

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2068 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

86

... Status of Bills ...

Key Senate Bills Introduced

- SPONSOR SUB SB-292 (Hoffman) Goodnews Bay closure to mining To RES, FIN
- SB-369: Ratify agree litigation state & ASRC / land exchange (Gov) To Oil & Gas, RCS, FIN
- SB-370: Involuntary dissolution of Native corporations (Adams)..... To C&RA, JUD
- SB-371: Education programs, disabled children (Gov) To HESS, FIN
- SB-373: Loan guarantee, subsidy assistive technology (See SB-377)(Duncan) To HESS & FIN
- SB-374: Investment pools for public entities (by Gov) To CRA & FIN
- SB-375: Law enforcement officers hold guide license (Hoffman) To SA & RCS
- SB-376: Act re: insurance revision (by L&C Committee)..... To L&C, JUD
- SB-377: Loan guarantee, assistive tech (by Duncan) (Also see SB-373) To HESS & FIN

Senate finance subcommittee schedules

Operating agencies

- Dept. of Administration 3:30 p.m. Beltz Room 211
- Feb. 4 - Alaska Public Broadcast Commission, RATNET, APOC
- Feb. 6 - Longevity Bonus, Pioneers' Homes, Older Alaskans' Commission
- Feb. 11 - Public Defender, Public Advocacy, Permanency Planning Panel
- Feb. 13 - Personnel, Labor Relat & Retir Benefits

Senate Committee Action

- SB-335 (Gov. Council on Handicapped) RLS to Calender
- SB-329 (est. Alaska State Pension Investment Board) SA to FIN
- SB-330 (exemption resources-in-place, municipal property taxes) RES to FIN
- SB-335 (Gov. Council on Handicapped, definition of developmentally disabled) HESS to RLS
- SB-80, Re: Eligibility under teachers retirement (FIN "mixed rec") To RLS
- SB-324: Report on earnings of Alaska Marine Hwy (TRANS "do pass") To FIN
- SB-325: Approp. ferries, vessel replacement fund (TRANS "do pass") To FIN
- SB-325: Ak State Pension Investment Board (FIN "do pass") To RLS
- SB-330: Muni taxation resources "in place" (FIN CS "do pass") To RLS

Heard in the Halls ...

New revenue commissioner Darrel Rexwinkel reportedly is jawboning Standard & Poors and Moody's rating services in an effort to boost the state's bond rating. But it's a tough sell. Alaska has enjoyed good ratings mainly because of the Permanent Fund, which the rating services see as an ultimate fallback under a disaster fiscal scenario. Now, however, it's working the other way: Looking at oil production trends, ratings analysts have somehow convinced themselves that Alaskans will eventually tap the fund, which diminishes its "confidence" value in boosting the state's rating. Rexwinkel's interest is not so much in aiding state bonds, but in helping municipalities, whose ratings tend to move up or down in tandem with the state's.

Heard in the Halls...

In testimony before House Resources and Senate Oil and Gas on his oil exploration incentive bill, DNR Commissioner Heinze painted a picture of cooperation with private Native corporation landowners. But word is that relations are anything but that. When regional corporation land managers met with DNR to discuss their ideas, mainly of extending the incentive test well program to Native lands, the reception was anything but warm. Also: Legislators, miners and environmentalists are laying for Heinze over reports he will introduce a bill excluding private lands from state land reclamation requirements put into law two years ago. Miners and Native corporations want to be included in the state program, mainly to preclude federal regulation. Heinze excluded them by regulation, and reportedly now wants to codify that in statute.

Salmon labeling

Rep. Cliff Davidson has put together an unusual letter, signed by all 60-lawmakers, appealing to the Alaska Congressional delegation to push federal implementation of consumer legislation that would label salmon by species and origin.

... Status of Bills ...

New House Bills, Resolutions

- HB-416: Ratify land exchange agreement state and ASRC (Gov) To RCS, JUD & FIN
- HB-417: Loan auth of the Ak Indus & Export Auth (Choquette/Baker)..... To TRANS, L&C, FIN
- HB-418: Require employers certain minors work break (MacLean) To L&C, FIN
- HB-419: Educ program children with disabilities, other exceptional (Gov) To HESS & FIN
- HB-420: Expand authority corrections contract for facilities (Gov) To HESS, JUD, FIN
- HB-421: State investment officer comply with AS 39:50 (Gov) To SA & FIN
- HB-422: Revoc drivers license, and privilege to obtain a license (Gov) To TRANS, JUD, FIN
- HB-423: Bulk fuel storage facilities grant program (Ivan) To CRA, L&C, FIN
- HB-424: State contracts for goods/services (Parnell) To L&C, SA
- HB-425: Insurance regulation (Labor & Comm Comm.) To L&C, JUD
- HB-426: Workers' comp, student work study (B. Davis) To HESS, L&C, JUD
- HB-427: Approp., distribution of pink salmon to public (Ellis) To L&C, FIN
- HB-428: Permanent Fund dividends (Gruenberg) To SA, FIN
- HB-429: Powers of Board of Game (Sharp) To RES, JUD, FIN
- HB-430: Creamer's Field Migratory Waterfowl Refuge (Sharp) To RES, FIN
- HCR-47: Task force to revise state school funding formula (R. Phillips) To HESS & FIN
- HJR-64: Asking feds mandatory seafood inspection (Jacko) To RCS

House Committee Action

- HB-155 Remodeling facilities make accessible handicapped (SA CS "do pass") To HESS
- HB-157: Spl. approp to barrier free remodeling fund (SA CS "no rec") To HESS
- HB-373: Exemption munny property taxation "in place" resources (CRA CS "do pass") To FIN

House Floor Action

- HB-31: Re: applicants for licensure as pharmacists Passed 38 to 0
- HB-247: Re: licensure as dentists Passed 30 to 0

... Business ...

SB-104: Business loss from condemnation

The Department of Transportation and Public Facilities (DOTPF) is prepared to put up a major fight to stop or make changes in legislation that would make Alaska the country's leader in compensation to businesses for non-property losses resulting from condemnation proceedings. SB 104, sponsored by Sen. Pat Kodey (D-Anch.) "would have a chilling effect on transportation," according to DOTPF right-of-way chief Jeff Ottesen. It would also cost the state an estimated \$3.1 million in expenses that could not be paid by federal highway funds and threaten lengthy delays on construction projects.

But supporters of the bill say it will correct a long standing inequity by forcing the state to pay for profits lost by a business resulting from public project work even when no property was taken by the state. SB 104 would require the state to deposit an estimated compensation amount for lost business. If businesses and state did not agree on that amount, the question would be directed to a court-appointed master for an informal hearing. Continued disagreement would result in a formal trial. The bill also requires expedited proceedings on the determination of just compensation and prohibits a court from granting right of entry until the deposited amount for compensation is sufficient. Ottesen agreed that the current \$20,000 limit on compensation to businesses forced to close or relocate by condemnation proceedings is "paltry," though DOT has not proposed an alternate cap and none is set in the bill. But the department charges that the bill arose from two condemnation cases involving two Anchorage service stations which should not be the basis for sweeping changes in what it sees as policies that are working well.

California's law on this issue is the national standard among the few that exist. Where that statute allows a business owner to file a claim for lost business upon notification of plans for a public works project, SB 104 would require the state to prepare an appraisal before any negotiations begin. While California's law requires a business owner to take reasonable steps to preserve his or her business's "goodwill," SB 104 puts no burden on the owner to attempt to minimize losses, critics say. Also, a California business must prove loss of goodwill while the Alaska business would have no burden, they argue.

... Business ...

Donley: More public review of regulations

The Hickel administration will strongly oppose legislation that would require a second round of public advertisement — and second opportunity for public comment—if proposed regulations are substantially changed during administrative processing after existing public notice and comment periods are completed. Introduced through the House Judiciary Committee, HB 328 was prepared by chairman Dave Donley (D-Anch.) in response to a “parade of complaints.” Donley charged that, instead of crossing “t’s” and dotting “i’s,” agency bureaucrats intentionally make “big, substantive changes” to new or amended regulations so that the final product is significantly different from what is discussed at public hearings.

