HB416

(11)

HOUSE COMMITTEE REPORT

Date Referred: March 6, 1992

FURTHER REFERRALS:

Date of Committee Action: 3/16/92

The FINANCE Committee considered: HB 416

HOUSE BILL NO. 416 RATIFY SETTLEMENT W/ ARCTIC SLOPE REG COR

"An Act ratifying an agreement settling litigation between the State of Alaska and the Arctic Slope Regional Corporation; establishing procedures for implementing the agreement; and providing for an effective date."

RECOMMENDATIONS:

be replaced with ______________________ [ ] the same title [ ] a new title

[ ] have attached amendments(s)

[✓] do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the ______________________ Committee

ADOPTS: ______________________ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact ______________________

[ ] zero fiscal note DNR 2/13/92

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) DNR 1/24/92

[✓] zero fiscal note(s) LAW 3/6/92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
[illegible]	✓				
Mike Navarre	✓				
Mark Boyer	X				
Kay Brown	✓				
[illegible]	✓				
[illegible]	X				
[illegible]	✓				
[illegible]	✓				
[illegible]	X				
[illegible]	X				
Ramona L. Barnes	X				

Mike Navarre [illegible]

No. 1
Bill Version: HB 416
(H) Publish Date: 1/24/92

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date: _____ Department Affected: Natural Resources & Law

Title: Short Title: ASRC Settlement BRU: Division of Oil & Gas

Components: _____

Sponsor: Rules Committee

Requestor: Governor COMPONENT SERIAL NO. 439

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE Funding Source:	N/A					

FUNDING: (Thousands of Dollars)

GENERAL FUND	N/A					
FEDERAL FUNDS						
OTHER Funding Source:						
TOTAL	N/A	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0.0					
PART-TIME	0.0					
TEMPORARY	0.0					

Estimate of Current year impact: _____

ANALYSIS: (Attach a separate page if necessary)

See Attachment

Prepared by: Bob Loeffler Phone: 762-2578

Division: Oil & Gas Date: 15-Jan-92

Approved by Commissioner: Harold C. Heinze HCHeinze Date: 1/15/92

Agency: Department of Natural Resources

Distribution (by preparer) : Legislative Finance, legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

REV 10/91

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 416

Revision Date: 3-Feb-92 Department Affected: Natural Resources & Law

Title: Short Title: ASRC Settlement BRU: Petroleum Management

Components:

Sponsor: House Rules

Requestor: House Resources COMPONENT SERIAL NO. 439

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE Funding Source:	N/A					

FUNDING: (Thousands of Dollars)

GENERAL FUND	N/A					
FEDERAL FUNDS						
OTHER Funding Source:						
TOTAL	N/A	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0.0					
PART-TIME	0.0					
TEMPORARY	0.0					

Estimate of Current year impact:

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Bob Loeffler Phone: 762-2578

Division: Oil & Gas Date: 3-Feb-92

Approved by Commissioner: B. Harold C. Heinze II Date: 3-Feb-92

Agency: Department of Natural Resources

Distribution (by preparer) : Legislative Finance, legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Attachment

Arctic Slope Regional Corporation Settlement Agreement

If the agreement is approved by the Legislature, no additional funds or positions will be needed to implement it.

If the agreement is not approved by the Legislature, the Department of Law would expend significant funds litigating the dispute. The Department of Natural Resources would need a portion of a position to support the litigation.

In addition, the settlement is needed if the state is to lease lands in the Nuiqsut area now scheduled for sale Oil and Gas Lease Sale 75 during December, 1992. If the agreement is approved this year, the lease sale could include approximately 60,000 acres of land covered in the agreement (about one quarter of the total acreage of Sale 75). If the agreement is not approved this session, the Nuiqsut acreage (assuming the litigation is settled) could not be leased until 1995 because of oil and gas lease sale procedural requirements. The Nuiqsut area lands have moderate oil and gas potential. Including them in the lease sale would bring significant new revenues to the state.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 416

Revision Date: _____
Title: "...settling litigation between the State...Arctic Slope Regional Corporation..."
Sponsor: House Rules/Request of the Governor
Requestor: House Judiciary Committee

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL | | | 9 | 3 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director
Division: Administrative Services
Phone: 465-3672
Date: February 21, 1992

Approved by Commissioner: Charles E. Cole, Attorney General
Richard L. Pegues /FOR/
Agency: Department of Law
Date: February 21, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 416

This bill approves and ratifies the 1991 settlement between the State of Alaska and the Arctic Slope Regional Corporation to settle claims raised in litigation involving lands in the Nuiqsut and Point Lay areas. Approval of this bill will have the effect of preventing other parties from making claims in this matter. Failure to ratify the settlement could result in the department having to defend against claims potentially costing tens of millions of dollars.

HOUSE BILL NO. 416

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 1/24/92
Referred: Resources, Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act ratifying an agreement settling litigation between the State of Alaska and the Arctic Slope Regional Corporation; establishing procedures for implementing the agreement; and providing for an effective date."

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

* **Section 1.** PURPOSE. The purpose of this Act is to provide for the settlement of certain claims raised in litigation between the State of Alaska and the Arctic Slope Regional Corporation (ASRC) in "State of Alaska v. Arctic Slope Regional Corporation," Alaska Superior Court, Third Judicial District, Case No. 3AN-85-15523, and to improve the marketability of certain land titles in the Nuiqsut and Point Lay areas. The litigation arose over a 1974 agreement under which ASRC and the state were to exchange certain potentially valuable mineral lands in the Point Lay and Nuiqsut areas in exchange for which the state was to withdraw challenges to the eligibility, under the Alaska Native Claims Settlement Act (ANCSA), of the villages of Nuiqsut (Kuukpik Corporation) and Point Lay (Cully Corporation). For reasons that the State and ASRC disputed, the land exchanges of the 1974 agreement were never completed. Under the 1991 Settlement Agreement that this Act ratifies, the state and ASRC will

exchange undivided interests in the subsurface of submerged lands and uplands in the Point Lay and Nuiqsut areas and establish a fixed revenue sharing percentage for those lands.

* Sec. 2. RATIFICATION. Notwithstanding any provision of AS 38 or any other provision of state law, the "1991 Settlement Agreement Between Arctic Slope Regional Corporation and the State of Alaska" (including the exhibits to it) is hereby ratified as to the rights, duties, agreements, and obligations of the state provided for or contemplated in it.

* Sec. 3. RULES AGAINST PERPETUITIES AND RESTRAINTS ON ALIENATION. No statutory or common law rules against perpetuities, including AS 34.27.010, or restraints on alienation of property apply to the settlement agreement ratified by this Act or to any interest or power created by it.

* Sec. 4. COMMISSIONER AUTHORITY. The commissioner of natural resources is authorized and directed to implement the terms of the settlement agreement ratified by this Act, including, without limitation, to execute and deliver patents to ASRC as provided for in the settlement agreement, notwithstanding any procedural requirement or other provision of Alaska law that might otherwise be deemed a restriction on the commissioner's authority to implement the agreement. The commissioner may not materially amend the settlement agreement without legislative approval.

* Sec. 5. RECORDATION. (a) The commissioner of natural resources shall record a true and authenticated photocopy of the settlement agreement ratified by this Act, and any conveyance document required by it, in the recording office of the appropriate recording district, and shall incorporate the settlement agreement in the land records system maintained by the Department of Natural Resources.

(b) The commissioner of natural resources shall deliver a signed original of the settlement agreement to the archivist in the Department of Administration, for preservation.

* Sec. 6. ACTIONS. (a) Notwithstanding any other provision of Alaska law, no person may bring an action challenging the legality of the settlement agreement ratified by this Act, in whole or in part, or the legality of a provision of this Act, unless the action is commenced in a state superior court within six months after the effective date of this Act.

(b) Nothing in this Act is intended to create a right in any person to challenge the legality of the settlement agreement ratified by this Act, in whole or in part, or the legality of a provision of this Act.

* Sec. 7. WAIVER OF SOVEREIGN IMMUNITY. The State of Alaska waives its sovereign immunity from suit by ASRC and its successors or assigns seeking to enforce or protect rights conferred on ASRC under the settlement agreement ratified by this Act, but only if that action is brought in state

superior court. Nothing in this Act is intended to waive the state's immunity from suit in federal court under the eleventh amendment of the Constitution of the United States.

* **Sec. 8.** This Act takes effect immediately under AS 01.10.070(c).

F

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

400 WILLOUGHBY AVENUE
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400
FACSIMILE: (907) 586-2754

February 3, 1992

The Honorable Cliff Davidson, Chair
House Resources Committee
State Capitol
Juneau, AK 99811-1182

Dear Representative Davidson:

Subject: HB 416, relating to the Legislature's ratification of the 1991 settlement agreement between the Arctic Slope Regional Corporation (ASRC) and the State of Alaska.

Position: The Department of Natural Resources supports this bill. It will ratify an agreement that resolves protracted litigation between the state and the ASRC over potentially valuable North Slope mineral lands, allowing some of these lands to be leased in a December, 1992 state oil and gas lease sale.

