

HB

1911

HFIN

FILE

HOUSE COMMITTEE REPORT

(11)

Date Referred: March 19, 1993

FURTHER REFERRALS:

Date of Committee Action: 3/31/93

The FINANCE Committee considered:

HB 191

HOUSE BILL NO. 191

CONTRACTOR OPERATED STATE HATCHERIES

"An Act relating to cost recovery by contractors who operate state-owned hatcheries."

RECOMMENDATIONS: [] the same title
 be replaced with _____ [] 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) _____

[] zero fiscal note _____

[] zero fiscal note(s) FISH GAME 3/17/93

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Ronald J. Larson</i>	X	<i>Eileen P. Maclean</i>			✓
<i>Mark Hanley</i>	✓	<i>John Hoffman</i>			✓
<i>Sean P. Powell</i>	X	<i>Kay Brown</i>			✓
<i>Ben Somers</i>	X				
<i>Mike Savani</i>	✓				
<i>Tom Kessner</i>	X				
<i>Richard [unclear]</i>	X				

 CO-CHAIRMAN'S SIGNATURE
 Larson Maclean

FISCAL NOTE

No. 1

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill Version: HB 191

(H) Publish Date: 3/17/93

Revision Date: _____

Department Affected: Fish and Game

Title: An act relating to cost recovery by contractors who operate state-owned hatcheries

BRU: FRED

Sponsor: Williams

Component: FRED

Requestor: _____

COMPONENT SERIAL NO. _____

EXPENDITURES/REVENUES:

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0

CAPITAL	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0
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REVENUE FUND SOURCE:	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0
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FUNDING:

(Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTLA	0.0	0.0	0.0	0.0	0.0	0.0
OTHER	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0

POSITIONS:

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

Estimate of current year (FY93) impact: \$0.0

ANALYSIS: (Attach a separate page if necessary)

Passage of this bill would allow funds from cost recovery at a contracted state hatchery to be used for the same purposes that funds from cost recovery at ordinary PNP hatcheries may be used. Under current AS 16.10.480(d), contractors can only use funds generated from cost recovery at a contracted hatchery for operating that hatchery. If insufficient operating funds are generated at a contracted hatchery, the contractor may use funds from one of its own hatcheries to support the state-owned hatchery, but could not use funds from another contracted facility to support the first.

Prepared By: Steve McGee

Phone: 465-4160

Division: FRED

Date: 3/10/93

Approved by Commissioner: Carl L. Rainey

Agency: Department of Fish and Game

Date: 3/17/93

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Chairman
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Regional Affairs
Labor & Commerce

Representative William K. Williams

M E M O R A N D U M

TO: Rep. MacLean, Co-chair
✓ Rep. Larson, Co-chair
House Finance Committee

FROM: Rep. Bill Williams *Bill*

DATE: March 20, 1993

RE: Request for scheduling of HB 191 for House Finance hearing

I would like to request a hearing of HB 191 before the House Finance Committee. I am the prime sponsor of this measure, and co-sponsors include Representatives Olberg, Phillips, Grussendorf, G. Davis, and Navarre.

HB 191 pertains to how a contractor (usually a regional aquaculture association) may spend the cost recovery monies generated from a state-owned hatchery which the contractor operates under contract with the state. This bill is strongly supported by aquaculture associations, fishermen, and the Department of Fish and Game. The bill has a zero fiscal note and will in the long run help to save money for the state while maintaining hatchery production. This is because the increased flexibility proposed by the bill will help to make the take-over of operation of state facilities by contractors more feasible, and thus help to accomplish the goal of weaning hatchery operations off of state funding.

HB 191 was passed unanimously by the Fisheries Committee and no one has voiced any opposition to the bill, so I'm sure that the bill would take very little of your committee's time. I would very much appreciate your consideration of scheduling it for a hearing soon.

Back-up information is attached to this request. If further information is needed, please contact my office at 465-3715. Thank you.

DEPARTMENT OF FISH AND GAME

POSITION PAPER

Bill No.: HB 191

Sponsor: Williams

Division: FRED

Bill Title: An act relating to cost recovery by contractors of state-owned hatcheries.

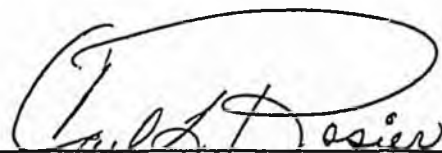
Background/Legislative Intent:

Passage of this bill would allow funds from cost recovery at a contracted state hatchery to be used for the same purposes that funds from cost recovery at ordinary PNP hatcheries may be used. Under current AS 16.10.480(d), contractors can only use funds generated from cost recovery at a contracted hatchery for operating that hatchery. If insufficient operating funds are generated at a contracted hatchery, the contractor may use funds from one of its own hatcheries to support the state-owned hatchery, but could not use funds from another contracted facility to support the first.

Analysis of Bill/Program Effects:

The current law unnecessarily restricts the flexibility of contractors to operate state-owned hatcheries and may result in the closure of productive state facilities that do not have immediate cost-recovery potential sufficient to support their operating costs. Under AS 16.10.450, PNP hatchery operators are able to utilize funds generated from harvests of salmon returning to their facilities for reasonable operating costs, including debt retirement, expansion of facilities, fisheries research or other salmon rehabilitation projects, or operating costs and fisheries-related activities of the regional aquaculture association. This bill would allow contractors of state-owned hatcheries to operate contracted hatcheries with the same flexibility they already have with their own hatcheries. It may also reduce the need for loans or additional state funding for some contracted hatcheries where cost recovery is not possible.

Signature:


Carl L. Rosier, Commissioner

3/14/93
Date

Back-up



UNITED FISHERMEN OF ALASKA

211 Fourth Street, Suite 112
Juneau, Alaska 99801
907/586-2820
Fax: 907/463-2545

March 16, 1993

The Honorable Carl Moses, Chair
and Committee Members
House Special Committee on Fisheries
The Capitol Building
Juneau, Alaska 99802-1182

RE: HB 191 - An Act relating to cost recovery by
contractors who operate state-owned hatcheries

Dear Chairman Moses and Committee Members:

The State of Alaska has more or less completed the process of transferring the operations of state-owned salmon hatcheries to regional aquaculture associations. Standard lease agreements with the State allow the regional associations to harvest a portion of the returning hatchery salmon to pay for the cost of producing those salmon. However, under current laws, the revenues received in the cost recovery harvest may only be used to pay for costs at the state-owned facility, and only for operating costs.

This bill, which is unanimously supported by the United Fishermen of Alaska, would allow the regional associations to use cost recovery revenues earned at state-owned hatcheries to pay for all costs that may be associated with producing salmon at those hatcheries. These include administrative, maintenance, and capital costs; program evaluation costs, such as tagging; and, debt retirement of any loans associated with the state-owned facilities.

The bill would also allow the regional associations to use those revenues to pay for costs associated with any other projects or facilities operated by the regional association. This allows an association to pool all cost recovery and enhancement tax revenues for the most efficient and effective use in its program.

The State has transferred the operation of commercially important hatcheries to the regional associations under the presumption that resource users should pay for the programs which benefit them. In order to make these transfers financially feasible, the regional associations have, in many cases, made capital improvements to these facilities.

MEMBER ORGANIZATIONS

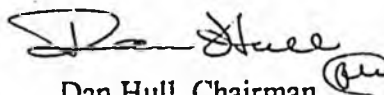
Alaska Crab Coalition • Alaska Longline Fisherman's Association • Alaska Trollers Association • Area K Seiners Association
Bering Sea Fishermen's Association • Bristol Bay Driftnetters Association • Concerned Area "M" Fishermen
Cook Inlet Aquaculture Association • Cordova District Fishermen United • Kenai Peninsula Fishermen's Association
North Pacific Fisheries Association • Northern Southeast Regional Aquaculture Association • Peninsula Marketing Association
Petersburg Vessel Owners Association • Prince William Sound Aquaculture Corporation • Seafood Producers Cooperative
Southeast Alaska Seiners Association • Southern Southeast Regional Aquaculture Association
United Cook Inlet Drift Association • Western Alaska Cooperative Marketing Association

The Honorable Carl Moses, Chair
and Committee Members
House Special Committee on Fisheries
March 16, 1993
Page Two

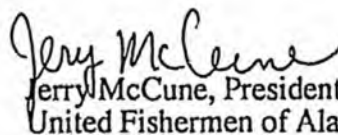
Now that the regional associations have the responsibility to operate these hatcheries, it is important that the State of Alaska also give them the opportunity to make them succeed, and not hobble them with unreasonable constraints. This bill will help to make the transfer program a success by removing one such constraint.

Thank you.

