Spearow

ALASKA DEPT. OF
FISH & GAME

JAN 08 1990

REGION II
HABITAT DIVISION

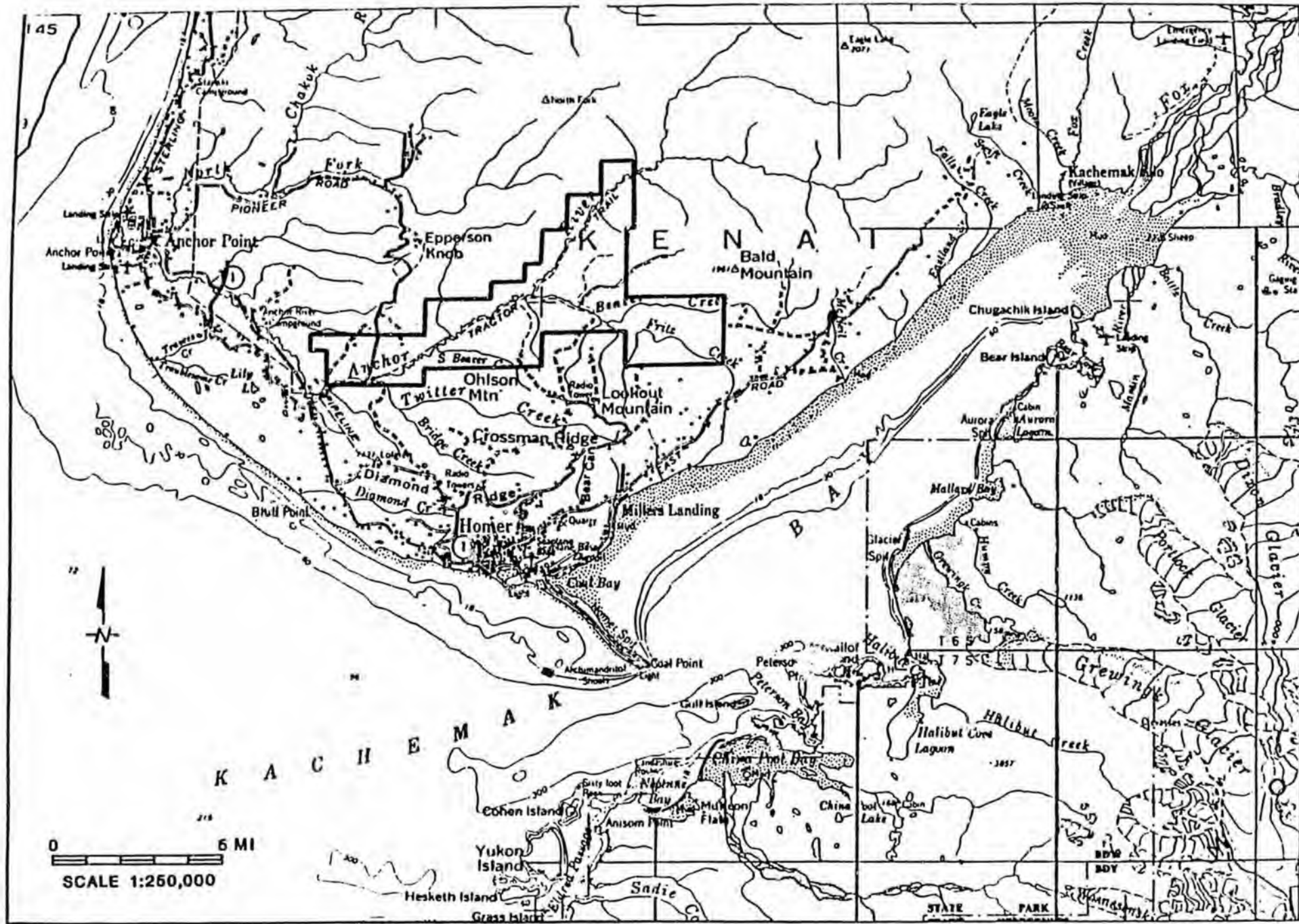
ANCHOR RIVER/FRITZ CREEK
CRITICAL HABITAT AREA
MANAGEMENT PLAN

JUNE 1989

Prepared by the
Divisions of Habitat and Wildlife Conservation

Alaska Department of Fish and Game
333 Raspberry Road
Anchorage, Alaska 99518

Don W. Collinsworth, Commissioner



ANCHOR RIVER FRITZ CREEK CRITICAL HABITAT AREA

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ACKNOWLEDGEMENTS

The Anchor River/Fritz Creek Critical Habitat Area was first proposed by the Kenai Peninsula Critical Habitat Task Force, a group of citizens concerned about the protection of this important area. It is largely through their support and the support of the citizens of Homer that the Anchor River/Fritz Creek Critical Habitat Area was established in 1985.