Background: The litigation stemmed from a 1974 agreement between ASRC and the state which was intended to resolve a dispute over the Alaska Native Claims Settlement Act eligibility of the villages of Nuiqsut and Point Lay. Under the 1974 agreement, for withdrawing its challenges to these villages eligibility and transferring certain state lands in the Point lay area to ASRC, the state was to receive the subsurface estate to certain lands near Nuiqsut. The dispute became a lawsuit in 1985 after Texaco announced an oil strike northeast of the Nuiqsut lands.

Under the new settlement agreement, the state and ASRC would jointly own undivided interests in the mineral estate of approximately 84,000 acres near Point Lay and over 100,000 acres near Nuiqsut. The state would hold joint oil and gas lease sales for itself and ASRC. If the two disagree about terms for the lease sales, such as minimum bid and royalty rate, a dispute resolution process agreed to in the settlement would be used instead of the courts.

Recommendation: Approve the settlement agreement.

Please let me know if you need additional information about the settlement agreement.

Sincerely,

Harold C Heinze

Harold C. Heinze
Commissioner

10-J9LH

cc: Committee Members
Paul Fuhs, Legislative Liaison, Office of the Governor
Charles E. Cole, Attorney General, Department of Law
Jim Eason, Director, Division of Oil and Gas

Questions and Answers
HB 416 House Resources Committee Hearing
February 5, 1992

Why does the legislature have to approve this settlement? It doesn't approve most settlements.

First, the settlement requires the state to convey a portion of its mineral interest to ASRC. Alienation of the state's mineral interest is prohibited by Section 6(i) of the Alaska Statehood Act. In 1976, however, Congress amended Section 22(f) of ANCSA to permit the state to enter into exchanges of land "for the purpose of effecting land consolidations or to facilitate the management or development of the land, or for other public purposes." Exchanges must be of equal value unless found to be in the public interest "by the appropriate Secretary." The United States has confirmed that its consent to the exchange is not required and that the requirements of Section 6(i) of the Statehood Act and 22(f) of ANCSA will be satisfied as long as the legislature finds the exchange to be in the public interest.

Second, AS 38.50 which provides authority for exchanges of interests in state lands does not provide an appropriate vehicle for the settlement of litigation. Among other things, Chapter 50 contemplates a voluntary exchange for equal values, and requires appraisals and a series of public hearings on proposed exchanges. Although the state and ASRC believe that the consideration given and received in the exchange is roughly equal, no effort has been made to appraise the lands. The terms of the exchange are influenced by factors other than land values (which are highly speculative, in any event), including each side's assessment of the risks of litigation. Because the agreement does not fit the process of AS 38.50, legislative approval provides the authority necessary to effectuate the exchange.

Third, Article VIII, Section 10 of the Alaska Constitution requires that "[n]o disposals...of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interests as may be prescribed by law." Public involvement in the settlement is provided through the process of legislative ratification, in order to avoid any potential constitutional infirmity.

How are funds accounted for? Does this settlement evade the legislature's appropriation authority?

Funds accruing to the state from oil and gas leases on state land go in part to the general fund and in part to the permanent fund. Leases issued under the ASRC agreement are no different. The agreement divides interests in land, but all revenue from the state's interest belongs to the state and is handled like "normal" state revenues. In addition, it is the lessee's responsibility to pay the appropriate share directly to the state and to ASRC. This divided payment is unusual for Alaska, but is a frequent occurrence in other parts of the United States where land status is more complex.

If, for example, the lessee owes $100 in rent under the lease made under this agreement, and that lease happens to be on land that the state owns a 60% undivided interest and ASRC owns a 40% undivided interest, then the lessee must send $60 to the state, and $40 to ASRC. That $60 is accounted for like other oil and gas revenues. Part goes to the general fund and part goes to the permanent fund.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☐ *P.O. BOX K— STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

February 28, 1992

The Honorable Pat Parnell
Alaska House of Representatives
P. O. Box V
Juneau, Alaska 99801-1182

Dear Representative Parnell:

This letter responds to your inquiries regarding the language in HB 416 (17th Legislature, second session) which ratifies a settlement agreement between the Arctic Slope Regional Corporation and the State of Alaska. Specifically, you questioned whether the language in section 2 (ratification) could be misconstrued by a court in two ways: first, could the provision in lines 5 and 6 that the settlement agreement is ratified "as to the rights, duties, agreements, and obligations of the state" be read to mean that something less than the whole agreement is ratified (i.e., only the enumerated items would be ratified); and second, does the language at line 6 which refers to the rights, duties, agreements, and obligations of the state "provided for or contemplated in" the settlement agreement suggest that some rights, duties, agreements, or obligations "contemplated" by someone at a future date become ratified?

Both the state's and ASRC's attorneys have discussed your question, and we believe that as a matter of law section 2 is clear in specifying that by enacting the bill the legislature is ratifying the agreement in toto and nothing more. The term "contemplated" refers only to those provisions expressly referred to in the settlement agreement, not to any future or undefined provisions. The terms "rights, duties, agreements, or obligations" is intended only to make clear that the settlement agreement does include those responsibilities, and the enumerated terms are broad enough to encompass all the provisions of the settlement agreement. We do not believe that it is necessary to edit the bill at this point to avoid a possible ambiguity or misconstruction. We believe that a court would interpret section 2 to mean that the settlement agreement is ratified in whole and that only what is in the settlement agreement is ratified; we believe a court would reach this conclusion regardless of whether the language after the word "ratified" in line 5 were deleted or left as is. The inclusion of this letter in the legislative history file, if nothing else, should insure that result.

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We appreciate your careful scrutiny of the bill and attention to good drafting style; you have certainly raised valid questions regarding proper English usage. As you are aware, the bill and the settlement agreement were the product of years of negotiations that involved a number of lawyers, oil and gas experts, and land managers, each of whom made editorial changes to the documents. That process necessarily entails certain sacrifices of prose style in the interest of achieving conceptual agreement. In the instance you have highlighted, we believe the language agreed upon does clearly, from a legal if not a stylistic perspective, express the intent of the drafters -- ratification of the 1991 settlement agreement. As Commissioner Heinze, Oliver Levitt, and many others have testified, we believe this bill and the agreement it ratifies constitute a positive step forward for all the citizens of this state, and we hope we will have your continued support for this legislation. If there are any other questions that we could address for you, please let us know.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Deborah E. Behr for
Sarah Elizabeth Gay
Assistant Attorney General

WICKWIRE, GREENE, CROSBY & SEWARD

By:
David Crosby
Attorneys for ASRC

cc: Paul Fuhs
Deborah Behr

RECEIVED JAN 1 3 1992

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF NATURAL RESOURCES

DIVISION OF OIL AND GAS

P.O. BOX 107034
ANCHORAGE, ALASKA 99510-7034
PHONE: (907) 762-2553

January 3, 1992

Dear Sir or Madame:

I am writing to inform you of a settlement agreement concerning certain mineral resources on the north slope. In December 1991, the State of Alaska and the Arctic Slope Regional Corporation (ASRC) settled a long-running legal dispute concerning land ownership on the north slope near Nuiqsut and Point Lay. The mineral estate of this land is potentially valuable for oil, gas, or coal. The settlement resolves litigation resulting from a 1974 agreement in which ASRC and the state agreed to exchange lands near Nuiqsut and Point Lay. The settlement is not effective until approved by the legislature. The Governor will submit the settlement agreement to the legislature at the beginning of the legislative session in January. Much of the Nuiqsut-area lands have existing oil and gas leases. Certain unleased portions of that area are scheduled to be offered for competitive leasing in Oil and Gas Lease Sale 75 in December 1992.

I am enclosing a copy of the settlement, and a summary of its terms prepared by the Division of Oil and Gas. If you would like more information, please contact Bob Loeffler of my staff at the address on the letterhead. He can be reached at 762-2578.

Sincerely,

James E. Eason
Director

Enclosures

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STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF NATURAL RESOURCES

P.O. BOX 107034
ANCHORAGE, ALASKA 99510-7034
PHONE: (907) 762-2553

DIVISION OF OIL AND GAS

SUMMARY OF THE 1991 SETTLEMENT AGREEMENT
between
ARCTIC SLOPE REGIONAL CORPORATION & STATE OF ALASKA

January 1992

INTRODUCTION

In December 1991, the State of Alaska and the Arctic Slope Regional Corporation (ASRC) settled a long-running legal dispute concerning north slope mineral ownership near Nuiqsut and Point Lay. The settlement resolves litigation resulting from a 1974 agreement in which ASRC and the state agreed to exchange lands near Nuiqsut and Point Lay. The settlement is not effective until approved by the legislature. The Governor will submit the settlement agreement to the legislature at the beginning of the legislative session in January. The area affected by the settlement is displayed in the maps on the next pages.

