

SB369

HOUSE COMMITTEE REPORT

(11)

Date Referred: April 16, 1992

FURTHER REFERRALS:

Date of Committee Action: 4/28/92

The FINANCE Committee considered:

SB 369

SENATE BILL NO. 369

RATIFY SETTLEMENT W/ARCTIC SLOPE REG CORP

"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 SB 369 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) _____

APPROVES PREVIOUS: (Dept/Date) _____

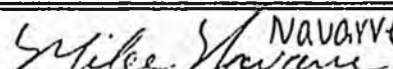
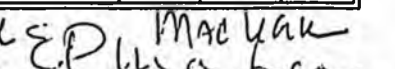
fiscal impact _____

fiscal note(s) FINR 1/24/92

zero fiscal note _____

zero fiscal note(s) _____

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Eileen P. MacLean	✓	_____			
Mike Navarre	✓				
MARIE BOYA Boyer	X				
_____ Koponen	✓				
George Jackson	X				
Bob Sharp	✓				
_____ Phillips	✓				
_____ Hanson	X				
_____ Ulmer	✓				
_____ Barus	✓				



 (6) CHAIRMAN'S SIGNATURE

SENATE BILL NO. 369

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 1/24/92

Referred: O&G, Resources, Finance

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

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

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

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

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

- 1 superior court. Nothing in this Act is intended to waive the state's immunity from suit in federal court
- 2 under the eleventh amendment of the Constitution of the United States.
- 3 * Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

No. 1

Bill Version: SB 369

(S) Publish Date: 1/24/92

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. _____

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						
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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. Heinz Date: _____
 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.

ALASKA STATE LEGISLATURE

Representative Eileen Panigeo MacLean
Co-Chair House Finance Committee
P.O. Box 830
Barrow, Alaska 99723

WHILE IN JUNEAU
State Capitol
Juneau, Alaska 99801-1182
465-4525
465-4833
463-3241 FAX

HOUSE OF REPRESENTATIVES

MEMORANDUM

District 22

North Slope
Borough

Anaktuvuk Pass
Atkasuk
Barrow
Kaktovik
Nulqsut
Point Hope
Point Lay
Wainwright

Northwest Arctic
Borough

Ambler
Buckland
Deering
Kiana
Kivalina
Kobuk
Kotzebue
Noatak
Noorvik
Selawik
Shungnak

TO: Rep. Mike Navarre *Mike*
Co-Chair, House Finance Committee

FROM: Rep. Eileen MacLean *Eileen*

DATE: April 20, 1992

RE: Request for hearing of SB 369

This is a request for a hearing in the Finance Committee on SB 369, An Act ratifying an agreement settling litigation between the State of Alaska and the Arctic Slope Regional Corporation.

SB 369 is identical to HB 416, which was approved with a unanimous "Do Pass" recommendation in the House Finance Committee. The bill has a zero fiscal note. For these reasons, I am asking that you put this bill on the consent agenda as soon as possible.

SB 369 settles an 18-year land dispute between the State of Alaska and the Arctic Slope Regional Corporation. The dispute arose when the Federal government allowed the Nuiqsut and Point Lay village corporations to select ANCSA lands that had been transferred to the State. The State protested the selections and agreed to a land exchange. However, the exchange was never completed. Oil was discovered in 1984, and both the State and ASRC filed lawsuits against each other.

The parties have finally negotiated an agreement that provides for joint ownership of oil and gas rights. This is the first land agreement resulting in joint ownership by the State and a Native corporation.

The agreement is a good one for both parties, and consequently this is good legislation. I urge you to schedule SB 369 in the Finance Committee as soon as possible.

WALTER J. HICKEL
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 23, 1992

The Honorable Richard I. Eliason
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear President Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that would ratify the "1991 Settlement Agreement Between the State of Alaska and the Arctic Slope Regional Corporation" (1991 Settlement Agreement). This bill would resolve longstanding litigation between the State of Alaska and the Arctic Slope Regional Corporation (ASRC) over ownership of potentially valuable mineral lands in the Point Lay and Nuiqsut areas of the North Slope. The litigation arose out of a 1974 land exchange agreement (1974 Agreement), discussed below, which followed passage of the Alaska Native Claims Settlement Act of 1971 (ANCSA). The bill also would remove impediments to title marketability to the disputed lands and to create a long-term partnership between the state and ASRC, aimed at maximizing revenue for both parties.