Hickel legislative liaison Paul Fuhs said the concept was good, but that legislators already complain that regulations do not move through the administrative process quickly enough. HB 328 faces “real problems” with the administration, he said. A Department of Law spokeswoman said the bill would slow the operation of government and be a disservice to the public. A Department of Fish and Game spokesman emphasized that the short period between meetings of the Fish or Game Boards and the start of hunting or fishing seasons they regulate could delay important resource management changes for a full year. In response, Donley agreed that the citizen involvement in those hearing processes was reason to exempt that department’s regulations from the bill’s requirements. Committee members briefly discussed whether to exempt the Department of Education on the same grounds, but rejected the idea. The bill is being held in committee until Donley prepares the fish and game amendment.

Heard in the Halls ...

Word is that the hefty workman's compensation and insurance regulation bills now in the hopper won't move very far this session. Both are highly technical, and interest groups will demand careful review, particularly in workman's comp.

Legislators cool to dedicated fuel tax

The administration’s dedicated fund for transportation got a cool reception before House Transportation, in that committee’s initial hearing on the plan. Approval for a November ballot initiative on a constitutional amendment establishing a dedicated fund for state fuel taxes is the top priority of the Dept. of Transportation and Public Facilities (DOTPF) this year. Clyde Stoltzfus, assistant to Commissioner Frank Turpin, said the department will not seek an increase in motor fuel taxes during the current session, although Alaska’s eight cent per gallon gasoline tax is the lowest in the country and has not been increased since 1961. The average state gas tax is 18 cents.

DOT plans transferring roads to locals

DOTPF also presented its long-range transportation plan, in which a major element, besides the dedicated fund, is transfer of some road maintenance responsibility to local governments and sharing of decision-making and revenues. Stoltzfus promoted the dedicated fund as a way to provide “stability over time” for maintenance. If approved, gasoline taxes would be used only for roadways, aviation fuel taxes for airports and marine fuel taxes for ports and harbors. Speaking later before Juneau businessmen, Turpin pointed out that \$3 million in marine fuel taxes are now used for other government purposes. Under the dedicated fund, all the money would go to ports and harbor work.

Hudson: Try summer-only tax hike

Committee members were more interested in hiking the fuels tax than in the dedicated fund proposal, and were sceptical of the idea that state money would match local responsibility for transportation facilities. Rep. Gene Kubina warns constituents against accepting state program responsibility based on the state's track record of never providing adequate funding. Rep. Bill Hudson said many legislators would oppose a dedicated fund because it reduces lawmakers' year-to-year line-item control over the budget. Hudson suggested DOTPF consider seeking a summertime/seasonal fuels tax increase that would make visitors pay for increased transportation system uses, then give residents a price break in the winter.

... Resources ...

Fisheries bill up in House committee

Three bills to help Alaska's ailing salmon industry made their first committee appearances Jan. 30, with sponsors' explanations before the House Labor & Commerce Committee. All three measures aim to improve salmon sales through marketing and new product development by new or existing organizations. No action was taken by the committee, which scheduled a public testimony session on the trio for Feb. 5.

Kubina: New salmon marketing group

HB 358, sponsored by Rep. Gene Kubina of Valdez, creates the Alaska Salmon Marketing Association (ASMA), a fisherman-controlled board that disperses grants to regional committees for marketing and product development. Committees in Southeast, Prince William Sound, Cook Inlet, Kodiak Island, Bristol Bay and the Arctic-Yukon-Kuskokwim regions would be formed if limited-entry permit holders there voted to assess themselves a tax of one percent of the sale value of their salmon catch. The tax would fund grants and operation of ASMA.

Kubina was a member of the governor's Salmon Marketing Task Force that released its own recommendations on Jan. 24. HB 358 did not win endorsement by that task force, and found little support from the labor and commerce committee. Rep. Robin Taylor of Wrangell suggested the marketing association was "in essence a conspiracy" to control prices and might violate federal anti-trust and monopoly laws.

Hudson's HB-414 tinkers with ASMI

HB 414, sponsored by Juneau's Rep. Bill Hudson, both changes and provides more stable funding for the Alaska Seafood Marketing Institute (ASMI). The change would increase by two the number of fishermen on ASMI's already large board of directors, increasing it to 20. Fishermen's organizations suggest the change in board makeup would have little practical effect, since processors would still control the board with 12 seats. Hudson, who headed ASMI from 1983-86, countered that his idea would promote greater awareness of the business/marketing side of fishing among fishermen and would help warm the traditionally cool relationship between processors and fishermen. Like Kubina's measure, Hudson's would impose a one percent tax on salmon sales, in this case for annual appropriation by the legislature to fund ASMI.

New salmon tax for marketing (Cont.)

Even that amount could vary greatly. The value of 1990's salmon harvest was over \$700,000 million while 1991's gross sales produced slightly more than \$300 million. ASMI currently operates on a combination of a processor's self-imposed tax and increasingly uncertain state funding and federal grants. Its activities would remain the same under HB 414. Hudson's bill would sunset in three years when, he suggested optimistically, the state of the salmon industry would be more secure.

Davidson: Endowment for fish research

Kodiak's Rep. Cliff Davidson's bills create, in HB 400, a Commercial Fisheries Development Endowment for the Alaska Fisheries Development Foundation (AFDF). Funding would be with a \$5 million appropriation in a separate bill, HB 401. The legislation provides a ten-year no interest loan for AFDF. Like ASMI, AFDF faces uncertain income levels from state and federal government sources. Despite a much lower public profile, the fisheries development foundation, created in 1977 with a \$100,000 state grant, is highly regarded in the seafood industry for its research work. Its efforts in product development helped create the multi-million dollar pollock industry. AFDF director Mel Munson testified in support of Davidson's proposals, and said only the approximate \$400,000 in annual interest from the \$5 million grant would be used for operations, so that the principle would be preserved for repayment in the year 2003.

ASMI, fishermen: No position yet on bills

ASMI director Kim Elton declined to take a position on any of the bills, but suggested the quickest way to help the industry and most efficient use of state funds would be through existing entities rather than new creations. Surprisingly, United Fishermen of Alaska director Greg Seider declined to state a position on any of the bills. He did emphasize the need for help for an industry he described as "adrift on the sea."

Oilfield regulation: As predicted in last week's Digest, legislation expanding the Alaska Oil and Gas Conservation Commission's power to regulate economic waste in field development was introduced. It is HB-433, by Rep. Kay Brown with co-sponsors Ellis, Koponen, Boyer, Ulmer and Navarre.

Schools: Going back to bonding, debt ?

(Continued from top page 1) Inherent in the package of legislation accumulating in the HESS subcommittee is whether the state should go back to bonding for any of its public needs, and how much capacity to bond the state has in a declining revenue situation and under criteria acceptable to bond buyers. In addition, lawmakers must assess the basic question of whether a single method of school construction funding is possible to apply to the state's three very different school systems —borough systems, single site city districts, and the state's rural REAA systems. Next, lawmakers must consider whether the DOE school construction priority system is salvageable amidst urban and rural difference, and further whether the system can be made to fit a bonding system that must run the gauntlet of statewide voter approval. The current system adopted several years ago in HB-37 represents an effort to fund all statewide school construction by a single method --fair to all. But urban districts complain that the system is stacked against their interests, which is a problem of building to 'house' new students in faster growing districts. The allegation is that the DOE system by giving priority recognition to life/health/safety measures, works to the advantage of rural areas. While priority for life/health/safety can be well argued, the net result is a politically and regionally unbalanced priority list that offers little motivation for lawmakers to dig a little deeper and fund further down the list.