Under the settlement, the state and ASRC agree to jointly own undivided interest in the mineral estate of the disputed lands. The settlement also grants the state the right to hold oil and gas lease sales jointly for itself and for ASRC. Once a lease has been signed, the state and ASRC each separately administer its lease with respect to its own undivided interest in the subsurface.

Under the settlement agreement, the state does not give up any of its duties to the public imposed by law. The state would still have to determine whether a sale would be in the best interest of the state, and would follow relevant procedural requirements for leasing and for permitting the subsequent exploration for natural resources. The state retains all rights under state law to ensure that development of the subsurface complies with laws governing natural resource management and protection.

The agreement involves only mineral estate; it does not change the surface ownership. The surface estate of the Point Lay lands is state-owned; the Nuiqsut surface is owned by the village corporation for Nuiqsut, Kuukpik Corporation.

The land dispute began in 1973 when the federal government allowed the village corporations for Nuiqsut and Point Lay to select lands that had previously been transferred to the state. The state then protested the eligibility of those villages under the Alaska Native Claims Settlement Act. One year later, the state withdrew its protest and agreed to give up ownership of Point Lay mineral estate in return for ownership of the Nuiqsut mineral estate. For various reasons, the land exchanges expected by the 1974 agreement were never completed. This smoldering dispute erupted into lawsuits in 1985 after Texaco announced an oil discovery northeast of the Nuiqsut lands.

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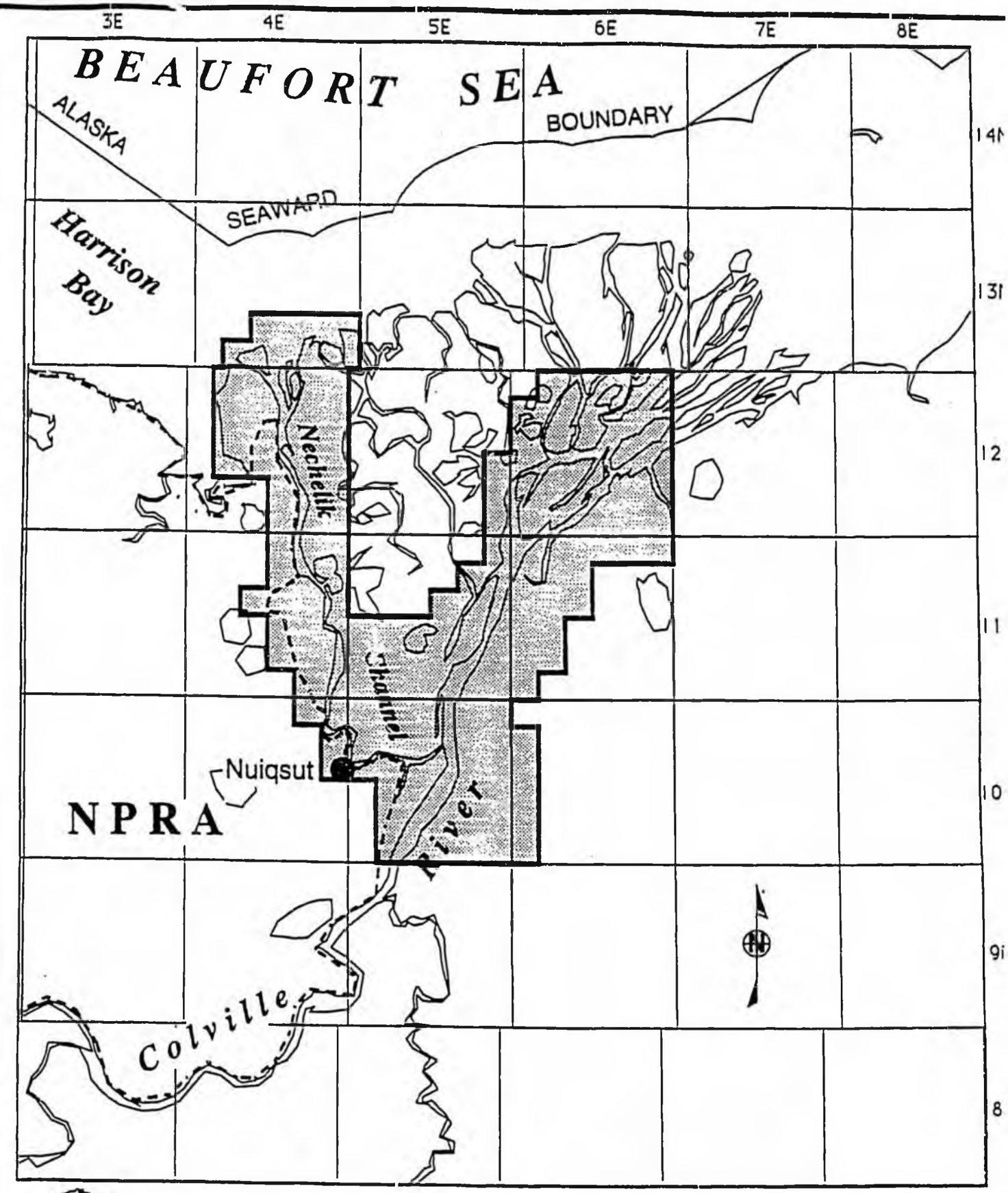


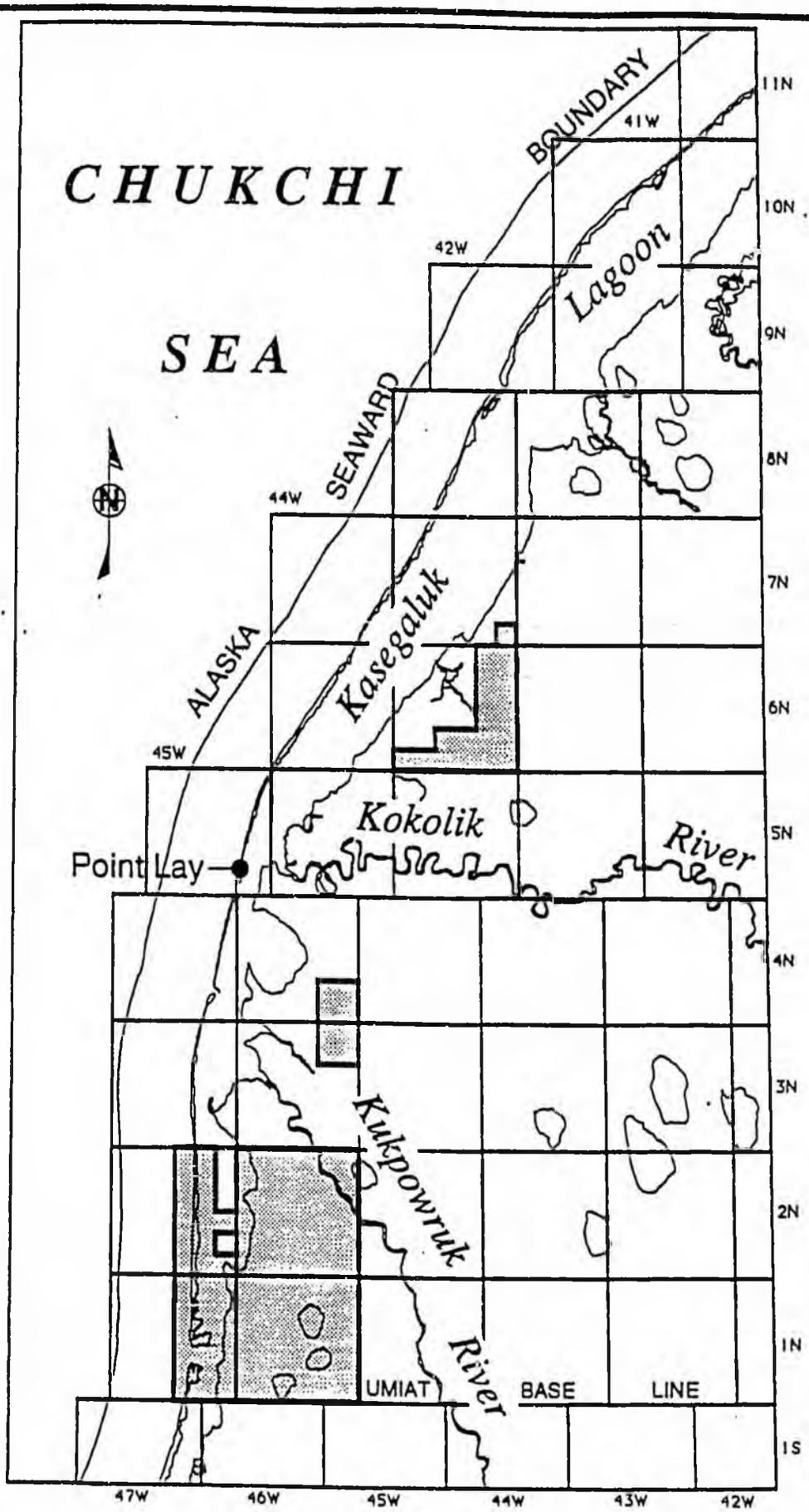
Nuiqsut Subsurface

SCALE 1: 317,000 ONE INCH = FIVE MILES APPROX.