Sincerely,



Dan Hull, Chairman
Aquaculture Committee
United Fishermen of Alaska



Jerry McCune, President
United Fishermen of Alaska

cc: UFA Board of Directors

FD:Legislation:HB191:HSComOnFish/3-19

March 9, 1993

Carl Moses, Chairman
House Special Committee on Fisheries
State Capitol Building
Juneau, Alaska 99801



Dear Mr. Chairman;

It is my understanding that House Bill 191, an act relating to cost recovery by contractors who operate state owned hatcheries, is scheduled to come before your committee.

This bill is very meaningful to my organization. We fund a state hatchery, located near Paxson on the Gulkana River. The state has asked us to accept full responsibility in FY-94 for the operation of that facility. There is no opportunity for cost recovery at the Gulkana Hatchery because the fish arrive there in spawning condition. Therefore, we must fund that facility with revenue earned at other hatcheries such as the Main Bay sockeye salmon hatchery in Prince William Sound.

The Main Bay Hatchery is owned by the state, but operated by the Prince William Sound Aquaculture Corporation. Current regulations prevent us from using Main Bay cost recovery revenue to fund another hatchery.

HB 191 will enable us to fund the Gulkana hatchery with Main Bay hatchery revenue, which is acceptable to gill net fishermen, since both hatcheries principally supply the gill net fishery plus the subsistence and dip net fisheries on the Copper River.

Thanks very much.

John McMullen
President

copy: Ray Gillespie



COOK INLET
AQUACULTURE ASSOCIATION

HC 2, BOX 849
SOLDOTNA, AK 99869-8707
(907) 283-6781

March 11, 1992

House Special Committee on Fisher
State Capitol
Juneau, Alaska 99801

Dear Special Committee Member:

CIAA urges approval of HB 191 because we need to be able to utilize cost recovery revenues generated at the State owned facilities we operate in exactly the same fashion as cost recovery revenues generated at facilities we own and operate. We need to be able to spend fish sale revenues generated at State owned facilities to:

- 1) make improvements to the State owned facilities. In many instances the complete design was never constructed, vital parts were left out. In other instances, poor construction or poor maintenance has resulted in the need for major improvements. In still other instances new regulations (fuel handling and storage for example) require expensive improvements.
- 2) pay reasonable costs of operating the regional associations. It is not fair that any association overhead must be charged off against those facilities owned by associations. All facilities require administrative services which we call overhead; all facilities should pay a fair share.
- 3) take advantage of the flexibility and security offered by securing operating revenue through a "corporate cost recovery goal". We can use monies generated from facilities owned by associations to operate, maintain or improve State owned hatcheries; We should be able to use monies generated at a State owned facility to operate, maintain or improve another State owned facility or an association owned facility. It is not likely that every facility will generate exactly its individual cost recovery goal every year. Shortages at one facility must be made up by surpluses from other facilities; regardless of who actually owns a particular facility.

I would be happy to answer any questions.

Sincerely,

A handwritten signature in cursive script that reads "Thomas E. Mears".

Thomas E. Mears,
Executive Director

Southern Southeast Regional Aquaculture Association, Inc.

2721 Tongass Avenue
Ketchikan, Alaska 99901
Phone: (907) 225-9605
Fax: (907) 225-1348



House Special Committee Fisheries
RE: HB 191 "An act relating to cost recovery by
contractors who operate state-owned hatcheries"

The Southern Southeast Regional Aquaculture Association (SSRAA) recommends the approval of this act. SSRAA signed an agreement with the Department of Fish and Game on July 1, 1992 to operate the State Sockeye Salmon Hatchery at Beaver Falls for a twenty year period. A cost recovery program is being developed that will pay for the operations of this facility. However, our experience in operating salmon hatcheries over the past fifteen years has shown that return rates and prices are highly volatile, and there will be times when a single species will not cover the operating costs.

One of the strengths of SSRAA's program is the diversification of our species being reared and the multiple sites where these fish are released. SSRAA releases all salmon species, except for pink salmon, and release them at multiple sites. When the return of one species is low or the price is depressed, we can frequently make cost recovery goals on another species for which the return or price is higher and/or harvest at another site.

SSRAA also operates all of our programs from a pool of money derived from the salmon enhancement tax and cost recovery. This pool is budgeted among all projects. It is not practical in our case to make each project pay for itself. This is more efficient and less costly than running each as an independent entity.

The current limitation on SSRAA to operate the State Beaver Falls Hatchery is not consistent with our operations. There will be occasions when the sockeye returns will not provide sufficient funds to operate the hatchery and SSRAA will have to subsidize the state hatchery from our other cost recovery efforts. It is only fair that SSRAA should also be able to use funds from the Beaver Falls cost recovery to meet our other program needs.

If HB 191 is enacted, it will help stabilize our source of revenue and add to our diversification strength. It will help assure that our other salmon enhancement programs will not be jeopardized and it will help assure that SSRAA will be able to meet our debt service to the State Fisheries Enhancement Revolving Loan Fund (FERLF). The recent legislative audit report (08-4445-93) recommends approval of this bill and advises that the bill would also help secure the future of the FERLF for other operators who still need to borrow from the fund.

Sincerely,

Donald F. Amend
General Manager

Revisor's notes. — Reorganized in 1983 to alphabetize the defined terms. Cross references. — For further definitions, see AS 16.05.940.

Sec. 16.10.370. Short title. AS 16.10.300 — 16.10.370 may be cited as the Commercial Fishing Loan Act. (§ 1 ch 134 SLA 1972)

Article 9. Salmon Hatcheries.

Section	Section
375. Regional salmon plans	445. Egg sources
380. Regional associations	450. Sale of salmon and salmon eggs: use of proceeds; quality and price
400. Permits for salmon hatcheries	460. Inspection of hatchery
410. Hearings before permit issuance	470. Annual report
420. Conditions of a permit	480. Contracts for the operation of state hatcheries
430. Alteration, suspension, or revocation of permit	
440. Regulations relating to released fish	
443. Department assistance and cooperation	

Cross references. — For legislative findings and purpose related to AS 16.10.375 — 16.10.560, see § 1, ch. 59, SLA 1979, in the 1979 Temporary and Special Acts and Resolves.

Sec. 16.10.375. Regional salmon plans. The commissioner shall designate regions of the state for the purpose of salmon production and have developed and amend as necessary a comprehensive salmon plan for each region, including provisions for both public and private nonprofit hatchery systems. Subject to plan approval by the commissioner, comprehensive salmon plans shall be developed by regional planning teams consisting of department personnel and representatives of the appropriate qualified regional associations formed under AS 16.10.380. (§ 2 ch 161 SLA 1976; am § 2 ch 154 SLA 1977)

Sec. 16.10.380. Regional associations. (a) The commissioner shall assist in and encourage the formation of qualified regional associations for the purpose of enhancing salmon production. A regional association is qualified if the commissioner determines that it

(1) is comprised of associations representative of commercial fishermen in the region;

(2) includes representatives of other user groups interested in fisheries within the region who wish to belong; and

(3) possesses a board of directors that includes no less than one representative of each user group that belongs to the association.

(b) In this section "user group" includes, but is not limited to, sport fishermen, processors, commercial fishermen, subsistence fishermen, and representatives of local communities.

(c) A qualified regional association, when it becomes a nonprofit corporation under AS 10.20, is established as a service area in the unorganized borough under AS 29.03.020 for the purpose of providing salmon enhancement services. (§ 2 ch 161 SLA 1976; am § 2 ch 59 SLA 1979)

NOTES TO DECISIONS

Cited in *State v. Alex*, 646 P.2d 203
(Alaska 1982).

Sec. 16.10.400. Permits for salmon hatcheries. (a) The commissioner or a designee may issue a permit, subject to the restrictions imposed by statute or regulation under AS 16.10.400 — 16.10.470, to a nonprofit corporation organized under AS 10.20, after the permit application has been reviewed by the regional planning team, for

- (1) the construction and operation of a salmon hatchery;
- (2) the operation of a hatchery under AS 16.10.480.

(b) The application for a permit under this section shall be on a form prescribed by the department and be accompanied by an application fee of \$100. The commissioner may waive the submission of an application for a permit to operate a hatchery under AS 16.10.480.

(c) A hatchery permit is nontransferable. If a permit holder sells or leases a hatchery for which a permit is issued under this section, the new operator shall apply for a new permit under this section.

(d) *[Repealed, § 19 ch 154 SLA 1977.]*

(e) A qualified regional association formed under AS 16.10.380, if it has become a nonprofit corporation under AS 10.20, has a preference right to a permit under (a)(1) of this section if its proposed hatchery is provided for in the comprehensive plan for that region developed under AS 16.10.375 and the fresh water source exceeds one cubic foot per second minimum flow. Another local nonprofit hatchery corporation approved by a qualified regional association has an identical preference right.

(f) Except for permits issued before June 16, 1976, a permit may not be issued for construction or operation of a hatchery on an anadromous fish stream unless the stream has been classified as suitable for enhancement purposes by the commissioner. The commissioner shall undertake to make such classifications in conjunction with the development of the comprehensive plan under AS 16.10.375.