The Anchor River/Fritz Creek Critical Habitat Area Management Plan was prepared by a multi-agency planning team lead by the Department of Fish and Game (ADF&G). Planning team representatives are as follows:

Debra Clausen	ADF&G, Habitat Division
John Matthews	ADF&G, Wildlife Conservation Division
Dave Holdermann	ADF&G, Wildlife Conservation Division
Dave Watsjold	ADF&G, Sport Fish Division
Sandra Cosentino	Department of Natural Resources
Tim Rumfelt	Department of Environmental Conservation
Hank Hosking	U.S. Fish and Wildlife Service
Kevin Fenner	Kenai Peninsula Borough
Susan Regan	City of Homer
Tom Arminski	Alaska Power Authority

Other ADF&G staff have contributed significant time and expertise in developing this plan including Lance Trasky and Steve Albert of Habitat Division, Tom Schroeder of Commercial Fisheries Division, and John Westlund of Wildlife Conservation Division. Department of Natural Resources staff Helen Nienhueser, Division of Land and Water Management; Wade Wahrenbrock, Division of Forestry; Mitch Henning, Division of Mining; Bonnie Friedman, Division of Agriculture; and Leila Weiss, Division of Oil and Gas also deserve recognition for their contributions in the development of this plan.

The Alaska Department of Fish and Game operates all of its public programs and activities free from discrimination on the basis of race, religion, color, national origin, age, sex, or handicap. Because the department receives federal funding, any person who believes he or she has been discriminated against should write to: OEO, U.S. Department of the Interior, Washington, D.C. 20240.

INTRODUCTION

Anchor River/Fritz Creek Critical Habitat Area, located in the southern Kenai Peninsula north of Homer, includes 19,000 acres of river bottoms, muskeys, upland spruce forests and subalpine meadows in the upper portions of the South Fork Anchor River and Fritz Creek drainages. The critical habitat area was established by the Alaska Legislature in 1985 for the purpose of protecting natural habitat critical to the perpetuation of fish and wildlife, especially moose. The critical habitat area contains portions of two of the most important moose ranges on the southern Kenai Peninsula.

The purpose of the Anchor River/Fritz Creek Critical Habitat Area Management Plan is to provide consistent long-range guidance to the Department of Fish and Game in managing the critical habitat area.

A variety of commercial and recreational activities have occurred in or been proposed for the critical habitat area. In order to evaluate the compatibility of these activities with the protection of fish and wildlife, their habitats, and public use of the critical habitat area, the Department of Fish and Game has undertaken this comprehensive critical habitat area management planning process.

The plan presents management goals for the critical habitat area and its resources and identifies policies to be used in determining whether proposed activities are compatible with the protection of fish and wildlife, their habitats, and public use of the area. The plan will guide management of the critical habitat area for the next ten years and will be reviewed after five years for necessary updates or amendments. The plan affects state lands only. Private lands within the boundaries of the area are not subject to critical habitat area authority. Harvest regulations for fish and wildlife populations are not addressed by this plan.

This document is the result of a public planning process led by the Department of Fish and Game. It was developed by a planning team represented by the following state, federal, and municipal agencies: the Alaska Departments of Fish and Game, Natural Resources, and Environmental Conservation; the Alaska Power Authority; Kenai Peninsula Borough; City of Homer; and the United States Fish and Wildlife Service. At the outset a public meeting was held in Homer to explain the planning process and solicit citizens' issues, interests, and concerns for the critical habitat area. Public input from this meeting was used by the planning team to formulate a list of issues to be addressed in the plan. At the same time resource information on the critical habitat area's fish and wildlife populations and their habitats, other natural resources, existing land use and land ownership was being collected and synthesized. This

information, presented in both map and narrative form comprises the plan's Resource Inventory.

Management goals and policies for the critical habitat area were developed by the planning team to address the identified issues. All policies were developed with consideration of their ability to meet the formulated management goals. In some cases alternative policies were developed. Each alternative policy was analyzed according to its ability to meet the management goals.

The draft plan went out for public review. Based on comments received during the public review process, the final plan was prepared. The plan is now being sent to the legislature for approval as directed in AS 16.20.605(d). Finally, the Commissioner of Fish and Game will adopt the plan for use by the department in managing the critical habitat area. At that point, the plan can be implemented by the Department of Fish and Game.