10 0 10 20 MILES

10 0 10 20 30 KILOMETERS

Alaska
Department of
Natural Resources
Division of Oil and Gas
12-4-91



Point Lay Subsurface

SCALE 1: 500,000 ONE INCH = EIGHT MILES APPROX.

Alaska
Department of
Natural Resources
Division of Oil and Gas
12-4-91

The Point Lay area includes the mineral estate beneath approximately 84,000 acres (including all lands -- both the disputed uplands and the state-owned submerged lands). The Nuiqsut area includes the mineral estate beneath approximately 111,000 acres. However, the Nuiqsut-area acreage will eventually be reduced. The agreement concerns the subsurface estate conveyed to ASRC by the federal government. Conveyances in that area are not complete. The Nuiqsut area includes overselections, all of which will not be conveyed to ASRC. Sections not conveyed to ASRC will eventually be eliminated from the area affected by the agreement.

SUMMARY OF THE ISSUES

Land Ownership. The dispute concerns the ownership of the subsurface estate beneath the uplands in the Nuiqsut and Pt. Lay areas. The agreement resolves the location and amount of the subsurface estate attributable to upland ownership. In concept, the state and ASRC agreed that submerged lands and the subsurface below them were state-owned. However, the location and amount of submerged lands were hotly disputed and difficult to resolve.

The agreement fixes the amount of submerged lands -- for purposes of oil and gas leasing -- for all time. This will eliminate administrative complexity for the state and ASRC, and for lessees who might otherwise be unsure who owns their lease tracts. The agreement also provides that the amount of submerged lands is agreed to for purposes of resolving this litigation only and has no further implication for the many other submerged lands disputes in which the state is involved.

According to the agreement, the state and ASRC own undivided interests in the subsurface estate of each section of land in the Nuiqsut and Pt. Lay areas. The interest that each owns reflects a 50/50 split of the uplands plus a state credit for 100% of the agreed-to submerged land acreage. The agreement establishes percentages for all times; the percentages will not change with changes in the extent of submerged lands (i.e., due to accretion, reliction, or erosion). Boundaries are "squared off" along the coast and along the NPRA border (i.e., the boundary includes entire sections). The squaring off allows for more efficient leasing. It also has the effect of giving ASRC a small share of lands in Harrison Bay which are already leased, and the state a small share of NPRA lands.

$$\text{State \%} = \frac{(\text{upland acres} * 50\%) + (\text{submerged land acres} * 100\%)}{\text{number of acres in the section (usually 640)}}$$

Crucial to the agreement is an exhibit that lists for each disputed section the state and the ASRC percentage ownership in that section. Revenue is calculated by section; it accrues according to the percentage ownership listed by section.

Land Management. The state and ASRC agreed to a system where the state manages the land for both parties up to the point of leasing. In return for that management, the state owes ASRC a certain standard of performance. Once the lease has been signed, the state has for the most part

discharged its duty to ASRC. Thereafter, the state and ASRC each separately administers its lease with respect to its own undivided interest in the subsurface. The exception is that in some situations, the commissioner has the power to establish the royalty value of oil for the state. If that occurs the commissioner's decision will also establish the value for purposes of ASRC.

TERMS OF THE AGREEMENT

The State's Right to Lease on Behalf of ASRC: ***The Grant of Executive Rights.*** Under the agreement, ASRC grants the state "executive rights" to lease the jointly held land on behalf of itself and ASRC. Thus, the state holds the lease sale, accepts bids, and signs the lease agreement with the lessee. The lease binds both the state and ASRC. In return for these executive rights, the state agrees to comply with a standard of performance with respect to ASRC's interest in the land. By this standard, the state agrees to act with "the degree of diligence and discretion that would be exercised by an average landowner, acting as a reasonable and prudent person...in seeking to cause his subsurface to be explored and developed..." The state and ASRC also agree that this standard of performance does not apply "to the extent that the state is prevented from complying with such standard because of its duties and obligations as sovereign or because of applicable federal or state statutes, regulations and constitutional provisions including, but not limited to, those that govern protection of natural resources and procedural requirements for disposal of interests in state lands..."

In other words, the state agrees to a standard of care, but does not give up any of its duties to the public imposed by law (i.e., we still have to determine whether a sale would be in the best interests of the state, etc.). If, for example, it is not in the state's best interest to lease because of potential environmental harm or another reason, the state can decline to lease (can decline to exercise its execute rights). In that case, ASRC has the same rights as any member of the public to appeal the state's finding, but cannot compel the state to act by virtue of this agreement. If the state refuses to lease, ASRC has the right to lease its own interest under the laws of mineral cotenancy. Finally, the state agrees to "treat ASRC's interest in the same manner as it treats its own interest and shall not act in a manner intended to benefit itself at the expense of ASRC."

The state's liability under this standard could, in some circumstances, be quite significant. With knowledge gained by exploration, it is always possible to second-guess the terms of a past lease sale. To avoid claims made in hindsight that the state should have acted differently and did not live up to its promised standard, the parties agreed upon a dispute resolution process to resolve differences before the sale (and without going to court).

In this process, the state proposes "substantive terms and conditions" for a lease sale to ASRC. These terms include such variables as royalty rate and minimum bid, but they do not include sovereign powers of the state such as those that are exercised in best interest findings or in stipulations attached to land use permits. If they cannot agree on the "substantive terms and conditions" of the sale, the disagreement is referred to an expert (called a qualified independent

consultant). The expert determines whether the state's proposed "substantive terms and conditions" meet the standard of performance.

Three outcomes are possible: (1) the state and ASRC agree on terms and the lease sale goes forward; (2) they disagree, and the issue is referred to the expert who decides in favor of the state; or (3) they disagree, and the issue is referred to the expert who decides in favor of ASRC. If either of the first two situations occurs (agreement or an expert decision favoring the state), ASRC forever waives the right to argue that the state violated its standard of performance. If the expert decides in favor of ASRC, the state can, of course, decide to adopt ASRC's recommendations. It can also go ahead under its own terms. If this occurs, however, ASRC may claim damages in court, arguing that the state violated the standard of performance that it promised in the agreement.

After the Joint Lease: ***Separate Administration.*** After the state signs the lease on behalf of itself and ASRC, the state and ASRC will each separately administer its own interest in the lease. The two parties have what is essentially identical but separate legal relationship with the lessee with respect to the same mineral estate. Although a new concept for Alaska, this is a frequent occurrence in other parts of the United States, like Texas, where landownership is more complicated.

Most state administration of oil and gas leases focuses on an operator's compliance with laws concerning natural resource management and protection (land use permits, etc.). This administration is based not upon the state's statutes for oil and gas leases, but on the state's sovereign powers. These regulatory decisions are made by the state alone. Decisions concerning whether the lessee has lived up to his lease obligation (e.g., paid rent, drilled for oil) are made under the requirements of the individual lease document. These decisions would be administered separately by the two parties with respect to their own interests.

There is an unlikely possibility that the state or ASRC will terminate its lease but that the other will not. In that case, the party with the unleased interest would be free to lease its interest on its own (though such a lease might be worth considerably less than a joint lease). In addition, the lessee may still explore and produce, but as long as part of the subsurface interest is unleased, production occurs under the laws of mineral cotenancy. These laws have not been tested in Alaska, but we expect that the lessee will owe the remaining lessor (the one with the lease) the royalty due under that lease, and will owe the other lessor (the one without a lease) the value of all oil after its share of production and development costs have been subtracted.

This system, while unusual for Alaska, is unlikely to create frequent conflict. The limited nature of decisions made under the lease and the self-interest of both the state and ASRC will likely result in consistent administration.

SUMMARY OF PROCESS BEFORE A JOINT LEASE SALE.

The previous section explained the concept of the settlement agreement. This section explains the steps that precede a joint lease sale.

The Grant of Executive Rights. Once State and ASRC both have title to a section and the section is unleased, State has Executive Rights to lease both State and ASRC acreage for oil and gas. With those executive rights, the State is held to a "Standard of Performance" but does not give up its "Sovereign Powers."

1. **State proposes** "substantive terms and conditions" of the lease sale. At least 6 months before sale, State gives ASRC notice of proposed "substantive terms and conditions" for the sale.

2a. **If State and ASRC reach "Approval Agreement"** -- that is, if State and ASRC agree on those terms, State goes forward and holds the sale. Go to Step 3.

2b. **If State and ASRC disagree - the Qualified Independent Consultant** (QIC). If State and ASRC disagree, the disagreement is referred an expert, the Qualified Independent Consultant. State and ASRC show each other and the QIC their information; QIC decides whether State would breach its "Standard of Performance" in using those "substantive terms and conditions."

(i) **If QIC decides for State.** State holds lease sale. Go to Step 3.