(g) During the development of a comprehensive plan for a region a permit may not be issued for a hatchery unless the commissioner determines that the action would result in substantial public benefits and would not jeopardize natural stocks. (§ 2 ch 111 SLA 1974; am § 3 ch 161 SLA 1976; am §§ 3, 19 ch 154 SLA 1977; am §§ 2 — 4 ch 14 SLA 1988)

Cross references. — For legislative intent in connection with the enactment of AS 16.10.400 — 16.10.470, see § 1, ch. 111, SLA 1974, in the Temporary and Special Acts.

Effect of amendments. — The 1988 amendment, effective March 31, 1988, in subsection (a), divided the formerly undivided language into an introductory paragraph and paragraph (1), and added paragraph (2); added the second sentence in subsection (b); and, in subsection (e), inserted "under (a)(1) of this section" in the first sentence and substituted "Another" for "Any other" in the second sentence.

Opinions of attorney general. — Since the conditions for issuance of a hatchery permit do not appear to be inconsistent with the operation of a fish processing and marketing facility in conjunction with the hatchery, a nonprofit hatchery can also process and market fisheries' products, but any profit would have to be used for expansion or improvement of facilities, hatcheries research or other authorized purposes of the regional association within which the corporation is located. June 11, 1984, Op. Att'y Gen.

Sec. 16.10.410. Hearings before permit issuance. (a) At least 30 days before the issuance of a permit under AS 16.10.400, a public hearing shall be held in a central location in the vicinity of the proposed hatchery facility.

(b) Notice of the hearing shall be published in a newspaper of general circulation once a week for three consecutive weeks, with completion of the notice at least 10 days before the hearing.

(c) The hearing shall be conducted by the department. At a hearing for a permit under AS 16.10.400(a)(1), the applicant shall present a plan for the proposed hatchery, describing the capacity of the hatchery and other relevant facts that may be of interest to the department or the public. Interested members of the public shall be afforded an opportunity to be heard.

(d) The department shall record and consider objections and recommendations offered by the public at the hearing conducted under this section. It shall respond in writing, within 10 days after the hearing is held, to any specific objections offered by a member of the public at the hearing. (§ 2 ch 111 SLA 1974; am § 5 ch 14 SLA 1988)

Effect of amendments. — The 1988 amendment, effective March 31, 1988, repealed and reenacted subsection (c), which formerly related to the transferability of the hatchery permit.

Sec. 16.10.420. Conditions of a permit. The department shall require, in a permit issued to a hatchery operator, that

(1) salmon eggs procured by the hatchery must be from the department or a source approved by the department;

(2) salmon eggs or resulting fry may not be placed in waters of the state other than those specifically designated in the permit;

(3) salmon eggs or resulting fry, sold to a permit holder by the state or by another party approved by the department, may not be resold or otherwise transferred to another person;

(4) salmon may not be released by the hatchery before department approval, and, for purposes of pathological examination and approval,

the department shall be notified of the proposed release of salmon at least 15 days before the date of their proposed release by the hatchery;

(5) diseased salmon be destroyed in a specific manner and place designated by the department;

(6) adult salmon be harvested by hatchery operators only at specific locations as designated by the department;

(7) surplus eggs from salmon returning to the hatchery be made available for sale first to the department and then, after inspection and approval by the department, to operators of other hatcheries authorized by permit to operate under AS 16.10.400 — 16.10.470;

(8) if surplus salmon eggs are sold by a permit holder to another permit holder, a copy of the sales transaction be provided to the department;

(9) *[Repealed, § 5 ch 110 SLA 1980.]*

(10) a hatchery be located in an area where a reasonable segregation from natural stocks occurs, but, when feasible, in an area where returning hatchery fish will pass through traditional salmon fisheries. (§ 2 ch 111 SLA 1974; am § 5 ch 110 SLA 1980)

Sec. 16.10.430. Alteration, suspension, or revocation of permit. (a) If a permit holder fails to comply with the conditions and terms of the permit issued under AS 16.10.400 — 16.10.470 within a reasonable period after notification of noncompliance by the department, the permit may be suspended or revoked, in the discretion of the commissioner after the regional planning team for the area in which the hatchery is located is notified and granted an opportunity to comment upon the proposed suspension or revocation.

(b) If the commissioner finds that the operation of the hatchery is not in the best interests of the public, the commissioner may alter the conditions of the permit to mitigate the adverse effects of the operation, or, if the adverse effects are irreversible and cannot be mitigated sufficiently, initiate a termination of the operation under the permit over a reasonable period of time under the circumstances, not to exceed four years. During the period of time that the operation is being terminated, the permit holder may harvest salmon under the terms of the permit but may not release additional fish. (§ 2 ch 111 SLA 1974; am § 4 ch 154 SLA 1977)

Sec. 16.10.440. Regulations relating to released fish. (a) Fish released into the natural waters of the state by a hatchery operated under AS 16.10.400 — 16.10.470 are available to the people for common use and are subject to regulation under applicable law in the same way as fish occurring in their natural state until they return to the specific location designated by the department for harvest by the hatchery operator.

(b) The Board of Fisheries may, after the issuance of a permit by the commissioner, amend by regulation adopted in accordance with AS 44.62 (Administrative Procedure Act), the terms of the permit relating to the source and number of salmon eggs, the harvest of fish by hatchery operators, and the specific locations designated by the department for harvest. The Board of Fisheries may not adopt any regulations or take any action regarding the issuance or denial of any permits required in AS 16.10.400 — 16.10.470. (§ 2 ch 111 SLA 1974; am § 24 ch 206 SLA 1975; am § 3 ch 59 SLA 1979)

Sec. 16.10.443. Department assistance and cooperation.

(a) Before and after permit issuance under AS 16.10.400 — 16.10.470, the department shall make every effort, within the limits of time and resources, to advise and assist applicants or permit holders, as appropriate, in the planning, construction, or operation of salmon hatcheries.

(b) Nothing in this section exempts an applicant or permit holder from compliance with AS 16.10.400 — 16.10.470 or from compliance with the regulations or restrictions adopted under AS 16.10.400 — 16.10.470. (§ 1 ch 97 SLA 1975)

Sec. 16.10.445. Egg sources. (a) The department shall approve the source and number of salmon eggs taken under AS 16.10.400 — 16.10.470.

(b) Where feasible, salmon eggs utilized by a hatchery operator shall first be taken from stocks native to the area in which the hatchery is located, and then, upon department approval, from other areas, as necessary. (§ 2 ch 111 SLA 1974)

Sec. 16.10.450. Sale of salmon and salmon eggs: use of proceeds; quality and price. (a) Except as otherwise provided in a contract for the operation of a hatchery under AS 16.10.480, a hatchery operator who sells salmon returning from the natural waters of the state, or sells salmon eggs to another hatchery operating under AS 16.10.400 — 16.10.470, after utilizing the funds for reasonable operating costs, including debt retirement, expanding its facilities, salmon rehabilitation projects, fisheries research, or costs of operating the qualified regional association for the area in which the hatchery is located, shall expend the remaining funds on other fisheries activities of the qualified regional association.

(b) Fish returning to hatcheries and sold for human consumption shall be of comparable quality to fish harvested by commercial fisheries in the area and shall be sold at prices commensurate with the current market. (§ 2 ch 111 SLA 1974; am § 5 ch 154 SLA 1977; am § 6 ch 14 SLA 1988)

Effect of amendments. — The 1988 amendment, effective March 31, 1988, designated the formerly undesignated two sentences as subsections (a) and (b), added "Except as otherwise provided in a con-

tract for the operation of a hatchery under AS 16.10.480" at the beginning of subsection (a), and made a series of minor stylistic changes throughout the section.

Sec. 16.10.460. Inspection of hatchery. (a) As a condition of and in consideration for a permit to operate a hatchery under AS 16.10.400 — 16.10.470, an inspection of the hatchery facility by department inspectors shall be permitted by the permit holder at any time the hatchery is operating. The inspection shall be conducted in a reasonable manner.

(b) The cost of an inspection performed by the department under AS 16.10.400 — 16.10.470 shall be borne by the department. (§ 2 ch 111 SLA 1974; am § 4 ch 110 SLA 1980)

Sec. 16.10.470. Annual report. (a) A person who holds a permit for the operation of a salmon hatchery under AS 16.10.400 — 16.10.470 shall submit an annual report no later than December 15 to the department and to the qualified regional association for the area in which the hatchery is located, to include but not be limited to information pertaining to species; brood stock source; number, age, weight, and length of spawners; number of eggs taken and fry fingerling produced; and the number, age, weight, and length of adult returns attributable to hatchery releases, on a form to be provided by the department.