Required 'early posting' of salmon prices

A bill that would require salmon buyers to publish proposed prices 120 days before a season opened, and actual prices when the season is underway, got a cool reception during an introductory House Resources hearing last week. Rep. George Jacko of Pedro Bay, himself a Bristol Bay fisherman, introduced HB-369 to "encourage serious price discussions" between processors and fishermen prior to the start of a season. Jacko based the preseason announcement date on a state law that allows the Department of Labor to begin mediating price disputes 120 days before a season begins if one-third of the involved fishermen petition for the assistance. He also received a memo from legislative legal counsel indicating the legislature can force price publication under their authority to regulate state trade and commerce. Pacific Seafood Processors Association lobbyist Rick Lauber said HB 369 may surpass practical limits on government involvement in the marketplace. If the bill were passed, processors would simply post low prices and make adjustments later, he said. The bill does not prohibit changes in the posting, but carries a \$1,000 fine for failure to publish a price.

Following SB-7 is CSHB-25 --the school appropriation bill

(Continued from bottom page 1) SB-7 represents an "authorization," meaning an appropriation bills must follow. Such an appropriation could come with the budget, but the House strategy (and probably the Senate) will be to approve the school appropriation in a separate bill "passed early," allowing lawmakers time to react to a gubernatorial veto. The appropriation bill was scheduled in House Finance last week, but was delayed and is due to come up again this week. The House Finance version of CSHB-25 will appropriate at the \$63,000 level. House HESS will also have up HB-316 in their committee, with that committee approving an identical figure to CSHB-25, which will allow CSHB-25 to head for Rules Committee and floor action with no referral back to HESS. However, CSHB-25 will have to work its way through the Senate.

Alaska Legislative Digest

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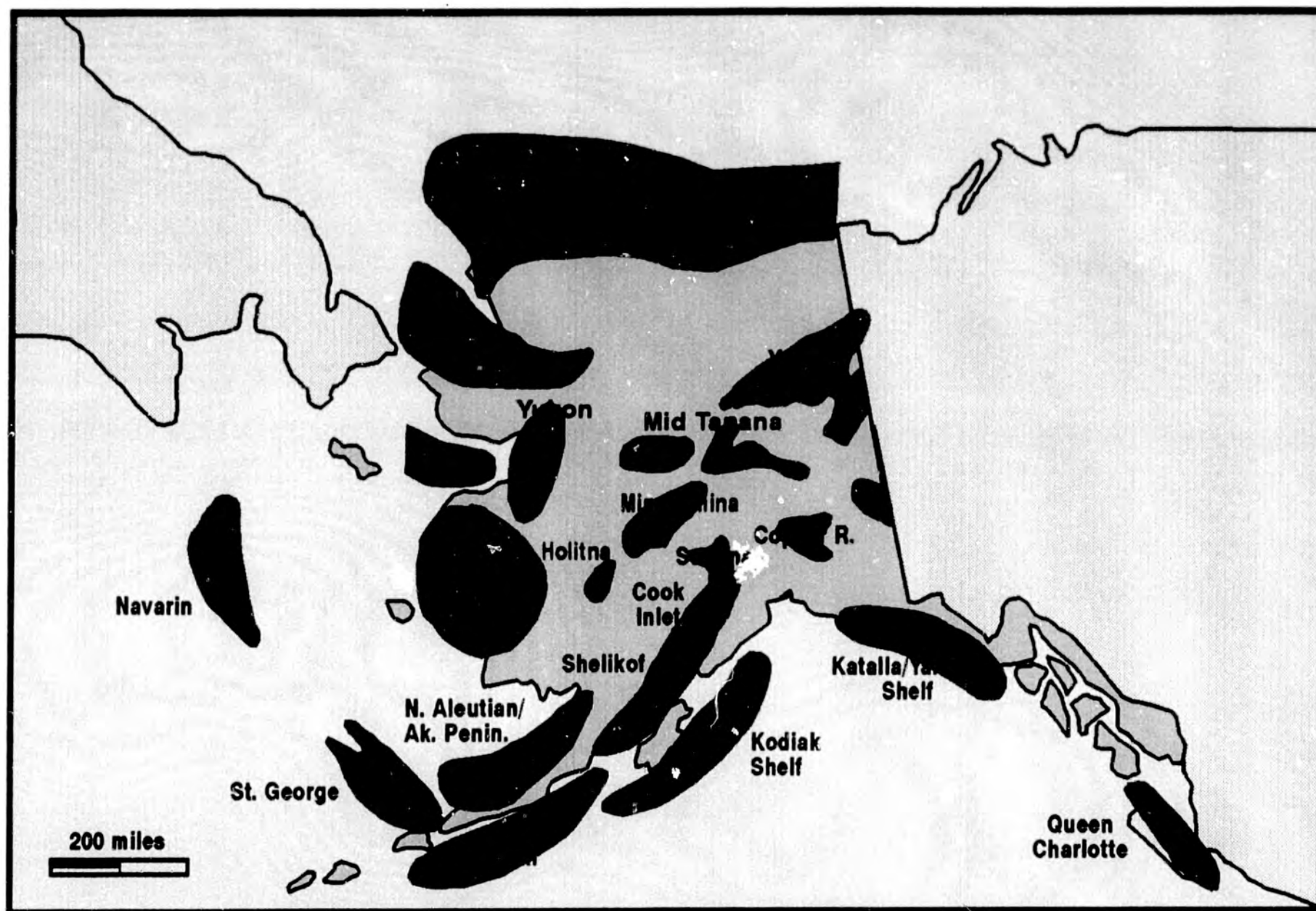
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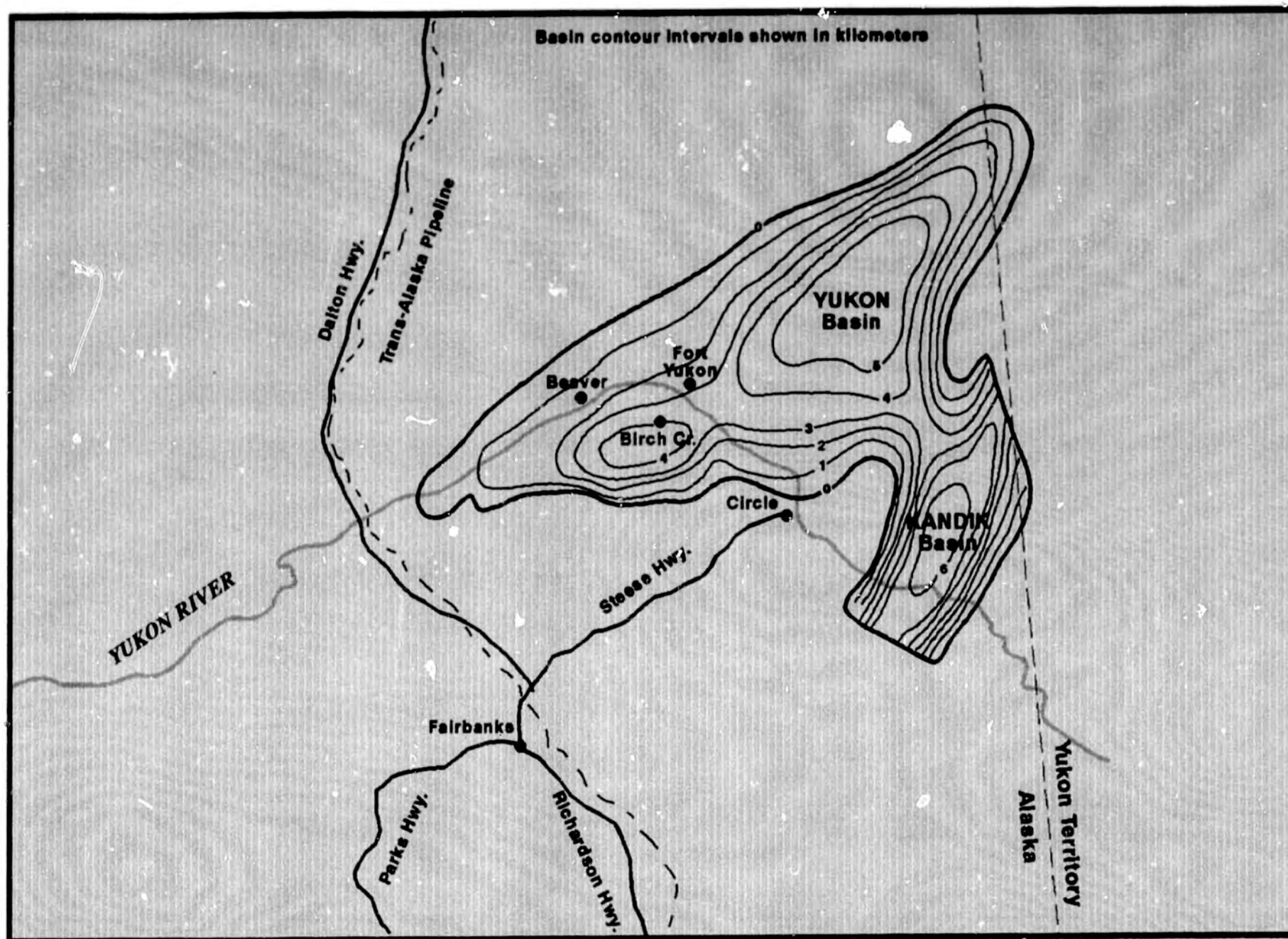
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FROM PRIVATE AND FEDERAL LANDS**