(ii) **If QIC decides against State.** State has two choices:
(A) **Change terms** to those requested by ASRC and hold sale. Go to Step 3.
(B) **Hold sale using State's proposed terms.** Go to Step 4.

3. **State holds Lease Sale -- Liability Ends.** ASRC loses right to argue State breached Executive Rights "Standard of Performance" because ASRC agreed or lost in front of the QIC.

4. **State holds Lease Sale -- Liability Continues.** ASRC retains right to sue for damages that State breached "standard of performance." If they sue, court reviews decision of QIC based on the record before QIC. If, based on record before QIC, court decides that QIC's decision was "arbitrary and capricious" State is absolved of liability. If court upholds QIC, then court awards damages on State's failure to comply with "standard of performance."

Grant of Executive Rights Ends -- State and ASRC Administer Own Interest Separately. One partial exceptions to separate administration: ASRC agrees to use State's method for royalty evaluation.

STANDARD OF PERFORMANCE. The agreed standard of performance is reproduced from the agreement.

4.2 Standard of Performance.

(a) The State shall exercise the Executive Rights granted herein in compliance with the Limited Prudent Landowner Standard, as defined herein, as to the substantive terms and conditions of all Subsurface Agreements[1] and Subsurface Agreement Solicitations[1] to be executed or issued by the State as executive pursuant to this Settlement Agreement. In exercising such Executive Rights, the State shall treat ASRC's interest in the same manner as it treats its own interest and shall not act in a manner intended to benefit itself at the expense of ASRC.

(b) Neither the Limited Prudent Landowner Standard nor any other provision of this Settlement Agreement creates a fiduciary duty on the part of the State to ASRC.

IMPORTANT DEFINITIONS

"Executive Rights" means the exclusive right, power, and authority to formulate and issue Subsurface Agreement Solicitations[1] and to negotiate, formulate, agree upon, execute, and grant Subsurface Agreements[1] pursuant to the terms of this Settlement Agreement.

"Limited Prudent Landowner Standard" means the **Prudent Landowner Standard** except to the extent that the State is prevented from complying with such standard because of its duties and obligations as sovereign or because of applicable federal or state statutes, regulations, and constitutional provisions, including, but not limited to, those that govern protection of natural resources and procedural requirements for disposal of interests in state lands for leasing, exploration, and development of natural resources, subject, however, to the provisions of subsection 8.2.[2]

"Prudent Landowner Standard" means the degree of diligence and discretion that would be exercised by an average landowner, acting as a reasonable and prudent person who is familiar with prevailing practices and standards in the oil, gas, and mineral industry in the area at the time, in seeking to cause his subsurface to be explored and developed and to maximize subsurface revenues from such subsurface and protect such subsurface from drainage.

"Substantive terms and conditions" means, but is not limited to, timing of lease sales, lease tract identification and composition, bid terms, and lease terms but shall not include (i) the exercise by the State of its duties and obligations as sovereign, (ii) the State's compliance with applicable federal or state statutes, regulations, and constitutional provisions, including but not

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[1] "Subsurface Agreements" are essentially oil and gas, or coal leases. "Subsurface Agreement Solicitations" is the lease sale.

[2] Section 8.2 ensures that ASRC has not waived "its right to challenge the constitutionality of any statute or the validity of any regulation...that singles out the Nuiqsut subsurface or the Point Lay subsurface for treatment different from that accorded to other lands with the State of Alaska, or that causes any injury-in-fact to any rights expressly granted to ASRC under this Settlement Agreement."

, those that govern protection of natural resources and procedural requirements for f interests in State lands for leasing, exploration, and development of natural resources, anting of exploration incentive credits against tax obligations or the State's royalty ut not ASRC's royalty interest), or (iv) other exercise of the State's taxing power."

STATE OF ALASKA

DEPT. OF NATURAL RESOURCES

DIVISION OF OIL AND GAS

WALTER J. HICKEL, GOVERNOR

P.O. BOX 107034
ANCHORAGE, ALASKA 99510-7034
PHONE: (907) 762-2553

December 23, 1991

Re: Proposed Oil and Gas Lease Sale 75, Kuparuk Uplands

Dear Potential Bidders, Interested Individuals and Agencies;

The Division of Oil and Gas (DO&G) of the Department of Natural Resources has rescheduled the sale date for its proposed Oil and Gas Lease Sale 75. The sale, originally planned to be held on September 29, 1992, has been moved to December 8, 1992.

Sale 75 is located on the North Slope of Alaska between the Colville River and Sagavanirktok River. A portion of the acreage included within this sale is the subject of pending litigation and a settlement agreement between the State of Alaska and the Arctic Slope Regional Corporation. This settlement agreement, which is subject to legislative approval, would facilitate the offering of unleased lands within the Colville River Delta in Sale 75. The postponement of the sale is needed to provide the time necessary for the Alaska State Legislature to review and ratify the settlement agreement. The postponement of Sale 75 would also allow inclusion of acreage contracting out of the Kuparuk River and Hemi Springs Units over the next three months.

As a consequence of rescheduling the sale date, the dates for the draft and final Best Interest Finding and public notices have also been rescheduled. DO&G now anticipates issuance of the draft finding and associated notice on or about May 26, 1992 with the final finding and Notice of Sale to be issued on or about August 25, 1992. Anyone with concerns or questions regarding Sale 75 may contact James Hansen, Petroleum Geophysicist at 762-2588.

James E. Eason
Director

75-7a

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EXPLANATION OF HB416/SB369[1]

"An Act relating to the approval of an agreement settling litigation between the State of Alaska and Arctic Slope Regional Corporation; and providing for an effective date."

The "1991 Settlement Agreement Between Arctic Slope Regional Corporation and State of Alaska" ("1991 Agreement") is an historically significant attempt to resolve disputes and forge new partnerships between the State of Alaska and Alaska Native Regional Corporations. The 1991 Agreement proposes to resolve a long-standing dispute between the State and the Arctic Slope Regional Corporation ("ASRC") over ownership of potentially valuable mineral lands on the North Slope. More importantly, it proposes to do so in a way that will remove impediments to title marketability and create a long term partnership between the State and ASRC aimed at maximizing revenues for both parties. Because the 1991 Agreement involves an exchange of the State's mineral estate and contemplates conferring new management powers on the Commissioner of Natural Resources unique to the 1991 Agreement, legislative approval is required.

The purpose of this memorandum is to acquaint th reader

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[1] This document was prepared by counsel for Arctic Slope Regional Corporation. It is being supplied to House and Senate staff to assist in analysis of HB416/SB369. It replaces a draft supplied to House and Senate staff on January 30, 1992. Please refer any questions to counsel for ASRC, David C. Crosby (586-6262).

with the 1991 Agreement and HB416/SB369. This memorandum is organized in three parts: Section I explains the historical setting that gave rise to the 1991 Agreement. Section II is a more detailed section-by-section explanation of the 1991 Agreement. Section III explains the provisions of the Bill.

I. HISTORY OF THE DISPUTE LEADING TO NEGOTIATION OF THE 1991 AGREEMENT.

Shortly after statehood, the State of Alaska filed selections in the delta of the Colville River immediately east of the National Petroleum Reserve No. 4 (since renamed the National Petroleum Reserve - Alaska, or "NPRA"). These lands are located approximately 50 miles west of Prudhoe Bay, and at the time of their selection were believed to be prospective for oil and gas. The selections were Tentatively Approved by the Secretary of the Interior and some of the lands were subsequently leased. An exploration program resulted in several dry holes.

In the mid-1960's the Arctic Slope Native Association filed aboriginal land claims to much of the North Slope, including the Colville Delta. The pendency of these and other Native claims led to the Secretarial land freeze order of 1968, and the eventual settlement of the claims of Alaska Natives by Congress in the Alaska Native Claims Settlement Act of 1971 ("ANCSA"). The basic land settlement contemplated selection of surface estate surrounding historic village cites by Village Corporations, with conveyance of the subsurface estate under the village land to the appropriate Native Regional Corporation. ANCSA identified roughly 200 Native villages and withdrew 25 townships of land, including lands previously Tentatively

Approved to the State, in the vicinity of each village. Within this area, eligible Village Corporations organized under ANCSA were permitted to select and receive title to up to three townships (69,120 acres) of lands Tentatively Approved to the State of Alaska.

The Colville Delta was the site of the historic Native Village of Nuiqsut (or "Nooiksut"), which was listed in Section 11(b) of ANCSA as a "Native village subject to this Act." That section also required the Secretary of the Interior to review the eligibility of listed Villages to determine whether they met the eligibility requirement of 25 or more residents as of the 1970 census. The Secretary's regulations defined "residence" broadly in terms of traditional Native occupancy patterns.

In 1974 the Secretary certified eight Inupiat villages in the Arctic Slope region as eligible to receive land benefits under ANCSA. The State of Alaska appealed the certification of two of these villages -- Nuiqsut and Pt. Lay -- on the ground that they did not satisfy the residency requirements for certification. Nuiqsut, because of its proximity to Prudhoe Bay and the possibility that ASRC would receive up to three townships of State TA'd lands in the Colville Delta if its certification were upheld, was of the greatest concern. The appeals were contested by ASRC on behalf of its villages.