(b) A person who holds a permit for the operation of a salmon hatchery under AS 16.10.400 — 16.10.470 and each regional association levying a voluntary assessment under AS 16.10.540 shall submit an annual financial report to the Department of Commerce and Economic Development on a form to be provided by the Department of Commerce and Economic Development. (§ 2 ch 111 SLA 1974; am § 6 ch 154 SLA 1977; am § 4 ch 59 SLA 1979; am § 31 ch 14 SLA 1987)

Sec. 16.10.475. Definitions. [Repealed, § 32 ch 14 SLA 1987.]

Sec. 16.10.480. Contracts for the operation of state hatcheries.

(a) If the department determines that it is unable to continue operating a state-owned hatchery or that it is in the best interest of the state to provide for the operation of the hatchery by another person or by another person in cooperation with the state, the department may enter into a contract for the operation or cooperative operation of the hatchery.

(b) Notwithstanding AS 36.30, when selecting a contractor under (a) of this section, the department shall give a preference to the regional association organized under AS 16.10.380 that is located in the region in which the hatchery is located. If the department determines

that the preferred regional association does not meet the criteria established by the department for the contract, the department may not award the contract to the preferred regional association and shall procure the contract under AS 36.30 after considering the recommendations of the preferred regional association.

(c) A contract entered into under this section must provide that the hatchery will be operated under AS 16.10.400 — 16.10.445 and 16.10.460 — 16.10.470 and the regulations adopted under those sections.

(d) The department may issue to a contractor who operates a hatchery under this section a permit to harvest adult salmon during the term of the contract in a quantity sufficient to allow the contractor to recover all or part of the contractor's costs of operating the hatchery.

(e) A contract under this section for the operation of a hatchery may not affect the state's ownership of the hatchery and does not affect the state's responsibility to manage the resource.

(f) The operation of a hatchery under a contract authorized by this section shall be conducted in accordance with the fisheries management and production goals of the department, and must be consistent with the Comprehensive Regional Salmon Plan approved under AS 16.10.375. During the term of the contract, the department may order changes in the operation of the hatchery that are necessary to ensure consistency with the production goals of the Comprehensive Regional Salmon Plan. The contract must specify the species to be raised and the production goals for each species, and these specifications must comply with the Comprehensive Regional Salmon Plan. The department may terminate a contract if the contractor fails to operate the hatchery in accordance with the requirements established by and under this subsection. (§ 1 ch 14 SLA 1988)

Legislative history reports. — For 1988 (CCS SB 410), see 1988 Senate Journal 2422.
legislative letter of intent on ch. 14, SLA

Article 10. Fisheries Enhancement Loan Program.

Section	Section
500. Declaration of policy	525. Repayment of principal and interest on loans
505. Fisheries enhancement revolving loan fund	540. Voluntary assessment on sale of salmon
507. Special account established	555. Disposal of property acquired by default or foreclosure
510. Powers and duties of the commissioner	560. Definitions
520. Limitation on loans	

Cross references. — For legislative findings and purpose related to AS 16.10.375 — 16.10.560, see § 1, ch. 59, SLA 1979, in the 1979 Temporary and Special Acts and Resolves.

MEMORANDUM

State of Alaska

Department of Law

TO: Honorable Carl L. Rosier
Commissioner
Dep't of Fish and Game

DATE August 26, 1992

FILE NO 663-92-0327

TEL NO 465-3600

SUBJECT: Review of hatchery
management contracts

FROM: *Marie Sansone*
Marie Sansone
Assistant Attorney General
Natural Resources Section - Juneau

You requested us to review all existing agreements between the Alaska Department of Fish and Game and the regional aquaculture associations for the operation of state fish hatcheries, particularly with respect to the characteristics of the funds used to operate the hatcheries, including fisheries enhancement tax funds, cost recovery money, designated grants, capital improvement project funds, and oil spill cost recovery funds. To respond to your request, this memorandum first presents general background on the operation of state hatcheries by the regional associations. Next, the various sources of funding are discussed. Pursuant to AS 36.05.030, questions regarding the Little Davis-Bacon Act, AS 36.05, will be referred to the Alaska Department of Labor. Finally, conclusions and recommendations are presented.

This memorandum of advice pertains only to the state hatcheries operated pursuant to AS 16.10.480 by the regional aquaculture associations under contract with the Alaska Department of Fish and Game, and not to the private nonprofit hatcheries constructed and operated by nonprofit corporations pursuant to AS 16.10.400(a)(1). Attachment I to this memorandum lists the contracts and contract amendments reviewed. Attachment II lists previous Department of Law memoranda of advice concerning the hatchery contracts or hatchery finance. Attachment III consists of a set of summary charts comparing the current contractual provisions of all the hatcheries under contract. Attachment IV is a memorandum from Jeffery P. Koenings, Director, Fisheries Rehabilitation and Enhancement Division, Alaska Department of Fish and Game, dated August 19, 1992, that provides a historical perspective of the development of the hatchery management contracts.

The following abbreviations are used in this memorandum:

ADF&G - Alaska Department of Fish and Game
CIAA - Cook Inlet Aquaculture Association

- CIP - Capital Improvements Project
- DCED - Alaska Department of Commerce and Economic Development
- FRED Div. - Alaska Department of Fish and Game, Fisheries Rehabilitation, Enhancement and Development Division.
- KRAA - Kodiak Regional Aquaculture Association
- NSRAA - ^{vne} Northern Southeast Regional Aquaculture Association
_{at}
- PNP - Private Nonprofit (hatchery operator)
- PWSAC - Prince William Sound Aquaculture Corporation
- SSRAA - Southern Southeast Regional Aquaculture Association
- RAA - Regional Aquaculture Association or Regional Association

Ten state hatcheries are currently the subject of operational contracts or cooperative agreements between ADF&G and a regional aquaculture association: CIAA funds and operates the Trail Lakes and Tutka hatcheries and funds a fisheries enhancement program at Crooked Creek; KRAA funds operations at Kitoi and Pillar Creek; NSRAA funds and operates Hidden Falls; PWSAC funds and operates Cannery Creek and Main Bay and funds the operations of Gulkana; and SSRAA funds and operates Beaver Falls. The Big Lake hatchery is the subject of a cooperative agreement with CIAA; however, ADF&G currently funds and operates the hatchery. ADF&G is concerned that as it has negotiated each contract, legal issues may not have been treated consistently. To facilitate the development and modification of contracts, ADF&G seeks consistency in the application of the law to each contract and to ensure compliance with applicable statutes and regulations.

Review of ADF&G's hatchery contracts and Department of Law advice concerning the hatcheries indicates that the contracts and their interpretation are to some extent inconsistent. As discussed in Attachment IV, some inconsistency is to be expected, given the unique characteristics of each hatchery and its salmon production activities. In addition, the nature and extent of the obligations undertaken by the regional associations vary from hatchery to hatchery and from regional association to regional association. However, if the contracts are inconsistent due to an

erroneous interpretation and application of the law or due to the omission of critical contract provisions, then the inconsistencies among the contracts may present legal difficulties. By reviewing Attachment III, the summary charts, it is possible to obtain an overview of the contracts and to identify where the inconsistencies and omissions occur. The Department of Law will continue to work with ADF&G to address any legal concerns over existing or new contracts.

DISCUSSION

Since 1981, the State of Alaska has sought more efficient and economical means of operating its hatcheries. See, e.g., Cannery Creek Contract, Statement of Problem and Background at 3 (June 14, 1988). In 1988, the legislature enacted AS 16.10.480, authorizing ADF&G to enter into contracts for the operation or cooperative operation of state hatcheries, when ADF&G determines that it is unable to continue operating a hatchery or that is in the best interest of the state to provide for the operation or cooperative operation of a hatchery by another person. The legislative history of AS 16.10.480 indicates that its main purpose was to relieve the burden placed on the general fund by the operating costs of certain state hatcheries, while at the same time providing an alternative means of allowing them to remain in operation.¹

¹ The legislature passed the Conference Committee Substitute for Senate Bill 410 in 1988, adding AS 16.10.480 and amending AS 16.10.400, AS 16.10.410, and AS 16.10.450. A memorandum from Representative Ben Grussendorf, Speaker of the House, the prime sponsor of House Bill 454 (which was identical to Senate Bill 410), to Representative Dave Donley, Chairman, House Labor and Commerce Committee, states:

House Bill 454 and Senate Bill 410 are an appropriate response by the Department of Fish and Game to intent language placed in the FY 1988 budget that required the department to develop ways to relieve the burden on the general fund caused by state hatchery operation.

Mem. at 2 (Feb. 22, 1988). See also Minutes of the House Resources Standing Comm. at 5 (Mar. 1, 1988) (Remarks of Doug Rickey, Legislative Assistant to Rep. Ben Grussendorf); Minutes of the Senate Resources Comm. at 4 (Feb. 22, 1988) (Remarks of Sen. Fred Zharoff). The hatcheries immediately affected were Cannery Creek, Hidden Falls, Kitoi, and Trail Lakes. Minutes of the House Resources Comm. at 3 (Mar. 10, 1988) (Remarks of Rep. John Sund).