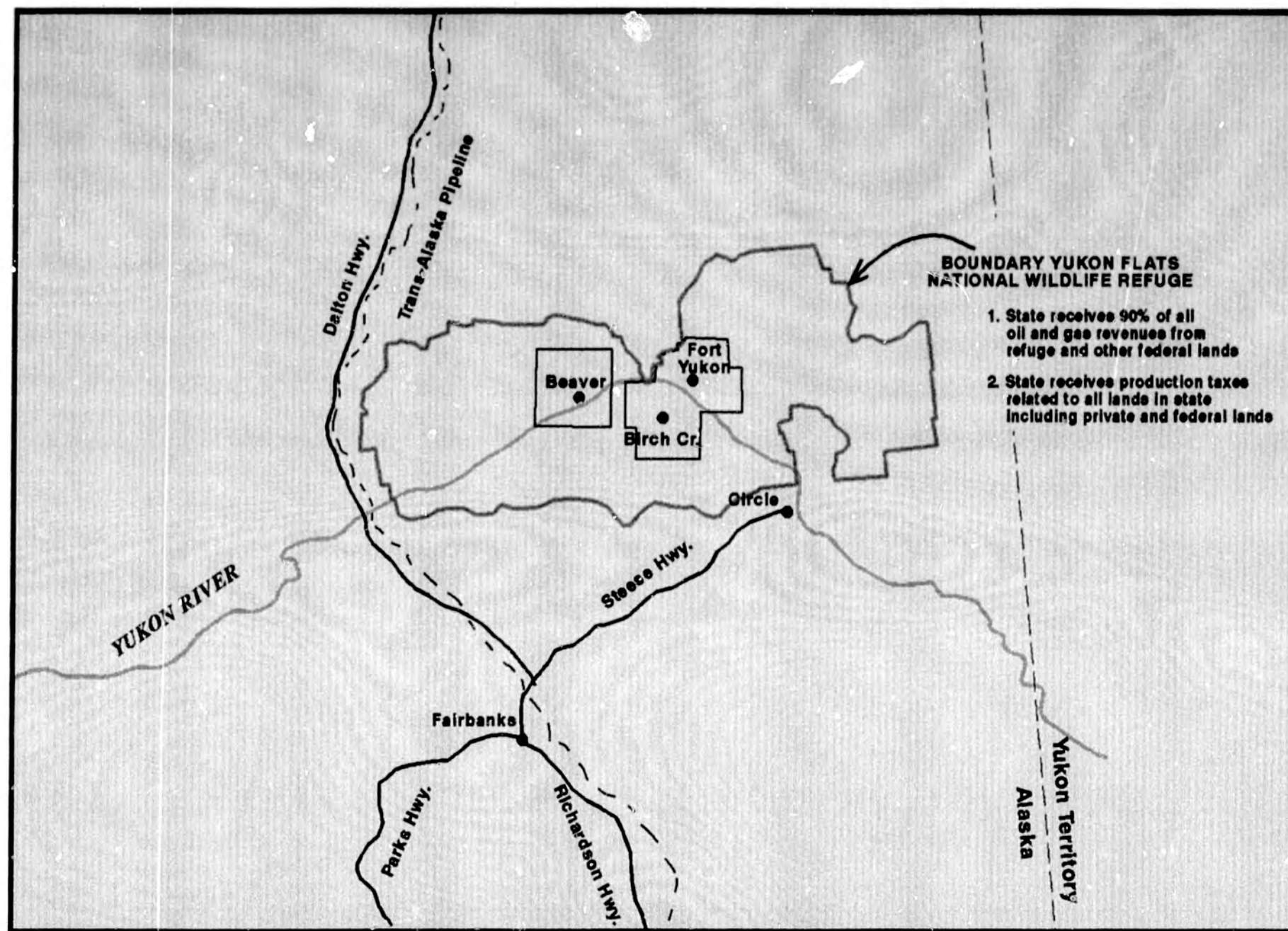
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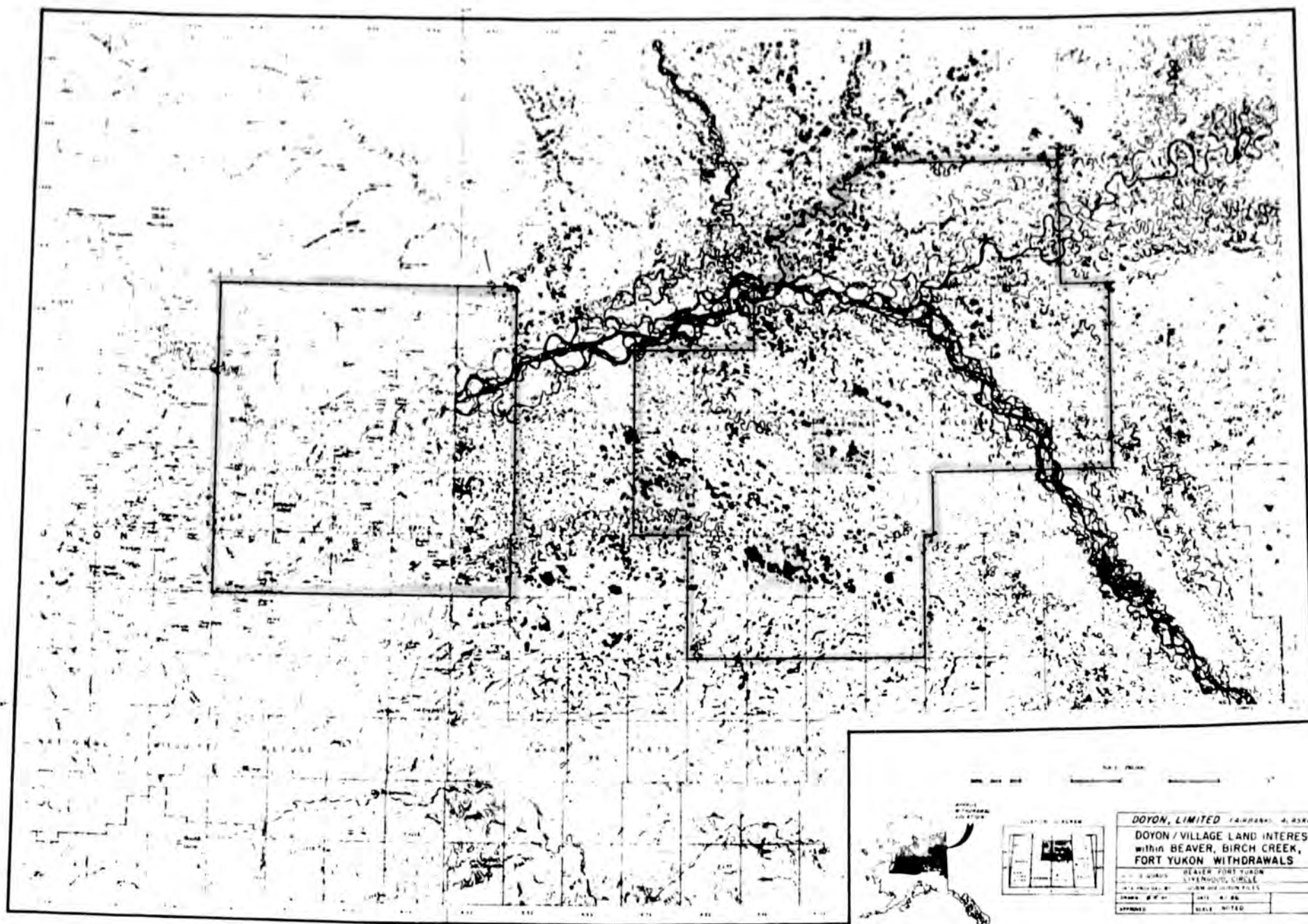
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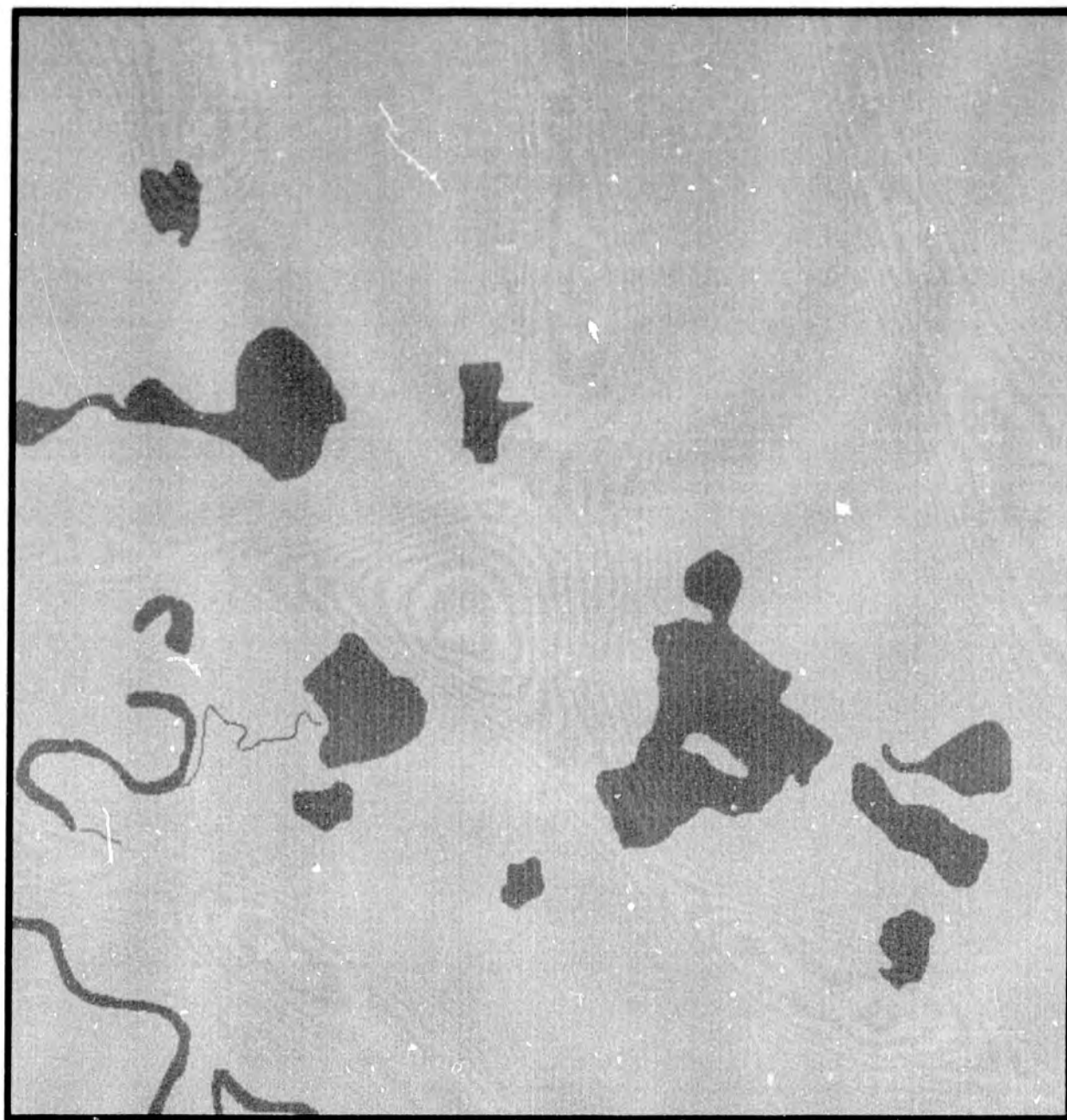