The 1991 Settlement Agreement - Background

The 1991 Settlement Agreement resolves a dispute over land entitlement stemming from a 1974 land exchange agreement. The 1974 Agreement was intended to resolve state challenges to the BIA-certified eligibility of two ANCSA village corporations by requiring the state and ASRC to exchange certain lands in the Nuiqsut and Point Lay areas, in exchange for which the state agreed to withdraw its challenges to the ANCSA eligibility of Point Lay (Cully Corporation) and Nuiqsut (Kuukpik Corporation).

Under the 1974 Agreement, ASRC agreed to quitclaim any interest it had in 69,120 acres of Nuiqsut area subsurface then tentatively approved to the state, the surface of which Kuukpik Corporation could select under ANCSA. The state agreed to convey to ASRC about 65,000 acres of lands owned by the state in the Point Lay area. Although the state did withdraw its challenges to the eligibility of Point Lay and Nuiqsut, the land exchange provisions of the 1974 Agreement were never completed, for reasons which ASRC and the Department of Natural Resources (DNR) dispute.

The Honorable Richard I. Eliason
January 23, 1992
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In 1985 Texaco made a promising oil strike northeast of the Nuiqsut area lands. At that point, DNR sought to implement the land exchange provisions of the 1974 Agreement. ASRC refused, asserting that the state had abandoned the 1974 Agreement by 11 years of inaction and that the 1974 Agreement was in violation of the Alaska Statehood Act, the Constitution of Alaska, and various state and federal laws. Negotiations between the parties failed, and litigation was filed in state and federal court.

After the initiation of litigation and extensive motion practice, DNR and ASRC, faced with the uncertainties of litigation and the speculative values of both the Nuiqsut and Point Lay parcels, reentered negotiations and in 1986 reached an agreement in principle that contemplated an even split of the contested uplands at both locations. This "50/50" split of the lands subject to the 1974 Agreement remains at the heart of the 1991 Settlement Agreement.

However, after the basic settlement concept was agreed to in 1986, DNR and ASRC engaged in extensive research and discussions concerning the boundaries, extent, and location of uplands and of the state's wholly-owned submerged lands (to which ASRC was not entitled), and regarding which party would manage the lands involved and under what conditions.

The most difficult issue during settlement negotiations concerned the boundaries, extent, and location of submerged lands. ASRC claimed that the extent of the state's wholly-owned submerged lands (including submerged lands underlying lakes, rivers, and tidelands) totalled substantially less in acreage than that claimed by DNR. The parties realized that the inability to agree on the submerged lands would inevitably result in further litigation and make it difficult if not impossible for either party to market its respective interests. Therefore, the parties tentatively agreed to merge title to the uplands and submerged lands and share the revenue from oil and gas development on a section-by-section basis, with the state to get more than 50 percent when, arguably at least, there were submerged lands in a section.

For three years the parties analyzed aerial photos, maps, United States Fish and Wildlife Service and Bureau of Land Management data, and other data in an effort to reach a common data base for determining what the state's wholly owned submerged lands were and what the uplands to be split between the parties were. It took a settlement conference before a United States District Court judge to force the parties to resolve this issue; in that 1989 settlement conference the parties compromised their respective positions. Since then, the parties have continued to negotiate the details of how the lands would be managed.

The resulting 1991 Settlement Agreement, as recommended to me by Attorney General Cole, has the following principal components:

1. The litigation is dismissed and the rights of the parties under the 1974 Agreement are superseded unless the 1991 Settlement Agreement is overturned by a court.

2. The state and ASRC acquire by exchange equal, undivided interests in the subsurface estate of all lands previously subject to the 1974 Agreement.

3. The state and ASRC merge their titles to uplands and submerged lands and establish a formula for percentages of undivided ownership, on a section-by-section basis. This merger would resolve all disputes regarding the existence, extent, and location of state-owned submerged lands and avoid, for all time, the ambiguities otherwise created by constantly shifting boundaries caused by accretion, reliction, and avulsion.

4. The state retains the "executive rights" (leasing authority) to lease all lands on behalf of ASRC and the state. ASRC has the opportunity to review and comment on proposed oil and gas lease terms, with a dispute-resolution mechanism in the event of disagreement. ASRC and the state each retain the right to separately enforce the lease with respect to their respective interests.