The contracting of state hatcheries benefits the public by continuing the enhancement of the common property fisheries, while at the same time freeing state resources for other purposes. See Cannery Creek Contract, Statement of Problem and Background at 3 (June 14, 1988). Under AS 16.10.480(f), the operation of a state hatchery under contract must be conducted in accordance with ADF&G's fisheries management and production goals, and must be consistent with its region's Comprehensive Regional Salmon Plan. Under AS 16.10.480(b), when selecting a contractor, ADF&G must give a preference to the regional aquaculture association for the region in which the hatchery is located. If ADF&G determines that the regional association does not meet ADF&G criteria for a contract, then after considering the association's recommendations, ADF&G must follow the State Procurement Code, AS 36.30, in selecting a contractor. So far, ADF&G has contracted with only the regional associations.

Another key feature of AS 16.10.480 is that a contract for the operation of a state hatchery may not affect the state's ownership of the hatchery.² AS 16.10.480(e) provides:

² The legislative history of AS 16.10.480 indicates that the state is to retain ownership of the hatcheries under contract. For example, House Bill 454 and Senate Bill 410 originally provided for the "transfer" of hatchery operations. The House Labor and Commerce Committee Substitute for House Bill 454 deleted the word "transfer" and instead, used the phrase, "provide for the operation of the hatchery." A memorandum concerning the committee substitute states, "This change clarifies the fact that the State of Alaska retains all ownership rights in the hatchery, as well as the right to manage the resource." Mem. from Rep. Ben Grussendorf, Speaker of the House, to Rep. Dave Donley, Chairman, House Labor and Commerce Comm. at 1 (Feb. 22, 1988). See Minutes of the House Labor and Commerce Comm. at 4-5 (Feb. 23, 1988). See also Minutes of the House Resources Comm. at 4 (Mar. 1, 1988) ("[T]he state would retain all ownership rights to the hatcheries and would continue to manage the resource." Remarks of Doug Rickey, Legislative Assistant to Rep. Ben Grussendorf); Minutes of the Senate Resources Comm. at 4 (Feb. 22, 1988) ("The hatcheries would remain in the hands of the state." Remarks of Sen. Fred Zharoff).

The question of the state's continued ownership of the state hatcheries was also explored at the conference committee meeting on Senate Bill 410:

REPRESENTATIVE GOLL: Finally, could you restate for the record whether it is the department's understanding, as it was mine, that not
(continued...)

A contract under this section for the operation of a hatchery may not affect the state's ownership of the hatchery and does not affect the state's ability to manage the resource.

This provision plays a major role in shaping the contract termination provisions, as well as the provisions relating to capital improvements, fixtures, and replacement equipment.

With respect to termination, AS 16.10.480(f) allows ADF&G to terminate a contract when a contract r fails to operate the hatchery in accordance with ADF&G fisheries management and production goals and the Comprehensive Regional Salmon Plan. In addition, most of the contracts contain a variety of provisions relating to termination, including termination at will by the regional association by giving 90 days' notice (Big Lake, Crooked Creek, Kitoi, and Pillar Creek contracts) and termination at will by either the regional association or the state by giving 180 days' notice (Beaver Falls, Cannery Creek, Main Bay, and Tutka contracts). A major concern in drafting and interpreting the contracts, therefore, is ensuring that, in the event of the termination or expiration without renewal of a contract, the hatchery will be returned to the state in a fully operational

² (...continued)

withstanding the phrase "transfer" was used in this hearing, what we're talking about is the contract for personnel to operate these state owned and operated facilities.

ROLAND SHANKS [Special Assistant, ADF&G]: The only intention is that the facility stays in state ownership and we're basically talking about a contract in the operation.

REPRESENTATIVE GOLL: So we're talking about contracting for staff; we're not talking about transferring hatcheries to the private sector, or to [indisc.], or to anybody else.

ROLAND SHANKS: No, we're talking about the operations.

mode.³ This requirement not only safeguards the public's investment in the hatchery structures and equipment, but also enables ADF&G or a successor contractor to immediately step in and manage the broodstock, so that the fishery enhancement efforts at the hatchery and the resource itself will not be jeopardized.

The question of property ownership also figures into the treatment of capital improvements to the hatcheries. All the hatchery contracts provide that the state owns any capital improvements made, regardless of the source of money used to pay for the improvements. This fulfills the intent of AS 16.10.480(e), because to treat capital improvements to state property as private property would inevitably diminish or encumber the state's ownership of the hatchery. Moreover, at many of the state hatcheries, the state owns the facility, but not the underlying land.⁴ Because the ownership of land gives the owner the right to limit any improvements placed on the land, 8,960 Square Feet. More or Less v. State, 806 P.2d 843, 846 (Alaska 1991), ADF&G may have separate, additional contractual obligations with respect to a hatchery that cannot be modified or impaired by a hatchery management contract.

Also of concern are the contractual provisions relating to fixtures. The law related to the removal of trade fixtures is summarized in Interior Energy Corp. v. Alaska Statebank, 771 P.2d 1352 (Alaska 1989). With respect to the treatment of fixtures in the hatchery contracts, the threshold question that must be

³ The Beaver Falls, Cannery Creek, Hidden Falls, Main Bay, Trail Lakes, and Tutka contracts thus require the regional associations to repair and maintain the state hatcheries at a level sufficient to ensure that upon completion of the contract, the site and facility will be returned to ADF&G in their original condition, excluding normal wear and tear.

⁴ ADF&G has U.S. Forest Service special use permits at Cannery Creek, Hidden Falls, and Main Bay; a lease agreement with the Alaska Department of Natural Resources, Division of Land and Water, for Hidden Falls; a lease agreement with the Afognak Corporation for Kitoi; an Interagency Land Management Assignment from the Alaska Department of Natural Resources, Division of Parks and Outdoor Recreation, on designated mental health trust lands, for Tutka; a ground lease with the Cape Fox Corporation for Beaver Falls; and a memorandum of understanding with the U.S. Bureau of Land Management and a pending Interagency Land Management Assignment from the Alaska Department of Natural Resources for Gulkana. At the Crooked Creek hatchery, ADF&G has a U.S. Fish and Wildlife Service special use permit for the Tustumena Lake sockeye salmon project.

considered is who purchased and installed the fixture. If the regional association did not pay for and install the fixture, the regional association has no right to remove the fixture. See id. at 1353-54. Except for those fixtures purchased and installed with state money, the ownership of expansion fixtures upon the termination of a hatchery contract is a matter for negotiation. In the absence of an agreement to the contrary, it will be presumed that the regional association did not intend to donate an expansion fixture to ADF&G. The regional association may remove the fixture, provided it can restore the hatchery to its former condition and provided there is no agreement to the contrary. See id. at 1355-56. It follows that unless there is an agreement to the contrary, the regional association may remove expansion equipment from the hatchery.⁵

Replacement fixtures and replacement equipment, however, must be treated differently. To protect the public investment in the hatcheries and the public interest in their continued operation, the hatcheries must be maintained and returned to the state in the condition they were in when the regional association assumed responsibility for their operation, normal wear and tear excepted. Thus, the Beaver Falls, Cannery Creek, Hidden Falls, Main Bay, Trail Lakes, and Tutka contracts all provide that replacement equipment becomes the property of ADF&G.

The general principles outlined above form the basis for the following discussion of the different funds used by the regional associations to pay state hatchery operating costs. The discussion of each funding source parallels the ADF&G memorandum to the Department of Law dated December 10, 1991, requesting the review of the hatchery contracts. The responses to ADF&G's questions that are presented in outline form are also based upon the above analysis, with further clarification where required. It should be noted that additional requirements may be imposed under the PNP permit issued to a regional association, the Annual Management Plan for the hatchery, any DCED fisheries enhancement loan agreements for enhancement activities at the hatchery, or any special use permits or lease agreements for the hatchery.

I. FISHERIES ENHANCEMENT TAX FUNDS

Statutory provisions relating to the salmon enhancement tax are found in AS 43.76; regulatory provisions, in 3 AAC 89.010-.130. The salmon enhancement tax is a tax that is

⁵ The Beaver Falls, Cannery Creek, Hidden Falls, Main Bay, Trail Lakes, and Tutka hatchery contracts provide that with the exception of replacement equipment, equipment purchased by the regional association belongs to the association.

self-imposed by a regional association on its limited entry permit holders to raise money for the association. The tax rate is established at one, two, or three percent of the value of the salmon the permit holder removes from the state or transfers to a buyer in the state.⁶ AS 43.76.010-.012. The buyer withholds the tax from the permit holder's fish payments, and remits the tax to the Department of Revenue for deposit in the general fund. The proceeds of the tax are state revenues, subject to legislative appropriations. 1987 Inf. Op. Att'y Gen. at 1 (Mar. 19; 663-87-0372). Based upon these revenues, the legislature makes appropriations to DCED for the purpose of providing financing to the regional associations. AS 43.76.025(c).