YUKON / KANDIK BASINS



CERTAIN PRIVATE LANDS WITHIN YUKON FLATS N.W.R. AND YUKON KANDIK BASINS





**FORT YUKON
BIRCH CREEK BLOCK**



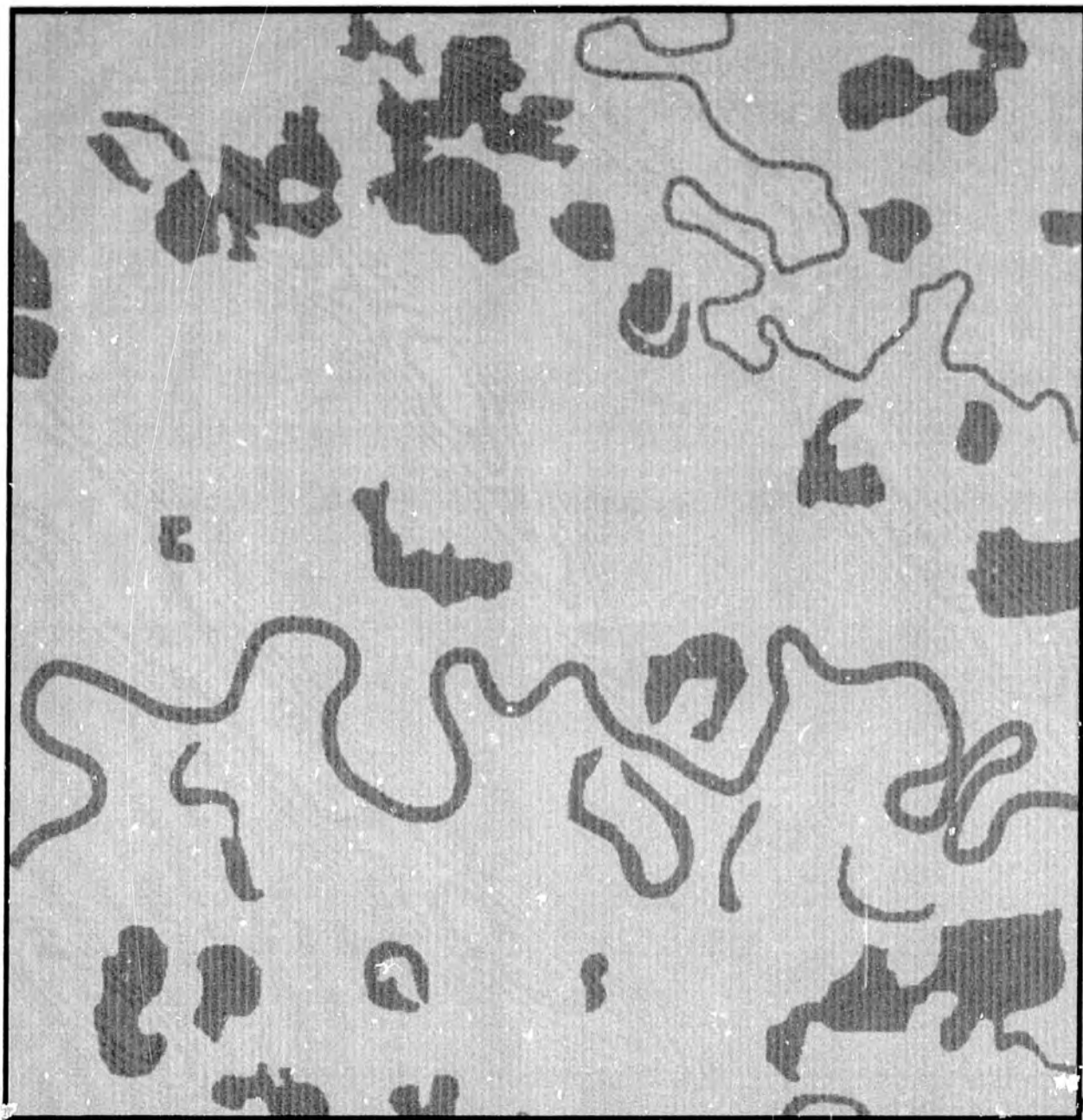
Total Area	22,853
Uplands	21,047
Aquatic Lands	1,806

RATIO:

Upland	92%
Aquatic Land	8%



Township T. 18 N. R. 10 E.