While the appeals were pending before the Alaska Native Claims Appeals Board, ASRC proposed to settle the certification disputes by relinquishing its ANCSA entitlement to the Colville Delta subsurface. In return, the State would withdraw its selections and permit ASRC to select and receive conveyance to the surface and subsurface of approximately 65,000 acres of lands that had previously been TA'd to the State in the Point Lay area. When the federal government refused to cooperate on the ground that the Secretary had no discretion not to convey the subsurface estate under village surface conveyances, the settlement was hastily recast as a two party exchange of ASRC's subsurface in the Colville Delta for the slightly smaller amount of land owned by the State in fee in the Pt. Lay area. The deal was finalized in a "1974 Settlement Agreement" and the State's appeal of the village certifications was dismissed.

Although the 1974 Settlement Agreement contemplated an immediate exchange of quitclaim deeds to the parties' respective interests, the Department of Natural Resources declined ASRC's proffered conveyance, stating that it would prefer to await ASRC's receipt of conveyances to the Nuiqsut subsurface before finalizing the exchange. In 1977, the Alaska Supreme Court decided in State v. Lewis, 559 P.2d 630 (1977), strongly suggesting that any attempt to alienate the State's mineral estate without the prior consent of Congress and the Alaska Legislature would violate Section 6 of the Alaska Statehood Act.

The ruling cast a cloud on the State's ability to convey any mineral estate to ASRC at Pt. Lay.

Following inquiries by ASRC in 1977, neither side showed any further interest in implementing the 1974 Settlement Agreement until Texaco announced a discovery in the Colville Delta in 1985. When the Commissioner of Natural Resources served a demand that ASRC consummate the 1974 Settlement Agreement, ASRC filed suit in federal District Court asserting that the exchange provisions of the 1974 Settlement Agreement violated Section 6 of the Statehood Act and were unenforceable. The State countered by filing suit for specific performance of the 1974 Settlement Agreement in Superior Court.

The litigation posed significant problems for both parties. On the one hand, ASRC appeared to be reneging on a deal. On the other hand, the State was forced to concede in its briefing to the Court that it had no authority to deliver a significant portion of the agreed upon consideration -- the Pt. Lay mineral estate. To further complicate matters, subsequent events seemed to suggest that the Texaco discovery might not be as significant as it was initially believed to be and the Pt. Lay lands were known to contain substantial coal deposits that could prove valuable in the future.

Faced with the uncertainties of litigation and the highly

speculative values of both the Nuiqsut and Pt. Lay parcels, then Commissioner of Natural Resources Esther Wannicke and ASRC reached an agreement in principle in 1986 to settle the litigation by splitting the disputed lands in such a way that each side would receive half of the disputed lands at Pt. Lay and half of the disputed lands at Nuiqsut. In this manner, neither side "lost," and both sides spread the risk that one or the other of the two speculative tracts might prove to be substantially more valuable than the other. This "50/50" split remains at the heart of the 1991 Settlement Agreement.

After shaking hands on a conceptual settlement that was believed to be fair to both sides, the negotiations bogged down over the description of the lands that were subject to the settlement. The difficulties focused on the State's claims of ownership to submerged lands underlying bodies of water alleged to be navigable. ASRC took the position that a 1942 public land order (PLO 82) withdrew the entire North Slope of Alaska for national defense purposes and precluded the State from acquiring title to any submerged lands as a matter of law. The matter had been clarified to some extent in the Colville Delta by Section 1431(n) of ANILCA, which retained ownership of the principal channels (often referred to as the "named channels") of the Colville River "in public ownership" (without specifying whether "public" meant federal or State ownership). Since the United States concede the right of the State of Alaska to select

submerged lands in the area covered by the former PLO 82 withdrawal (which was rescinded shortly after statehood), and the State had in fact selected all available lands in the Colville Delta, there was no question that the State was the undisputed owner of submerged lands under the named channels. There, however, the agreement ended.

The State contended that the extent of submerged lands under the named channels was substantially greater than ASRC was prepared to concede. In addition, the State claimed exclusive ownership of a number of other smaller channels and sloughs in the Colville Delta, as well as the Kukpowruk River running through the Pt. Lay lands, and a number of lakes in both places. ASRC contended that submerged lands, other than the named channels of the Colville mentioned in Section 1431(n) of ANILCA, should be treated as subject to the settlement and divided 50/50. The State insisted that since ANCSA did not entitled ASRC to receive conveyance to any submerged lands under navigable waters, these submerged lands were not subject to the settlement. To further complicate matters, the law provides that title to submerged lands changes as the banks and shores of water bodies shift due to accretion, reliction and erosion. Thus, the boundary line between State and ASRC lands would be constantly shifting, especially in the Colville Delta. This fact alone would tend to make titles uncertain and decrease the marketability of title for <u>both</u> owners. Future litigation over

the existence and extent of State ownership of submerged lands was almost a certainty.

Ultimately, the parties concluded that the settlement should anticipate and resolve as many future disputes as possible, even if those disputes did not, strictly speaking, have to be resolved in order to settle the controversy over the 1974 Settlement Agreement. The parties concluded that the optimal settlement would (1) dispose of the dispute regarding the enforceability of the exchange provisions of the 1974 Settlement Agreement; (2) lay to rest disputes regarding the existence and extent of State owned submerged lands; (3) resolve the ambiguity created by the problem of accretion, reliction and erosion; and (4) provide for common management of uplands and submerged lands.

The parties had already agreed in principle to a 50/50 split of lands subject to the exchange provisions of the 1974 Settlement Agreement. They next agreed to quantify the extent of State owned by submerged lands by splitting the difference between the State's calculations and those of ASRC. Title problems were resolved by pooling the interests of the State and ASRC on a section-by-section basis with each party receiving an undivided percentage ownership reflecting a 50/50 division of the stipulated uplands within the section, with the State receiving full (i.e., 100 percent) credit for any stipulated submerged lands within the section. (The State retains full sovereign

powers over submerged lands, notwithstanding ASRC's undivided interest.) In order to eliminate any possible future disputes over the boundary of the settlement area on the coastline and the NPRA boundary (where the original 1974 settlement area followed the sinuosity of the constantly shifting ocean boundary and the west bank of the Nechelik Channel of the Colville River), the parties agreed to extend section lines into the ocean and across the NPRA boundary so that the area subject to the 1991 Agreement will include only full sections whose location can be protracted at any time without reference to changes brought about by accretion, reliction and erosion. In this manner, approximately 4,000 acres of ocean submerged lands owned by the State outside the 1974 Settlement Agreement area and approximately 9,000 acres of NPRA subsurface owned by ASRC and outside the 1974 Settlement Agreement area were included in the 1991 Agreement. In each instance the parties' undivided percentage interest in each section so extended was adjusted to provide a 100 percent credit for lands outside the original 1974 Settlement Agreement area.

Finally, the parties agreed that the State of Alaska would be the executive rights holder for both parties' interests. As defined by the 1991 Agreement, the State is authorized to enter into leases on behalf of both ASRC and the State. Lease sales will be conducted in the usual manner as provided by Title 38 of Alaska Statutes, subject to all legal requirements otherwise applicable to leasing of State lands. The 1991 Agreement

includes provisions to insure that ASRC is treated fairly in the leasing process.

Thus, the 1991 Agreement not only settles long-standing litigation between ASRC and the State, it anticipates and resolves disputes regarding the existence, extent and location of submerged lands owned by the State of Alaska. Finally, ASRC and the Department believe that by merging title to uplands and submerged lands and vesting executive rights in the State, the 1991 Agreement will result in maximum certainty and predictability for potential lessees, which in turn will make the interests of both the State and ASRC more marketable.

On November 28, 1989, the United States District Court for the District of Alaska approved the agreement in principle, including the section-by-section percentages set out in Exhibits E and F to the Agreement. (These percentages have since been adjusted slightly by mutual agreement to correct errors in calculation and make allowance for contingencies relating to future disposition of Native allotment claims.)

II. SECTION-BY SECTION ANALYSIS OF THE 1991 AGREEMENT

The following section provides a more detailed section-by-section explanation of the terms of the 1991 Agreement. Much of the complexity of the document derives from the confused state of title in the Colville Delta and the technical nature of the executive rights arrangement. The underlying consideration given by the parties -- the cross conveyance of 50% undivided interests in the lands subject to the 1974 parcel-for-parcel Exchange -- is straightforward.

No effort has been made to treat each subsection individually. Emphasis is placed on drawing attention to significant issues and summarizing complex technical provisions.

Introduction.

This section explains that the purpose of the agreement is to settle pending litigation between ASRC and the State regarding the enforceability of the 1974 Settlement Agreement and to eliminate the potential for future ownership disputes over submerged lands by exchanging undivided interests in the subsurface of submerged lands and uplands and establishing fixed revenue sharing percentages for the settlement lands that will not change in the event of accretion, reliction or avulsion.