Future land use activities within the critical habitat area, including those proposed by the state, will be approved, conditioned, or denied on the basis of their consistency with the goals and policies provided in this plan as well as state laws and regulations. A Special Areas Permit is required for any habitat altering work, including any construction activity, in a designated Critical Habitat Area (5 AAC 95). A Special Areas Permit application form can be obtained from any Department of Fish and Game office and should be submitted to the Habitat Division Regional Office in Anchorage.

Future management activities of the Department of Fish and Game in the critical habitat area will also be directed by this plan. Research programs, public use facilities and other department projects will be consistent with the goals and policies presented in this plan.

Other state, federal, and local agencies have management responsibilities on critical habitat area lands as well.

Any use, lease or disposal of resources on state land in the critical habitat area requires Department of Natural Resources authorization. Activities affecting air or water quality require authorization from the Department of Environmental Conservation. The U.S. Army Corps of Engineers evaluates applications of the Department of the Army (DA) permits for discharging dredged and fill material in waters of the United States including wetlands. Various federal and state agencies, along with local governments, review proposals for DA permits, pursuant to the Fish and Wildlife Coordination Act (16 USC 661-666R). The Kenai

Peninsula Borough reviews and comments on all permit proposals within the coastal zone, including the Anchor River/Fritz Creek Critical Habitat Area.

This plan will be formally reviewed and, if appropriate, updated every ten years. Public participation will be solicited during the update process.



STATE OF ALASKA
OFFICE OF THE GOVERNOR

BILL ANALYSIS

DEPARTMENT Fish and Game	DIVISION Habitat	BILL NUMBER HB424	SPONSOR House Rules at Request of Governor
SHORT TITLE OF BILL Anchor River and Fritz Creek Critical Habitat Area Management Plan			
DEPARTMENT POSITION Support			
PREPARED BY <i>Frank Rue</i> Frank Rue, Director	DATE 2/5/90	COMMISSIONER'S SIGNATURE <i>David W. DeLong</i>	DATE 2/6/90

SUMMARY

OTHER AGENCIES AFFECTED BY BILL Department of Natural Resources	CONSTITUENT GROUP(S) AFFECTED BY BILL Homer area residents
ORGANIZATIONAL SUPPORT FOR BILL	ORGANIZATIONAL OPPOSITION TO BILL None

FISCAL IMPACT: NONE FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT

The purpose of the bill is to implement the Anchor River and Fritz Creek Critical Habitat Area Management Plan developed through a public planning process conducted by the Department of Fish and Game as directed in AS 16.20.605(d).

ANALYSIS OF BILL/PROGRAM EFFECTS

The bill will implement the Anchor River and Fritz Creek Critical Habitat Area Management Plan and allow future plan updates and amendments to be implemented through the Administrative Procedure Act.

AMENDMENTS PROPOSED

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Dept. of Fish and Game
 Title: Anchor River/Fritz Creek Critical Habitat Area Mgmt. Plan. BRU: Habitat Division
 Sponsor: _____ Components: _____
 Requestor: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0					
TRAVEL	0					
CONTRACTUAL	0					
SUPPLIES	0					
EQUIPMENT	0					
LAND & STRUCTURES	0					
GRANTS, CLAIMS	0					
MISCELLANEOUS	0					
TOTAL OPERATING	0					
CAPITAL	0					
REVENUE	0					

FUNDING: (Thousands of Dollars)

GENERAL FUND	0					
FEDERAL FUNDS	0					
OTHER	0					
TOTAL	0					

POSITIONS:

FULL-TIME	0					
PART-TIME	0					
TEMPORARY	0					

ANALYSIS : (Attach a separate page if necessary)

No FY 90 impact

Prepared by: Frank Rue, Director Phone: 465-4105
 Division: Habitat Date: 2/5/90

Approved by Commissioner: *Donna P. Wiley* Date: 2/5/90
 Agency: Department of Fish and Game

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

P.O. BOX 3-2000
JUNEAU, ALASKA 99802-2000
PHONE: (907) 465-4100

March 16, 1990

The Honorable Mike Szymanski
Chairman
Community & Regional Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

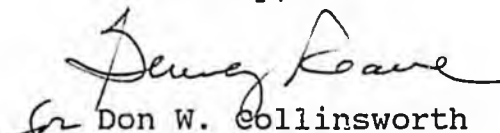
Dear Senator Szymanski:

Please accept this request to schedule a hearing at your earliest convenience for HB 424, "An Act relating to the Anchor River and Fritz Creek Critical Habitat Area management plan," sponsored by the Rules Committee at the request of the Governor.

This plan went through a lengthy public process, and it is important that the goals and policies of the plan be implemented as quickly as possible.

Thank you for your help with this request.

Sincerely,


Don W. Collinsworth
Commissioner