**FORT YUKON
BIRCH CREEK BLOCK**



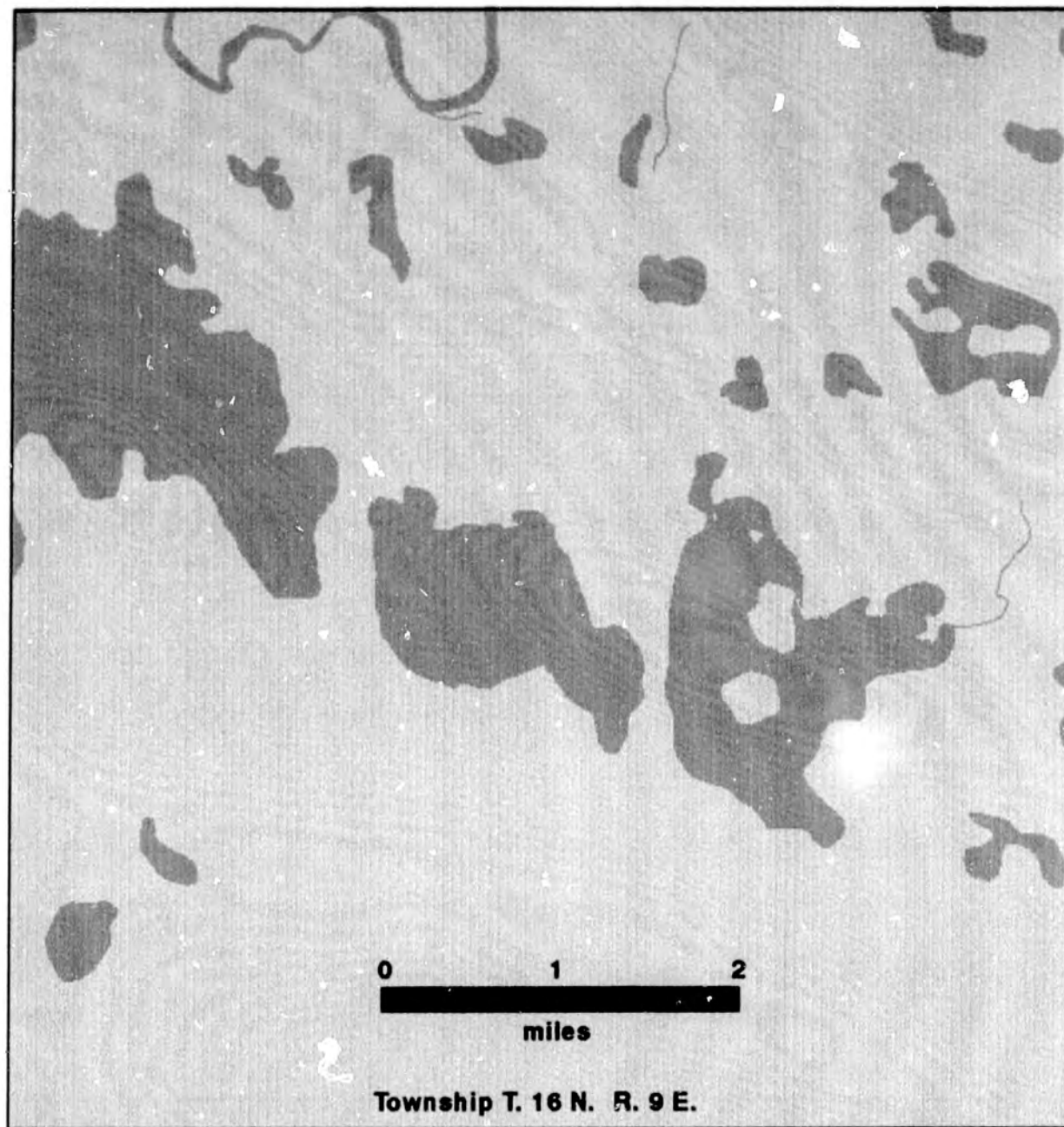
Total Area	22,950
Uplands	19,138
Aquatic Lands	3,812

RATIO:

Upland	83%
Aquatic Land	17%



Township T. 17 N. R. 7 E.



**FORT YUKON
BIRCH CREEK BLOCK**



Total Area	22,919
Uplands	19,118
Aquatic Lands	3,801

RATIO:	
Upland	83%
Aquatic Land	17%

ANALYSIS OF AQUATIC LANDS IN SAMPLE TOWNSHIPS

(AREAS ARE IN ACRES)

TOWNSHIP	RANGE	TOTAL AREA	UPLAND AREA	AQUATIC LAND AREA	PERCENTAGE OF UPLANDS	PERCENTAGE OF AQUATIC LANDS
T16	R9	22,919	19,118	3,801	83%	17%
T17	R7	22,950	19,138	3,812	83%	17%
T18	R10	22,853	21,047	1,806	92%	8%

CRITERIA:

- WATER BODIES GREATER THAN 20 ACRES
- FLOWING RIVERS AND STREAMS

HYPOTHETICAL REVENUE CALCULATIONS

Location:

Yukon Flats Basin, approximately 70-90 miles from TAPS.

Ownership:

Productive acreage is a combination of (1) federal and Native corporation uplands and submerged lands beneath non-navigable waterbodies, and (2) State of Alaska submerged lands beneath navigable waters. The state would own 100% of the oil and attendant revenues associated with the submerged lands beneath all navigable waters within both the federal and private lands. The State also would receive 90% of all bonuses, rentals and royalties from the federal uplands; for this reason, the remaining 10% federal interest will be ignored in the calculations below.

Because of the large number of waterbodies on federal and private lands in the Yukon Flats Basin and because of the 90% federal sharing requirement, assume that each of the State of Alaska and the Native corporations would receive 50% of all royalty revenues. Current upland ownership status, when overlaid by DNR's own oil and gas basin map, would seem to validate the reasonableness of this order of magnitude example. Other examples, some even more favorable to the state, could be applied to the Yukon Flats, Central Arctic and other Interior basins.

Production:

100,000 barrels per day, 36.5 million barrels per year. As a frame of reference, Endicott produces about 100,000 barrels per day.

Royalty Rate:

12.5%; no calculation of bonuses or rentals, or state income taxes or multiplier values, though possibly substantial.

Wellhead or Gross Value:

\$12 per barrel.

Revenues:

Millions of \$ per year

	<u>State</u>	<u>Private</u>	<u>Producers</u>
Royalty	27.4	27.4	(54.8)
Production Tax	41	(2.7)	(38.3)
Cons. Surcharge	1.7	(.1)	(1.6)
EP&PTP Taxes	10	-0-	(10)
Cons. Tax	.2	(.01)	(.2)
Yearly Totals	80.3	24.6	(104.9)

Notes:

1. Native corporations and state royalty shares of yearly production: 2,281,250 barrels each (6.25% x 36,500,000 barrels)
2. State royalty share free of production, conservation surcharge and conservation taxes; AS 43.55.900(13)
3. Yearly shares of production (private and producers) not exempt from production, conservation surcharge and conservation taxes: 34,218,750 barrels (2,281,250 private barrels plus 31,937,500 producers barrels)
4. Production tax at 10% of wellhead value, representing application of an economic limit factor similar to the one used at Endicott; AS 43.55.011, AS 43.55.013
5. Conservation surcharge at \$0.05 per barrel; AS 43.55.200
6. EP&PTP taxes at 20 mills on facilities of \$500 million; AS 43.56.018
7. Conservation tax at 5 mills per barrel; AS 43.57.010

AneboVAGE

TESTIFIER

NAME/REPRESENTING	ADDRESS	PHONE	BILL NO.
1. JAMES HANSEN/DIV OF OIL & GAS	PO BOX 107034 99510	762-2588	SB302

2.