Under current regulations, DCED disburses money to the regional associations through grant agreements. Grant money is disbursed quarterly in accordance with quarterly cash-flow projections, identified in annual budgets submitted to DCED by the associations. 3 AAC 89.070. The regulations require the associations to include in their final reports "a description of how surplus money remaining in a budget component or cost category or subcategory will be reallocated or carried over." 3 AAC 89.090(a)(3).

With respect to the state hatchery contracts only, the fisheries enhancement tax funds must be treated as follows:

- a. Compliance with procurement law: No. The State Procurement Code does not apply to grants. AS 36.30.850(b)(1).
- b. Little Davis-Bacon applicability: To be determined by the Department of Labor.
- c. Ownership of replacement equipment or buildings: State.
- d. Ownership of buildings constructed: State.
- e. Ownership of expansion fixtures: Negotiable.
- f. Ownership of removable expansion equipment: Regional association.

II. STATE HATCHERY COST RECOVERY FUNDS

The term "cost recovery funds" refers to money derived from the sale of salmon returning from the natural waters of the

⁶ Salmon harvested by a regional association for cost recovery at a state hatchery are not taxed. See AS 43.76.035.

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state to specific locations identified by ADF&G for harvest by PNP hatchery operators. Pursuant to statute, these funds are designated to meet hatchery operating costs. See AS 16.10.450; AS 16.10.480(d); 1990 Inf. Op. Att'y Gen. at 2-3 (Aug. 1; 663-90-0327). Cost recovery harvests thus enable the hatcheries to operate on a self-supporting basis.

You asked us to reexamine the status of cost recovery funds to determine whether they are private or public funds. In a previous memorandum, we stated that there are valid arguments on both sides of this issue. We also concluded that cost-recovery funds not used during a fiscal year by a regional association for a state hatchery could be held over for another year, to protect against shortfalls in future years. Any funds remaining at the end of a contract must be returned to the state or, if determined appropriate by ADF&G, turned over to a successor contractor. 1990 Inf. Op. Att'y Gen. at 4-5 (Sept. 14; 663-91-0106).

The statutory provision that controls cost recovery harvests at a state hatchery under contract is found at AS 16.10.480(d):

The department may issue to a contractor who operates a hatchery under this section a permit to harvest adult salmon during the term of the contract in a quantity sufficient to allow the contractor to recover all or part of the contractor's costs of operating the hatchery.

Because AS 16.10.480 does not address the question of whether state hatchery cost recovery funds are private or public funds, it is necessary to consult its legislative history and administrative interpretation. See Nat'l Bank of Alaska v. State, 642 P.2d 811, 814-19 (Alaska 1982).

Our review indicates that the use of cost recovery harvests to pay operating costs at the state hatcheries was patterned after the use of cost recovery harvests at the PNP hatcheries. For example, the bill analysis of the committee substitute for Senate Bill 410 and House Bill 454, dated February 22, 1988, prepared by ADF&G, states:

Further, the amendment provides certain assurances to the state, which must maintain jurisdiction over the facilities, to the general public, which bonded themselves for original capital costs to construct the facilities, and to the fishery user groups who depend on the hatchery-produced fish to supplement the natural stocks in off-years. These assurances arise from the proven

technical and managerial expertise of the RAAs, along with their financial capability and socially and legally acceptable practice of special harvests of hatchery returns to pay hatchery operational costs. This approach allows for continued hatchery production while reducing the impact on the general fund.

A Department of Law memorandum to ADF&G concerning the Cannery Creek hatchery contract also suggests that cost recovery funds are private funds. In that memorandum, we stated:

The funds provided by PWSAC do not fall under the definition of "state funds" merely because the expenditures will be made on a state-owned facility. Furthermore, the state will not be paying PWSAC state money to perform this contract. Instead, the consideration being provided is similar to a lease agreement. In consideration of a 20-year contract to operate and maintain the Cannery Creek Hatchery, PWSAC may harvest and sell eggs, conduct cost recovery harvests, and retain any other revenue generating procedures at the hatchery in keeping with the Annual Management Plan and statutes. This will allow PWSAC to recover all or part of its costs of operating the hatchery. The state will not be receiving any of the revenue from the hatchery during the term of the agreement. Instead, the contract provides that PWSAC must ensure that upon completion of the contract the hatchery is returned to ADF&G in a fully operational mode similar to when the contract was initially let.

1988 Inf. Op. Att'y Gen. at 1-2 (June 14; 663-93-0037) (re-dated for purposes of indexing, Jan. 1, 1992) (citations omitted).

Likewise, a memorandum from Don W. Collinsworth, Commissioner, ADF&G, to Grace Berg Schaible, Attorney General, dated August 5, 1988, states:

ADF&G and Department of Law staffs had discussions about whether or not state money would be involved in operations, maintenance, and capital improvements. They determined along with the Department of Transportation and Public Facilities, that the principal source of money would be cost recovery of salmon returning to the hatcheries and other release sites stocked with fish from hatchery sites. This money would belong to the hatchery

permittee and operators as is the case with other private nonprofit hatcheries permitted under AS 16.10.375, et seq.

Based upon our review of the legislative history and administrative interpretation of AS 16.10.480, we conclude that state hatchery cost recovery funds have the same status as private funds as PNP hatchery cost recovery funds. However, as discussed below, because section 480(d) only authorizes the use of state hatchery cost recovery funds to pay all or part of the operating costs of the hatchery under contract, we also conclude that any surplus cost recovery funds remaining at the completion or termination of a contract must be returned to ADF&G.

With respect to the state hatchery contracts only, cost recovery funds must be treated as follows:

a. Compliance with procurement law: No. The Procurement Code only applies to expenditures of "state money by the state." AS 36.30.850(b). "State money" is defined as "any money appropriated to an agency or spent by an agency irrespective of its source" AS 36.30.990(20). Cost recovery money is neither appropriated to nor spent by ADF&G, and therefore is not "state money." See 1988 Inf. Op. Att'y Gen. (June 14; 663-93-0037) (re-dated for purposes of indexing, Jan. 1, 1992).

b. Little Davis-Bacon applicability: To be determined by the Department of Labor.

c. Ownership of replacement equipment or buildings: State.

d. Ownership of buildings constructed with: State.

e. Ownership of expansion fixtures: Negotiable.

f. Ownership of removable expansion equipment: Regional association.

g. Residual money left at end of contract: State.

You also asked whether surplus cost recovery funds returned to ADF&G at the end of a contract could be allocated to a new contractor, or whether the funds must be deposited in the general fund. ADF&G's authority to expend funds derives from legislative appropriations. See Alaska Const. art. IX, § 12. Further, the Alaska Constitution prohibits the dedication of funds to a special purpose. Art. IX, § 7; see State v. Alex, 646 P.2d 203, 207-11 (Alaska 1982). Therefore, any surplus funds returned to ADF&G must be remitted to the Department of Revenue for deposit

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into the general fund. This money will then be available to the legislature for appropriation to ADF&G for the hatchery, if the legislature so chooses, in much the same manner as the DCED fisheries enhancement tax appropriations.

With respect to your questions regarding the purchase of equipment with cost recovery funds, it is not so much the character of the funds, but rather the regional association's contractual obligation to return the hatchery to the state in a fully operational condition, along with the underlying statutory requirement of AS 16.10.480(e) that a hatchery contract may not affect the state's ownership of the hatchery, that controls the ownership of equipment. As discussed above at page 7, replacement fixtures and equipment are owned by the state. The ownership of removable expansion fixtures is negotiable. Unless there is an agreement to the contrary, the regional associations are presumed to own removable expansion equipment.

Finally, a regional association may not spend funds derived from a cost recovery harvest at a state hatchery to support its other hatcheries or fisheries activities not directly related to the hatchery under contract. Under AS 16.10.480(d), cost recovery harvests at a state hatchery are limited to the quantity of salmon sufficient to allow the association to recover part or all of its costs of operating the hatchery.

*
2
AS 16.10.480 does not define "costs of operating the hatchery"; however, AS 16.10.450, which concerns the sale of salmon and salmon eggs by PNP hatchery operators, defines "reasonable operating costs" to include debt retirement, expansion of hatchery facilities, salmon rehabilitation projects, fisheries research, or the costs of operating the qualified regional association for the area in which the hatchery is located. We previously found that under section 450, ADF&G has the discretion to provide contractually for the manner in which a contractor operating a state hatchery under section 480 may spend cost recovery money, and thus can allow a regional association to use cost recovery funds for capital improvements at a state hatchery. See 1991 Inf. Op. Att'y Gen. (Mar. 14; 663-91-0280). To the extent our previous opinion may be interpreted more broadly, for the reasons stated below, it is overruled.