Section 1: LEGISLATIVE APPROVAL.

This section provides for submission of the 1991 Agreement to the legislature (1.1) and commits the parties to the form of the legislation approving the same (1.2). The parties may withdraw at any time prior to enactment of an acceptable bill approving the 1991 Agreement (1.3(a)). If an acceptable bill is enacted, the litigation will be dismissed (1.4) and the 1991 Agreement will supersede the obligations of the parties under the 1974 Settlement Agreement, unless the statute, the 1991 Agreement or any conveyance authorized by the 1991 Agreement is set aside by the courts (1.3(b)). The parties commit not to create any third party interests in the lands subject to the 1991 Agreement pending deliberations on the bill (1.5).

Section 2: LANDS SUBJECT TO THE 1991 SETTLEMENT AGREEMENT

2.1 describes the intent of the parties with respect to inclusion of submerged lands in the 1991 Agreement, including offshore lands under the Beaufort Sea, the Chukchi Sea and the Kasegaluk Lagoon necessary to describe settlement lands by full sections.

2.2 describes the current ownership of the Nuiqsut subsurface, including ASRC's right to receive future conveyances, the status of outstanding third party interests created by either

the State or ASRC, and State claims of ownership to submerged lands.

2.3 explains possible changes regarding ownership of the Nuiqsut subsurface (and corresponding corrections to ownership percentages) contingent upon disposition of pending Native allotment applications and possible exclusion of sections from the settlement area in the event Kuukpik Corporation does not receive title to the surface estate. This latter provision is now moot. The BLM recently determined that Kuukpik was under-selected by approximately 500 acres, none of which may be selected from State TA'd lands. As a consequence, all of the lands identified in the Agreement will in fact remain in the Agreement. Any references to "over-selection" by Kuukpik should be disregarded.

2.4 provides a comparable analysis the State's title to the Point Lay subsurface.

Section 3: CONVEYANCE OF INTEREST IN LANDS

3.1 commits ASRC to convey to the State the applicable percentage undivided interest, according to Exhibit E, in each section of ASRC's Nuiqsut subsurface as soon as that section has been fully conveyed to ASRC, retaining to the State its own percentage interest, also according to Exhibit E. (Conveyances

are not called for until all title contingencies have been resolved.)

3.2(a) commits the State to convey the applicable percentage undivided interest in the Point Lay subsurface, including any submerged lands therein, as set forth in Exhibit F, to ASRC within 30 days of the final effective date of the 1991 Agreement, retaining its own percentage interest, also as described in Exhibit F.

3.2(b) obligates the State to make a cross conveyance to ASRC of the applicable undivided percentage interest in the Nuiqsut subsurface, including any submerged lands therein, as set forth in Exhibit E, retaining the applicable percentage interest to itself, also as described in Exhibit E.

3.3 states that no change in the boundary, location or extent of submerged lands or uplands will affect the percentage undivided interest conveyed pursuant to the 1991 Agreement.

The net effect of the cross-conveyances called for in Section 3 is an exchange of undivided interests in the subsurface estate such that the title to submerged lands and uplands has been merged and the parties, for all time, will own their respective undivided percentage interest in each section according to the schedules set forth in Exhibits E and F. This

percentage is fixed and will not change regardless of the amount or location of submerged lands that may be contained in the section from time to time.

Section 4: SUBSURFACE AGREEMENTS AFFECTING NUIOSUT SUBSURFACE AND POINT LAY SUBSURFACE; GRANT OF RIGHTS TO EXECUTIVE; RIGHTS AND DUTIES OF EXECUTIVE.

4.1 ASRC grants to the State of Alaska executive rights in the Point Lay and Nuiqsut subsurface. Executive rights are defined in section 11.8 as the right to formulate and issue Subsurface Agreement Solicitations and to negotiate and execute Subsurface Agreements -- primarily oil and gas leases -- on behalf of ASRC with respect to ASRC's interest in the Nuiqsut and Point Lay subsurface.

4.2 requires that the State will be held to a prudent landowner standard, except to the extent that obligations imposed on the State by law require it to act otherwise. The State must treat ASRC's interest in the same manner as it treats its own and may not act so as to benefit itself at the expense of ASRC. The limited prudent landowner standard does not create a fiduciary duty to ASRC by the State. The State may not assign its executive rights without the consent of ASRC (7.2).

4.3 provides for notice to and consultation with ASRC prior

to exercise of executive rights by the State. It also provides a mechanism for resolving disputes if the two parties are unable to agree on the substantive terms of subsurface agreements or solicitations. ASRC may refer disputes to a member of a panel of qualified independent consultants who is charged with determining whether the action proposed by the State is consistent with the limited prudent landowner standard. A decision in favor of the State is binding on ASRC without right of appeal. The State is not bound by a decision in favor of ASRC, but is exposed to future damages if it proceeds and a court subsequently upholds the qualified independent consultant.

4.6 provides that the executive rights of the State with respect to a subsurface agreement cease upon execution of the agreement. Thereafter, each side may execute amendments or changes with respect to its own undivided interest only.

4.8 relieves the State, as executive rights holder, of any obligation to conduct operations on the lands. Rather, the 1991 Agreement contemplates that the State will fulfill its obligations by entering into agreements with third parties.

4.9 provides that the State has no right, obligation, or duty to enforce the terms of subsurface agreements once they are executed. ASRC is responsible for enforcing the terms of any such agreement as they relate to its interests, and the State is

not exposed to any liability for failure to enforce such agreements.

In order to acquire title to subsurface within NPRA, ASRC entered into an agreement with the surface owner, Kuukpik Corporation, not to develop the subsurface of any NPRA subsurface without first obtaining Kuukpik's consent. Approximately 9,000 acres (all deemed to be 100 owned by ASRC) are affected by this consent. Kuukpik may also have consent rights for lands in the vicinity of the village under Section 14(f) of ANCSA. Although the State will hold executive rights to all of this acreage, it is not liable for failure to lease any such land if Kuukpik's consent is required and cannot be obtained. The 1991 Agreement resolves title disputes between ASRC and the State of Alaska. It does not purport to affect the rights of Kuukpik as against ASRC or the State (or vice versa). Kuukpik and its counsel have been fully informed of the negotiations and have been supplied with copies of the Agreement, which it supports.

4.14 precludes communitizing settlement acreage in a lease with non-settlement acreage. Nor will the inclusion of two or more sections of acreage in a common lease result in pooling or communitizing of the interests in those sections. Revenues are shared strictly on a section-by-section basis according to the respective percentages set out in Exhibits E and F. This section prevents prejudice that might result to either party if

unproductive sections could be averaged in with productive sections.

4.15 provides that until sections become fully conveyed such that the parties are obligated to execute cross conveyances with respect to that section, neither party will grant third party interests in any such sections without the consent of the other party.

Section 5: MINIMUM COVENANTS REQUIRED IN ALL SUBSURFACE AGREEMENTS

This section describes certain minimum requirements for all subsurface agreements executed by the State in the exercise of its executive rights. Subsection 5.2 provides a limited exception to the general rule that the executive powers of the State cease following execution of a subsurface agreement. In the event the State exercises its discretion under a lease containing a term permitting the Commissioner to set or adjust royalty valuation, the Commissioner's determination shall bind ASRC's interest as well. This section does not require the Commissioner to exercise his discretion under any such lease and does not expose the State to any liability for the Commissioner's exercise (or refusal to exercise) of his discretion.

Section 6: SUSPENSION OF EXECUTIVE RIGHTS

The 1991 Agreement contemplates that the State, in the exercise of its executive rights, will be bound by all provisions of State law governing its conduct as a public land owner and sovereign. The 1991 Agreement further contemplates that occasions may arise in which the State concludes that entering into a subsurface agreement would not be in the public interest or would conflict with sovereign obligations. The State is not liable to ASRC in such instances. Section 6.1 (a) provides that after giving appropriate notice to the State, however, executive rights are suspended ASRC is then free to lease its own interest.[2] Executive rights return to the State if ASRC rescinds its election to suspend executive rights under Section 6.1(a) prior to executing a subsurface agreement with respect to its interest (6.3(a)). The State's executive rights are also suspended if either the State or ASRC exercise their power to terminate a subsurface agreement and the other party elects not to do so (6.1(b)). Executive rights return to the State automatically at such time as neither the State's nor ASRC's interest is subject to a subsurface agreement (6.3).

During any period of time that executive rights is suspended, the rights and duties of the parties to one another

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[2] The respective rights of the parties would be governed by the common law of cotenancy. Because the lessee would be required to account to the State for its unleased 50 percent of any oil produced, such a lease would be economically unattractive and therefore improbable. In effect, the lessee would be required to pay a royalty to ASRC on 50% of the oil produced and give a 50% net profits working interest to the State.

are governed by the law of cotenancy in common. Either party may develop the subsurface and the other will still receive its percentage share of the proceeds, after deduction of the cotenant's costs of development.