3.

4.

5.

OBSERVER

NAME/REPRESENTING	ADDRESS	PHONE	BILL NO.
1.			

SCOMM

78:37

FISCAL NOTE

STATE OF ALASKA

1992 LEGISLATIVE SESSION

BILL NO. SB 369Revision Date: 18-Feb-92Department Affected: Natural ResourcesTitle: Short Title: ASRC SettlementBRU: Natural Resources

Components: _____

Sponsor: Senate RulesRequestor: Senate Oil and GasCOMPONENT SERIAL NO. 439

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
Funding Source:	N/A					

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME	0.0					
PART-TIME	0.0					
TEMPORARY	0.0					

Estimate of Current year impact:

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Bob LoefflerPhone: 762-2578Division: Oil and GasDate: 18-Feb-92Approved by Commissioner: (B) Harold C. HeinzeDate: 18-Feb-92Agency: Department of Natural ResourcesDistribution (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.

STATE OF ALASKA

1992 LEGISLATIVE SESSION

Revision Date: _____ Department Affected: Natural Resources & Law
 Title: Short Title: ASRC Settlement BRU: Division of Oil & Gas
 Components: _____
 Sponsor: Rules Committee
 Requestor: Governor COMPONENT SERIAL NO. 439

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94		FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
Funding Source:	N/A					

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME	0.0					
PART-TIME	0.0					
TEMPORARY	0.0					

Estimate of Current year impact:

ANALYSIS: (Attach a separate page if necessary)

See Attachment

Prepared by: Bob Loeffler Phone: 762-2578
 Division: Oil & Gas Date: 15-Jan-92

Approved by Commissioner: Harold C. Heinz Date: 1/13/92
 Agency: Department of Natural Resources

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

WALTER J. HICKEL

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 23, 1992

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Speaker Grussendorf:

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).

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CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

STATE OF ALASKA

1992 LEGISLATIVE SESSION

Revision Date: _____

Department Affected: _____

Natural Resources & LawTitle: Short Title: ASRC SettlementBRU: Division of Oil & Gas

Components: _____

Sponsor: Rules CommitteeRequestor: Governor

COMPONENT SERIAL NO. _____

439

EXPENDITURES/REVENUES:

(Thousands of Dollars)

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
OPERATING						
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS.CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
Funding Source:	N/A					

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME	0.0					
PART-TIME	0.0					
TEMPORARY	0.0					

Estimate of Current year impact:

ANALYSIS: (Attach a separate page if necessary)

See Attachment

Prepared by: Bob LoefflerPhone: 762-2578Division: Oil & GasDate: 15-Jan-92Approved by Commissioner: Harold C. Heinz

Date: _____

Agency: Department of Natural ResourcesDistribution (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.

WALTER J. RICKEL

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 23, 1992

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1132

Dear Speaker Grussendorf:

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.

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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.

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January 23, 1992
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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 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.

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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.

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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.

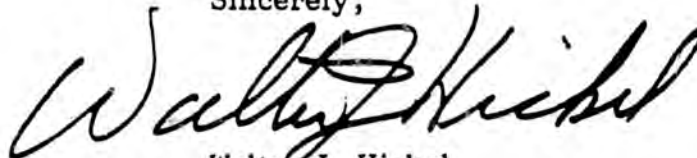
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The 1991 Settlement Agreement is a compromise, and settles highly disputed issues. Because of that, it is not without risks to both the state and ASRC. However, I believe that these risks are outweighed by the benefits to the state of finally resolving 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 black ink, appearing to read "Walter J. Hickel". The signature is fluid and cursive, with the first name "Walter" being particularly prominent.

Walter J. Hickel
Governor

SUMMARY SHEET -- HB416/SB369

- * Ratifies the settlement of protracted litigation between the State and the Arctic Slope Regional Corporation ("ASRC") over title to lands in the Colville Delta and Point Lay areas.

- * Improves marketability of title by merging State and Native Corporation subsurface interests, settling all submerged lands conflicts, and providing for joint leasing of lands under the administration of the Commissioner of Natural Resources.

- * Clears obstacles to the leasing of State lands in the Colville Delta 12 miles west of the Kuparuk oil field at a time of industry interest in the area.

- * Forms an historic partnership between the State and ASRC and provides a model for resolution of other disputes between the State and Native Corporations.

- * Will not affect State control over submerged lands beneath navigable waters.

- * Insures that leasing will comply with all statutory and regulatory safeguards, including environmental reviews, applicable to state lease sales.

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 you with the

¹ This document is a draft prepared by counsel for Arctic Slope Regional Corporation. It is being supplied to House and Senate staff to assist in analysis of HB416/SB369. Additional information and details are still being gathered and will be supplied to staff at a later date. Please refer any questions regarding this draft to counsel for ASRC, David C. Crosby (586-6262).

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.

In ____ 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 ____ 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 in _____. Some of the lands in the Colville Delta were leased by the State in _____. An exploration program conducted in _____ resulted in several dry holes.

In ____ 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 infamous 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 sites 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 __ 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 ____ 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. Of the three villages, 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 _____ 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 a 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 197_, the Alaska Supreme Court's ruled in _____ that an attempt to exchange the State's mineral estate with the Cook Inlet Regional Corporation violated Section 6 of the Alaska Statehood Act and was void. The ruling cast a cloud on the 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 renegeing on deal. On the other hand, the State was forced to concede 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 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 ____ 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" 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 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 agreement ended.

The State contended that the extent of submerged lands under the named channels was substantially greater than ASRC was prepared to concede. In addition, the State claimed exclusive ownership of a number of other smaller channels and sloughs in the Colville Delta, as well as the Kukpowruk River running through the Pt. Lay lands, and a number of lakes in both places. ASRC contended that submerged lands, other than the named channels of the Colville mentioned in Section 1431(n) of ANILCA, should be treated as subject to the settlement and divided 50/50. The State insisted that since ANCSA did not entitled ASRC to receive conveyance to any submerged lands under navigable waters, these submerged lands were not subject to the settlement. To further complicate matters, the law provides that title to submerged lands changes as the banks and shores of water bodies shift due to accretion, reliction and erosion. 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 was almost a certainty.

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

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

lands within the section. (The State retains full sovereign powers over submerged lands, notwithstanding ASRC's undivided interest.) In order to eliminate any possible future disputes over the boundary of the settlement area on the coastline and the NPRA boundary (where the original 1974 settlement area followed the sinuosity of the constantly shifting ocean boundary and the west bank of the Nechelik Channel of the Colville River), the parties agreed to extend section lines into the ocean and across the NPRA boundary so that the area subject to the 1991 Agreement will include only full sections whose location can be protracted at any time without reference to changes brought about by accretion, reliction and erosion. In this manner, approximately ____ of ocean submerged lands owned by the State outside the 1974 Settlement Agreement area and approximately ____ 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 _____ the United States District Court for the District of Alaska approved the agreement in principle, including the section-by-section percentages set out in Exhibit _____. (These percentages have 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. No

effort has been made to treat each subsection individually. Emphasis is placed on drawing attention to significant provisions 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 supercede 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).

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 sections from the settlement area in the event Kuukpik Corporation does not receive title to the surface estate.

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

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 itself 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-conveyance 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 schedule set forth in Exhibit E. 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.

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 ____ 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 Exhibit E. This section prevents prejudice that might result to either party if unproductive section 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 with the consent of the other party.

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 require the Commissioner to exercise his discretion under such and lease and does not expose the State to any liability for the Commissioner's exercise (or refusal to exercise) of discretion.