5. Revenue generated from the undivided interests is paid directly to the state and ASRC, respectively, in proportion to their percentage ownership interests in the subsurface estates.

6. The state did not give up any of its duties to the public imposed by law. The state will still have to determine whether a sale is in the best interest of the state, and must follow relevant procedural requirements for leasing or exploring for natural resources. The state retains all rights under state law to ensure that development of the subsurface complies with laws concerning natural resource management and protection.

The 1991 Settlement Agreement contains a number of complex, technical provisions dealing with existing oil and gas leases at Nuiqsut, status of state submerged lands, boundary problems, and land management rights and duties. The following describes in more detail the major provisions of the settlement agreement.

1991 Settlement Agreement - Substantive Provisions

Under the 1991 Settlement Agreement, the parties agreed to quantify the extent of state-owned submerged lands by splitting the difference between the state's calculations of submerged lands and those of ASRC. Title problems were resolved by combining 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 agreed-to uplands within each section, and the state receiving full (i.e., 100 percent) credit for any agreed-to submerged lands within the section. The state retains full sovereign powers over submerged lands, notwithstanding ASRC's undivided ownership interest.

The Honorable Richard I. Eliason
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The net effect of the cross-conveyances called for in the 1991 Settlement Agreement is an exchange of undivided interests in the subsurface estate such that the titles to submerged lands and uplands are merged and the parties, for all time, will own their respective undivided percentage interests in each section according to the schedules set out in Exhibits E and F to the 1991 Settlement Agreement. This percentage is fixed and will not change regardless of the amount or location of submerged lands that may be contained in any section from time to time.

In order to eliminate any possible future disputes over the boundary of the settlement area along the coastline and along the National Petroleum Reserve-Alaska (NPRA) boundary, the parties agreed to extend section lines into the ocean and across the NPRA boundary so that the area subject to the 1991 Settlement Agreement will include only full sections whose location can be protracted at any time without reference to changes brought about by accretion, reliction, or avulsion. In this manner, approximately 4,000 acres of ocean submerged lands owned by the state outside the 1974 Agreement area, and approximately 9,000 acres of NPRA subsurface owned by ASRC also outside the 1974 Agreement area, were included in the 1991 Settlement Agreement. In each instance the parties' undivided percentage interest in any section so extended was adjusted to provide a 100 percent credit for lands contributed by the state or ASRC from outside the original 1974 Agreement boundaries.

Finally, the parties agreed that the state would hold the "executive rights" for both parties' interests. As defined in the 1991 Settlement Agreement, "executive rights" empower the state to enter into leases and other subsurface agreements on behalf of both ASRC and the state. The 1991 Settlement Agreement contemplates that the commissioner will exercise the executive rights consistent with statutory constraints; the agreement does not waive any sovereign powers of the state.

The parties to the 1991 Settlement Agreement also discussed the issue of section 6(i) of the Alaska Statehood Act, which generally prohibits the state from alienating any interest in mineral estates it owns. Congress has authorized an exception to this provision under sec. 22(f) of ANCSA, which authorizes exchanges of land with ANCSA corporations. In order to resolve any question as to whether the exchange contemplated in the settlement agreement would require approval of the Secretary of Interior, the state has requested, and expects to receive shortly, an opinion from the Interior Solicitor ruling that no Secretarial approval is required for the 1991 Settlement Agreement.

The Bill

The attached bill ratifies the 1991 Settlement Agreement and establishes procedures for implementing it. Section 1 of the bill sets out the overall purposes of the bill and settlement agreement.

Section 2 of the bill specifies that the 1991 Settlement Agreement is ratified "notwithstanding any provision of AS 38 or any other provisions of Alaska law." This clarifies that the exchange of undivided interests in land contemplated by the 1991 Settlement Agreement is not subject to the provisions, in particular, of AS 38.50.

AS 38.50 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. For example, AS 38.50 contemplates a voluntary exchange of land 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 under the settlement agreement 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 under AS 38.50.

In addition to addressing AS 38.50, the "notwithstanding any other provision of Alaska law" language is intended to ensure that no other provision of state law might subsequently be raised to challenge the settlement itself. The bill deliberately uses broad language to accomplish this result. This language is intended to make it clear, for example, that in carrying out the provisions of the settlement the commissioner is acting under the mandate of the legislature as provided in this bill and not exercising the commissioner's discretion under other statutory provisions that authorize administrative disposition of state lands. Specifically, this language, together with sec. 3 of the bill, discussed below, relieves the commissioner of any further notice, hearing, or public interest finding requirements before making the conveyances required by the 1991 Settlement Agreement.