Section 480 specifically concerns cost recovery at the state hatcheries, and must take precedence over section 450, the general statute applicable to PNP hatcheries. See City of Cordova v. Medicaid Rate Comm'n, 789 P.2d 346, 352 (Alaska 1990). Section 480(c) specifically omits section 450 from the PNP statutory provisions made directly applicable to the state

hatcheries.⁷ While section 450 would permit a regional association to spend cost recovery money on "other fisheries activities of the qualified regional association" (a category of expenditures not included in the definition of "reasonable operating costs"), such expenditures are impermissible under section 480, which only authorizes recovery of all or part of the costs of operating the state hatchery under contract.

Nowhere in the legislative history of section 480, nor the 1988 amendment to section 450, did we find any indication that state hatchery cost recovery funds could be used for purposes other than the state hatchery under contract or expenses directly related to the state hatchery. To the contrary, the legislative history indicates that cost recovery under section 480 is limited to the costs of operating and expanding the hatchery under contract.

For example, with respect to the cost recovery language of AS 16.10.480, the Attorney General's bill review letter states:

The bill provides that a contractor may be issued a permit to harvest salmon in a quantity sufficient to recover all or part of its cost of operation of the hatchery during the term of the contract. . . . Under this provision, the department will have the latitude to allow only part of the cost of operation to be recovered through salmon harvest, or to allow operation costs during a year of low return to be recovered in other years if the term of the contract is for multiple years. Section 1 of the bill.

. . . .

The bill amends AS 16.10.450 to allow the department flexibility in providing contractually for the manner in which a contractor under AS 16.10.480 may spend money received as a result of the sale of salmon harvested by the contractor. This will allow the department to require, for example, that any money received in excess of actual operating costs be used solely for

⁷ AS 16.10.480(c) states:

A contract entered into under this section must provide that the hatchery will be operated under AS 16.10.400 - 16.10.445 and 16.10.460 - 16.10.470 and the regulations adopted under those sections.

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enhancement of the state hatchery facility.
Section 6 of the bill.

Letter from Grace Berg Schaible, Attorney General, to Steve Cowper, Governor, at 2 (Mar. 29, 1988) (emphasis added).

ADF&G arrived at the same conclusion with respect to the Kitoi hatchery:

Review of the amendment language clarifies that the first intent of the amendment was to harvest in the Kitoi Hatchery Special Harvest Area, the pink salmon made inaccessible to the fishermen because of the [Exxon Valdez Oil Spill] and, secondarily, to be certain any revenue from that harvest would not be used for any other purpose except for the original intent of the contract; that is, supporting operational costs of the hatchery. Having been involved in the negotiation of the amendment, I can reach no other interpretation of the intent. Any diversion of these funds for fisheries enhancement purposes at other locations or for administrative costs not directly connected with Kitoi Hatchery operations would constitute violation of the contract.

Letter from Norman A. Cohen, Deputy Commissioner of ADF&G, to Oliver Holm, president of KRAA at 2 (Apr. 27, 1990). The memorandum from Jeffery P. Koenings, Director, FRED Division, ADF&G, dated August 19, 1992), Attachment IV, further explains that the initial contracts did not envision the regional associations using cost recovery money to support activities unrelated to the hatchery under contract.

Based on the above, we conclude that under AS 16.10.480, cost recovery money derived from harvesting salmon at the state hatchery may not be spent on other hatcheries operated by the regional associations nor on other fisheries activities not directly related to the state hatcheries. Cost recovery money derived from harvesting salmon at a state hatchery may be spent only on the state hatchery under contract and on any operationally-related facilities and activities.

Listed below are several examples of operationally-related facilities and activities for which cost recovery funds may be spent. First, cost recovery funds may be used to fully reimburse a regional association for the money it spends out of its own coffers in operating the state hatchery during those years when cost recovery is insufficient to fund hatchery operations.

Accounting procedures, mutually agreed upon by ADF&G and the regional association, must be in place to verify the expenditures.

Second, the regional associations may use cost recovery funds to meet their direct and indirect costs of operating the hatcheries. For example, the Beaver Falls, Kitoi, Pillar Creek, Trail Lakes, and Tutka contracts specifically allow cost recovery funds to be used for indirect costs or administrative overhead. The Beaver Falls contract recognizes that cost recovery funds may be used to pay for the legal and professional services necessary for hatchery management.

Third, cost recovery funds may be used to pay expenses incurred in outstocking from the state hatchery. These activities include planning, constructing, and operating supportive infrastructure such as weirs and cabins; planning stocking programs; site surveys; lake fertilization; transporting fish and stock to stocking sites; and evaluating returns of fish outstocked from a contracted hatchery operated as a central incubation facility. In short, cost recovery funds generated by a state hatchery under contract can be used to finance structures and activities directly related to that hatchery.

III. DESIGNATED GRANTS

Designated grants are governed by AS 37.05.316. ADF&G disburses grants to the regional associations for various purposes, including planning, construction, and lake studies. In a previous memorandum, we found that the State Procurement Code, AS 36.30, does not apply to ADF&G's allocation to PNP hatchery operators of federal funds granted to Alaska in connection with the U.S. - Canada Pacific Salmon Treaty. 1988 Inf. Op. Att'y Gen. (Apr. 13; 663-88-0413).

Unless otherwise specified in the grant agreement, for the state hatchery contracts only, designated grants are treated as follows:

- a. Compliance with procurement law: No. The State Procurement Code does not apply to grants. AS 36.30.850(b)(1).
- b. Little Davis-Bacon applicability: To be determined by the Department of Labor.
- c. Ownership of replacement equipment or buildings: State.
- d. Ownership of buildings constructed with: State.
- e. Ownership of expansion fixtures: Negotiable.

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f. Ownership of removable expansion equipment: Regional association.

IV. CAPITAL IMPROVEMENTS PROJECT MONEY

"Capital projects" and "capital improvements" are defined in the Executive Budget Act as "an allocation or appropriation item for an asset with an anticipated life exceeding one year and a cost exceeding \$25,000 and include land acquisition, construction, structural improvement, engineering and design for the project and equipment and repair costs." AS 37.07.120.

In 1991, the legislature appropriated \$5 million from the general fund to ADF&G for capital improvements projects. Sec. 163, ch. 96, SLA 1991. The FRED Division allocated \$3 million to Main Bay Hatchery, operated by PWSAC, and \$2 million to Tutka Hatchery, operated by CIAA. You asked if ADF&G can transfer the full amount to the regional associations at the initiation of the contract amendments.

Generally, it is not appropriate to prepay or otherwise disburse public money to a contractor in advance of performance of a public contract. Our office has repeatedly advised state agencies that unless there is evidence of legislative intent that appropriations are to be used for investment purposes, such as the case with "seed money," money appropriated for a specific purpose may not be diverted for use as investment capital or to capitalize an investment program. 1988 Inf. Op. Att'y Gen. at 2 (Mar. 22; 661-88-0396). For example, in a previous opinion on the appropriation of salmon enhancement tax proceeds to a regional association, we stated, "To be constitutional, the appropriation must directly impact the designated or recognized public purpose (salmon enhancement), such as providing financing of current construction, operations, or maintenance." 1987 Inf. Op. Att'y Gen. at 2 (Mar. 19; 663-87-0372) (emphasis added).

Section 35.100 of the Alaska Administrative Manual (1990), however, provides an exception to the general rule against prepayment when prepayment is in the state's best interest. Prepayment requires the approval of the Department of Administration and the Department of Revenue. ADF&G has obtained approval to prepay the Main Bay and Tutka CIP contract amendments in order to provide the regional associations the maximum benefit from the limited funding available through legislative appropriation.

To assure that the capital improvement project funds are applied to the purpose which the legislature intended, the hatchery contracts or contract amendments for capital improvements should require the regional associations to promptly undertake and

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complete all construction and renovation. 1992 Inf. Op. Att'y Gen. (Apr. 24; 663-92-0501). The contracts should also require progress reports and an accounting and audit on a regular basis. Further, the requirements of any other agreements or permits relating to capital improvements at the hatcheries must be met.

In the state hatchery contracts, CIP funds must be treated as follows:

a. Compliance with procurement law: Yes. The State Procurement Code must be adhered to for any capital project that involves state general operating or capital improvement funds. 1988 Inf. Op. Att'y Gen. at 1 (June 14; 663-93-0037) (re-dated for purposes of indexing, Jan. 1, 1992).

b. Little Davis-Bacon applicability: Yes. The Little Davis-Bacon Act applies to "public construction in the state, as defined by AS 36.95.010." AS 36.05.010. "Public construction" is defined as "the on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecorating of buildings, highways or other improvements to real property under contract for the state. . . ." AS 36.95.010(3). Capital improvements to the hatcheries are "public construction"; thus, the Little Davis-Bacon Act applies. *

c. Ownership of replacement equipment or buildings: State.

d. Ownership of buildings constructed: State.

e. Ownership of expansion fixtures: State.

f. Ownership of residual funds: State. The unexpended balance of a capital appropriation is valid for the life of the project. Upon completion of the project, the unexpended balance will lapse. See Alaska Const. art. IX, § 13; AS 37.25.020.