Section 7: MISCELLANEOUS RESTRICTIONS ON BOTH PARTIES

7.1 provides that while the State holds executive rights, neither the State nor ASRC may become a lessee of the lands or engage in self-development without the consent of the other.

7.3 provides that neither side may convey its interest in the Point Lay subsurface or the Nuiqsut subsurface without the consent of the other, and any such consent may be conditioned on termination of executive rights. In such case, the respective holders of the percentage interests would be cotenants in common.

Section 8: STATE'S RIGHTS AS SOVEREIGN

8.1 explicitly provides that nothing in the agreement diminishes or affects the sovereign rights of the State with respect to regulation or management of submerged lands, fish and game, or natural resources. ASRC's only recourse is under subsection 8.2 to challenge the constitutionality of a statute, or the validity of a regulation, if it feels that the statute or regulation singles out settlement lands for different treatment

from that accorded to other land in the State, or causes injury-in-fact to any rights expressly granted to ASRC under the 1991 Agreement.

Section 9: PREEXISTING LEASES OF THE NUIOSUT SUBSURFACE

This section describes the current status of leases affecting the Nuiqsut subsurface, provides for separate administration and enforcement of the parties respective percentage interests in existing leases, and provides for an equitable division of revenues received by either party with respect to leased lands prior to the effective date of the 1991 Agreement. The Section is complicated by the fact that ASRC has not received conveyances from the United States for all the Nuiqsut subsurface to which it is entitled. 1991 Agreement does not contemplate an exchange of interests with respect to any section until that section has become fully conveyed to ASRC (as defined in Section 11.12). Also, the State has waived its administration rights with respect to leases on some of the lands conveyed to ASRC by the United States, but has not waived with respect to other lands so conveyed. Consequently, it took a lot of verbiage to align all the preexisting legal relationships so that they conform to the basic pattern contemplated by the 1991 Agreement. The principles, however, are straightforward.

Section 10: MISCELLANEOUS

This section contains a number of routine provisions relating to interpretation and administration of the 1991 Agreement. Notable provisions include a requirement that subsurface data be shared to the maximum extent permitted by preexisting legal constraints (10.3), subject to strict confidentially requirements (10.1); subsection 10.11 commits the parties to joint defense of the 1991 Agreement, unless the challenge relates to ASRC's revenue sharing obligations to other ANCSA Corporations, in which case ASRC must defend, indemnify and hold the State harmless from such claims.

Section 11: DEFINITIONS

This Section defines key terms used throughout the 1991 Agreement.

EXHIBITS

Exhibits include the form of proposed legislation (Exhibit A, discussed in Section III, below), maps of the lands subject to the 1991 Agreement (Exhibits C and D), schedules of the respective percentage undivided interest in each section of land subject to the 1991 Agreement (Exhibits E and F), and specimen copies of various instruments called for in the 1991 Agreement (Exhibits G - J).

III. SECTION-BY-SECTION EXPLANATION OF HB416 AND SB369.

Section 1. PURPOSE. Provides that the purpose of the Bill is to provide for the settlement of outstanding litigation between the State and ASRC.

Section 2. RATIFICATION. This Section ratifies the 1991 Agreement "notwithstanding any other provision of law." Because the 1991 Agreement involves an exchange of the State's mineral interests in the Nuiqsut and Point Lay subsurface, legislative approval is required. Alienation of the State's mineral interest is prohibited by Section 6(i) of the Alaska Statehood Act. In 1976, however, Congress amended Section 22(f) of the Alaska Native Claims Settlement Act to permit the State of Alaska to enter into exchanges of land "for the purpose of effecting land consolidations or to facilitate the management or development of the land, or for other public purposes." Exchanges must be of equal value unless found to be in the public interest "by the appropriate Secretary." The United States has confirmed that its consent to the exchange is not required and that the requirements of Section 6(i) of the Statehood Act and 22(f) of ANCSA will be satisfied as long as the appropriate State approving authority finds the exchange to be in the public interest.

Chapter 50 of Title 38 of Alaska Statutes provides authority

for exchanges of the State's mineral estate, including the mineral estate in submerged lands. For a variety of reasons, however, that Chapter does not provide an appropriate vehicle for the settlement of litigation. Among other things, Chapter 50 contemplates a voluntary exchange for equal values and requires appraisals and a series of public hearings on proposed exchanges. Although the State and ASRC believe that the consideration given and received in the exchange is roughly equal, no effort has been made to appraise the lands. The terms of the exchange are influenced by factors other than land values (which are highly speculative, in any event), including each side's assessment of the risks of litigation. Finally, settlement negotiations have necessarily and appropriately been conducted in closed sessions. Public involvement is provided through the process of legislative ratification, but could not realistically have been provided earlier in the process, as contemplated for a voluntary exchange under Chapter 50. The "notwithstanding any other provision of Alaska law" will clarify that the exchange contemplated by the 1991 Agreement is not subject to the requirements of Chapter 50.

In addition to AS 38.50, the "notwithstanding any other provision of Alaska law" is intended satisfy any other provision of State law that might subsequently be raised to defeat the settlement itself. The Bill deliberately uses broad language to accomplish this result. Among other things, this language is intended to make it clear that in carrying out the provisions of

the settlement the Commissioner is acting pursuant to the mandate of the legislature and not exercising his discretion under other statutory provisions that authorize administrative disposition of state lands. Specifically, this language, together with section 3 of the Bill discussed below, relieve the Commissioner of any further notice, hearing or public interest finding requirements prior to making the conveyances required by the 1991 Agreement.

This exemption extends only to those actions mandated by the 1991 Agreement necessary to carry out the settlement and ratified by the Bill. Since the 1991 Agreement contemplates that the Commissioner will exercise his executive rights consistent with statutory constraints and does not waive any sovereign powers of the State of Alaska, any development activities that occur subsequent to the exchange will be fully subject to the statutory and regulatory procedures normally applicable to administration of State lands. Specifically, lease sales will be conducted in the normal manner and all regulatory requirements will be observed, including coastal zone consistency and public interest findings. To the extent that ASRC exercises powers as a landowner, this legislation does not exempt ASRC from federal, state or local requirements otherwise applicable to private landowners.

Section 2 also provides that "no statutory or common law rules against perpetuities or restraints of alienation of

property shall apply to the settlement agreement or to any interest or power created by it." The 1991 Agreement commits the State and ASRC permanently to merge their titles with no right of partition, to jointly lease and develop their interests, and to take a number of other steps with respect to their lands for an indefinite period of time. The law is generally hostile to such perpetual restrictions or restraints on alienation that might be deemed unreasonable. AS 34.27.010, for example, provides that an interest that would violate the rule against perpetuities may be reformed by a court. If the rules apply, the 1991 Agreement could be challenged at any time by the State or ASRC (or possibly in a citizen suit) and stricken down or modified in ways that were never intended.

A major consideration of both the State and ASRC in entering into the 1991 Agreement is improving marketability of title. This objective, and the benefits of the settlement, would be frustrated if the merging of title, prohibition against partition of those interests and executive rights provisions were ever successfully challenged as violative of the rule against perpetuities or as an unreasonable restraint on alienation. Accordingly, Section 2 exempts the 1991 Agreement from these requirements.

Section 3. COMMISSIONER AUTHORITY. This section affirmatively authorizes and directs the Commissioner to carry

out the exchange and makes it clear that in doing so he carried out the mandate of the legislature. The Commissioner is not authorized, however, to materially amend the 1991 Agreement without coming back to the legislature for approval.

Section 4. RECORDATION. This section requires the Commissioner to record the 1991 Agreement in the appropriate recording office, incorporate it into the DNR land record system, and deposit a signed original with the State Archivist.

Section 5. ACTIONS. In order to minimize the possibility that the exchange will have to be unwound after the State and ASRC have committed themselves to making the conveyances and taking the other actions required by the 1991 Agreement, this section provides that any action challenging the legality of the 1991 Agreement must be commenced within six months of the effective date of the legislation. Specifically this provision will insure that the State and ASRC will know whether the exchange is going to be challenged before the Colville Delta lands are leased in a State lease sale scheduled for December 1992. The Act itself may not be construed as creating any rights in any party not privy to the 1991 Agreement to challenge that Agreement or the Act. Finally, the Section waives the sovereign immunity of the State of Alaska to any suit brought by ASRC to enforce the 1991 Agreement, provided that any such action is commenced in a Superior Court of the State of Alaska.

Section 6. EFFECTIVE DATE. This Section provides for an immediate effective date in accordance with AS 01.10.070(c).

PLEASE MICROFILM TOP PAGE ONLY

DOCUMENTS WHICH HAVE NOT BEEN FILMED BUT ARE AVAILABLE IN THE ORIGINAL FILE INCLUDE:

→ 1991 Settlement Agreement Between Arctic Slope Regional Corporation and the State of Alaska