The exemption as to other provisions of Alaska law extends, however, only to those actions mandated by the 1991 Settlement Agreement necessary to implement the settlement. The 1991 Settlement Agreement contemplates that, following conveyance, the commissioner will exercise management responsibilities consistent with statutory constraints, and does not waive any sovereign powers of the state. Any exploration and development activities that occur subsequent to the exchange will be fully subject to the normal statutory and regulatory procedures 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 3 of the bill provides that "no statutory or common law rules against perpetuities . . . or restraints on alienation of property shall apply to the settlement agreement . . . or to any interest or power created by it." The 1991 Settlement 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, including contemplation of sales, with respect to their lands for an indefinite period of time. The law is generally hostile to perpetual restrictions or restraints on alienation. For example, AS 34.27.010 provides that an interest that would violate the rule against perpetuities may be reformed by a court. If these rules were to apply, the 1991 Settlement Agreement might be challenged and stricken down or modified in ways that were never intended.

A major consideration for both the state and ASRC in entering into the 1991 Settlement Agreement is to improve the 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 unreasonable restraints on alienation. Accordingly, sec. 3 exempts the 1991 Settlement Agreement from these requirements.

Sections 4 and 5 of the bill outline the authorities and duties of the commissioner of natural resources to carry out the terms of the 1991 Settlement Agreement, including issuing and recording the appropriate land conveyances.

Section 6 of the bill limits the time within which the bill or the 1991 Settlement Agreement can be challenged in court. In order to minimize the possibility that the exchange might be altered or invalidated by a court after the state and ASRC have committed themselves to making the conveyances and taking the other actions required by the 1991 Settlement Agreement, sec. 6 provides that any action challenging the legality of the 1991 Settlement Agreement must be commenced within six months after the effective date of the legislation. A joint lease sale involving lands subject to the settlement agreement is scheduled for December 1992. Any uncertainty as to the validity of the 1991 Settlement Agreement or the implementing legislation could adversely affect the marketability of the leases. Although the six-month limitation period is rather short, the parties most likely to have standing to challenge the settlement agreement are the state and ASRC or entities in privity with them. We believe that the short limitation period is reasonable in light of the extensive past negotiations between the parties and the need to provide some finality to the litigation and to allow for future uses of the lands. Also, sec. 6 of the bill provides that the bill may not be construed as creating any right in any party not privy to the 1991 Settlement Agreement to challenge that Agreement or the Act.

Finally, sec. 7 of the bill waives the sovereign immunity of the state to any suit brought by ASRC to enforce the 1991 Settlement Agreement if that action is commenced in a superior court of the state. The state does not waive its protection from suit in federal court under the eleventh amendment of the Constitution of the United States.

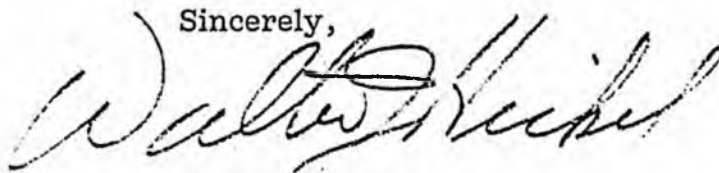
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Page 7

The 1991 Settlement Agreement is a compromise, and settles highly disputed issues. Because of that, it is not without risks to both the state and ASRC. However, I believe that these risks are outweighed by the benefits to the state of finally resolving this 18-year-old dispute. The 1991 Settlement Agreement not only settles long-standing litigation between ASRC and the state, it also anticipates and resolves disputes regarding the existence, extent, and location of submerged lands owned by the state in the Nuiqsut and Point Lay areas. Finally, 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.

Copies of the 1991 Settlement Agreement will be provided to the senate secretary and the clerk of the house. Additional copies are available through the Department of Natural Resources.

I urge your prompt consideration and passage of this bill.

Sincerely,

A handwritten signature in cursive script, appearing to read "Walter J. Hickel".

Walter J. Hickel
Governor

EXPLANATION OF HB416/SB369¹

"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 the reader

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 entitle 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 both 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 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 NUIQSUT
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

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 confidentiality 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).