V. OIL SPILL COST RECOVERY MONEY

During the 1989 Exxon Valdez oil spill, commercial salmon fisheries in the Kodiak and Prince William Sound areas were closed due to concern for contamination of the fish and fishing gear. However, because oil containment booms were present at the Kitoi and Main Bay hatcheries, KRAA and PWSAC were allowed to conduct a terminal harvest in excess of hatchery broodstock needs inside the booms. KRAA obtained \$10 million from this harvest; PWSAC, \$500,000. Under contract amendments between ADF&G and the regional associations, the associations were to deposit these funds in interest-bearing accounts. These funds are to be spent, with

approval from both ADF&G and the associations, on operating and expanding the Kitoi and Main Bay hatcheries.

You asked whether these funds should be treated the same as other cost recovery money. We examined this matter closely, revisiting the initial advice given ADF&G during the oil spill crisis. The only difference between the oil spill cost recovery harvest and a typical cost recovery harvest at a state hatchery appears to be the magnitude of the recovery and the state's contribution to the harvest in setting up and maintaining the oil containment booms. First, the magnitude of the harvest should not in itself result in different treatment of these funds. As discussed above, the intent of AS 16.10.480 was to allow a carry-over of funds from one year to another to safeguard against years of low return. Given the uncertainty of future cost recovery harvests due to the oil spill, it was consistent with the intent of section 480 to allow the harvest of salmon in excess of broodstock needs and to save the proceeds to guard against lean years. Second, the state's contribution to the oil spill cost recovery harvest does not appear to differ significantly from other cooperative efforts between the state and the regional associations at the state hatcheries. We conclude therefore that the funds from the oil spill cost recovery harvest should be treated in the same manner as state hatchery cost recovery funds.

ADF&G need not take any further steps to implement this decision. However, to assure that these funds are properly used, ADF&G should require on a regular basis an accounting and audit of KRAA's and PWSAC's financial records for the Kitoi and Main Bay hatcheries.

You also asked whether the oil spill cost recovery funds are still being considered by the oil spill defendants as partial mitigation of the damages claimed by the fishermen in the Kodiak and Prince William Sound areas. We understand that the fishermen's claims are still pending. Because the oil spill cost recovery funds are to be treated in the same manner as state hatchery cost recovery funds, and because KRAA and PWSAC must use the funds pursuant to AS 16.10.480(d) for their costs of operating the Kitoi and Main Bay hatcheries, the status of the fishermen's claims should not affect how the oil spill cost recovery funds are treated in the hatchery contracts.

CONCLUSIONS AND RECOMMENDATIONS

The state hatchery contracts present complex and difficult legal and policy issues. ADF&G is appropriately concerned with the consistent treatment of legal requirements in the hatchery contracts and with complying with all applicable laws. Considering the issues that have arisen with the development of new

contracts, it appears that statutory amendments to AS 16.10 could benefit the hatchery program.

1. You indicated that the regional associations wish to use the cost recovery funds generated at state hatcheries at other PNP hatcheries or for their other fisheries activities not directly related to the state hatchery under contract. Statutory amendments will be required to enable the regional associations to use state hatchery cost recovery funds on their other activities. There are several options you may wish to consider, including:

a. an amendment to AS 16.10.480(c) to include AS 16.10.450 among the statutes that are directly applicable to the state hatcheries; and

b. an amendment to AS 16.10.480(d) to allow the contractor to recover not only the contractor's cost of operating the state hatchery, but also the costs of the contractor's fisheries activities; or, alternatively,

c. an amendment to AS 16.10.480 that spells out the categories of costs which may be recovered.

2. Another question that has come up is whether a regional association may conduct cost recovery harvests at a state hatchery following the termination or completion of a contract. An amendment to AS 16.10.480 to expressly allow a contractor to conduct cost recovery harvests following the termination or completion of a hatchery contract for purposes of recouping its costs of operating the state hatchery would provide greater certainty for the regional associations.

3. You may also wish to consider an amendment to AS 16.10.480 to address the disposition of surplus cost recovery funds upon the termination of a contract. While we believe our analysis to be sound, legislative direction on this matter would be appropriate.

If we can be of further assistance regarding this matter, please do not hesitate to contact us.

cc: / Jeffery P. Koenings, FRED Div., ADF&G
Larry Jones, Div. of Administration, ADF&G
Dave Massey, Div. of Investments, DCED

ATTACHMENT I

List of Contracts and Contract Amendments Reviewed

Beaver Falls Hatchery -- SSRAA
IHP-93-001
Cooperative Agreement (Coop 91-009) -- August 28,
1990
Amended -- July 24, 1991
Agreement -- July 2, 1992

Big Lake Hatchery -- CIAA
IHP-91-010
Cooperative Agreement -- October 23, 1990
Letter of Agreement -- October 23, 1990

Cannery Creek Hatchery -- PWSAC
IHP-88-196
Agreement -- June 14, 1988
Amended -- April 11, 1989
Amended -- September 12, 1991

Crooked Creek Hatchery -- CIAA
IHP-91-009
Cooperative Agreement -- October 23, 1990
Letter of Agreement -- October 23, 1990
Amended -- November 27, 1991

Gulkana Hatchery -- PWSAC
Coop-91-007
Cooperative Agreement -- July 1, 1990
Amended -- August 14, 1991

Hidden Falls Hatchery -- NSRAA
IHP-88-229
Agreement -- June 24, 1988
Amended -- October 14, 1988
Amended -- January 8, 1990
Amended -- July 17, 1991
Amended -- June 25, 1992

Kitoi Hatchery -- KRAA
IHP-88-239
Agreement -- July 11, 1988
Amended -- August 9, 1989
Amended -- September 11, 1990
Amended -- September 6, 1991

Main Bay Hatchery -- PWSAC
IHP-92-001
Oil Spill Cost Recovery Agreement (IHP-89-090) --
July 17, 1989
Agreement -- September 5, 1991

Amended -- September 5, 1991
Amended -- November 7, 1991

Pillar Creek Hatchery -- KRAA
IHP-92-006
Cooperative Agreement -- December 10, 1991

Trail Lakes Hatchery -- CIAA
IHP-88-228
Agreement -- July 11, 1988
Amended -- September 14, 1988
Amended -- July 11, 1990

Tutka Hatchery -- CIAA
IHP-92-002
Agreement -- August 22, 1991
Amended -- April 3, 1992
Amended -- April 23, 1992

ATTACHMENT II

List of Memoranda of Advice Reviewed

- 1992 Inf. Op. Att'y Gen. (Apr. 24; 663-92-0501) (CIP amendment to Tutka hatchery).
- Letter from Douglas L. Blankenship, Deputy Attorney General, to Jaki Sanders, ADF&G (June 14, 1992) (PWSAC contract provisions on termination and ownership of documents).
- 1990 Inf. Op. Att'y Gen. (Sept. 11; 663-91-0106), superseded, Letter from Elizabeth J. Kerttula, Assistant Attorney General, to Norman A. Cohen, Deputy Commissioner, ADF&G (Sept. 28, 1990; 663-91-0106), revised, 1991 Inf. Op. Att'y Gen. (Mar. 14; 663-91-0280) (Main Bay hatchery contract; cost recovery funds), overruled in part, 1992 Inf. Op. Att'y Gen. (Aug. 26; 663-92-0327).
- 1990 Inf. Op. Att'y Gen. (Aug. 1; 663-90-0327) (ADF&G authority to manage fisheries for hatchery broodstock and cost recovery).
- 1988 Inf. Op. Att'y Gen. (June 14; 663-93-0037) (re-dated for purposes of indexing, Jan. 1, 1992) (Cannery Creek hatchery contract; application of State Procurement Code).
- 1988 Inf. Op. Att'y Gen. (June 8; 663-88-0501) (Baranoff Warm Springs Hatchery development options).
- 1988 Inf. Op. Att'y Gen. (Apr. 13; 663-88-0413) (Application of AS 36.30 to allocation of federal funds related to U.S. - Canada Pacific Salmon Treaty).
- 1987 Inf. Op. Att'y Gen. (Mar. 19; 663-87-0372) (Appropriation of salmon enhancement tax proceeds to aquaculture association).
- 1984 Inf. Op. Att'y Gen. (June 11; 366-180-84) (Vertical integration of nonprofit fish hatchery).
- 1982 Inf. Op. Att'y Gen. (Sept. 9; 366-086-83) (Authority to transfer hatcheries).
- 1982 Inf. Op. Att'y Gen. (Mar. 30; 366-197-82) (Transfer of operation of state hatcheries).