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 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. 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 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.

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 with 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.

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.

9. PREEXISTING LEASES OF THE NUIQSUT 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 from the United States for all the conveyances of 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 allign all the preexisting legal relationships so that they conform to the basic pattern contemplated by the 1991 Agreement. The principles, however, are straightforward.

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.

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 ____ BILL NO. ____.

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 normal 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 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 [THIS LANGUAGE SHOULD BE ADDED TO THE BILL] the Commissioner to carry out the exchange and makes it clear that in doing so he carrying 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 to the Commissioner to record the 1991 Agreement in the appropriate recording office, incorporate it into the DNR lands record system, and deposit a signed original with the State Archivist, and incorporate.

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 thirty days of the effective date of the legislation. 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).

ALASKA STATE LEGISLATURE

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



WHILE IN JUNEAU
Box V
Juneau, Alaska 99811
465-4525
465-4833

HOUSE OF REPRESENTATIVES

District 22

North Slope
Borough

Anaktuvuk Pass
Atkasuk
Barrow
Kaktovik
Nuiqsut
Point Hope
Point Lay
Wainwright

Northwest Arctic
Borough

Ambler
Buckland
Deering
Kiana
Kivalina
Kobuk
Kotzebue
Noatak
Noorvik
Selawik
Shungnak

MEMORANDUM

DATE: January 29, 1991

TO: Representative Cliff Davidson, Chairman
House Resources Committee

FROM: Representative Eileen P. MacLean *EPM*

SUBJ: Committee Hearing on HB 416

This is to request a hearing on HB 416, 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.

HB 416 settles an 18 year land dispute between the State of Alaska and the Arctic Slope Regional Corp. The dispute arose when the federal government allowed Nuiqsut and Point Lay village corporations to choose lands for ownership that had been transferred to the state through the Alaska Native Claims Settlement Act. 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 agreement provides that the state and ASRC will jointly own oil and gas rights, with the state maintaining a 57% share. This will be the first land agreement where the state and a Native Corporation jointly own land, and it is the first oil and gas sale involving the state and a private owner.

House Resources Committee
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If the legislature does not approve of the settlement this session the terms of the settlement could be called into question. According to DNR, litigation would continue and the state would delay oil and gas leasing of the potentially valuable land.

I respectfully request a hearing on HB 416 in the House Resources Committee at your earliest convenience. If you have any questions, please contact Rena Bukovich of my staff at 465-4525.

I would appreciate your scheduling of the bill, as per our conversation the other day. Thanks Quayana

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

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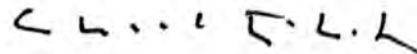
January 14, 1992

The Honorable Sam Cotten
Alaska State Legislature
State Capitol
Juneau, AK 99811-1182

Dear Senator Cotten:

Annexed is a copy of a memorandum prepared last January by Michael J. Frank, Assistant Attorney General, to Commissioner Heinze discussing the settlement agreement between ASRC and the State of Alaska relating the Nuiqsut Point Lay lands litigation and settlement proposal background.

Very truly yours,



Charles E. Cole
Attorney General

CEC:djd

Enclosure

MEMORANDUM

State of Alaska
Department of Law

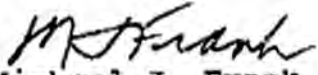
TO: The Honorable Harold Heinze
Commissioner
Department of Natural Resources

DATE: January 11, 1991

FILE NO.:

TEL. NO.: 276-3550

SUBJECT: ASRC-State of Alaska
Nuiqsut Point Lay lands
litigation and settlement
proposal background

FROM: 
Michael J. Frank
Assistant Attorney General

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

This memorandum sets out the background of the Arctic Slope Regional Corporation ("ASRC") and DNR settlement negotiations intended to resolve litigation arising out of a 1974 Agreement for the exchange of lands in the Nuiqsut and Point Lay areas.

I. HISTORY OF ASRC-STATE 1958 THROUGH 1984.

A. General Background.

In Section 4 of the Alaska Statehood Act, Congress left unresolved the question of Alaska Native aboriginal title. At the same time, it granted the new State the right to select over the course of 25 years in excess of 100 million acres of land. Statehood Act, § 6(a) and (b). While the language of section 6 seemed to speak of a present "grant" of lands to the State, the State could not receive the United State's official patent to selected lands until they were surveyed. *Id.*, § 6(g). Because Congress realized that surveys would take a long time, it authorized the State to deal with selected lands prior to survey and patent, but only as follows:

Following the selection of lands by the State and tentative approval of such selection by the Secretary of the Interior or his designee, but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands. (Emphasis supplied.)

Id., § 6(g).

This section became particularly important in the context of settling Alaska Native land claims, because the exact nature of the State's "title" to "tentatively approved" lands was a contested issue. The section also is the source of State power to issue "conditional leases" to oil and gas companies, which leases have significance in the contest of the settlement with ASRC.

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Confidential Attorney-
Client Communication

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In section 6(i) of the Statehood Act Congress expressly included mineral deposits in all land grants made to the State, but subject to a requirement that "all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all the minerals. . . ." Id., § 6(i). While section 6(i) allowed the State to lease mineral deposits as the State legislature might direct, any violation of the section was subject to the threat of a forfeiture action by the United States Attorney General. A detailed history of section 6(i) can be found in State v. Lewis, 559 P.2d 630 (Alaska 1976), cert. denied 432 U.S. 901 (1977) (involving the land exchange between the State, the United States, and Cook Inlet Region, Inc. wherein the section 6(i) mineral reservation requirement was waived), and in Trustees for Alaska v. State, 736 P.2d 324 (Alaska 1987), cert. denied, _____ U.S. _____ (1988) (requiring the State to seek compensation for hard rock mineral disposals in order to be in compliance with section 6(i)).

After becoming a State in 1958, Alaska slowly began making land selections. In the mid-1960s it received the Secretary of the Interior's "tentative approval" to thousands of acres in the Point Lay area in the western Arctic on the Chukchi Sea, and thousands of acres on the Beaufort Sea in the northeastern Arctic. The Beaufort Sea lands included not only the famous Prudhoe Bay uplands, but also lands located near the present municipality of Nuiqsut. These Nuiqsut lands were just east of and adjacent to the National Petroleum Reserve - Alaska's ("NPRA") ¹/ eastern-most boundary.

In the mid-1960s the State also began receiving tentative approval to lands it had selected under the Statehood Act. Alaska Natives protested the tentative approvals, claiming the lands were unavailable for selection by, or conveyance to, the State because they were not vacant lands, being occupied by them from time immemorial. Litigation followed, the result of which posed great uncertainty for State land selections. See State of Alaska v. Udall, 420 F.2d 938 (9th Cir. 1969), cert. denied 397 U.S. 1076 (1970). After the Prudhoe Bay oil field was discovered, it became clear that Congress would have to act to resolve Alaska Native land claims.

B. ANCSA Background.

Congress began active consideration of various land claims bills in the late 1960s. Those advocating for a large land settlement for Alaska Natives argued that unless the Natives were allowed to select State tentatively approved lands, no attractive lands would be available for Native selection, the State having

¹ Formerly Naval Petroleum Reserve No. 4.

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already chosen most of the lands around villages and the otherwise valuable resource lands. The State, while willing to make some tentatively approved lands available for Native selection, took the position that tentatively approved status was tantamount to title, and that the only acts to be accomplished after tentative approval were the ministerial ones of survey and patent by the United States Department of the Interior.

Congress eventually passed the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), 43 U.S.C. 1601 et seq. (as amended). ANCSA called for the creation of 12 regional corporations based on 12 geographic regions, one of which Arctic Slope Native Association represented. ANCSA, § 7(a). Arctic Slope Native Association was, for all practical purposes, the predecessor to ASRC.

ANCSA, section 11(b)(1) also identified a large number of "Native villages subject to this Act". The Secretary of the Interior was required to determine the eligibility of all these listed villages for ANCSA land and money grants within two and one half years. Id., § 11(b)(2). Eligible village corporations organized pursuant to section 8(a) became entitled to select lands, the total quantity of which was dependent on the size of the village's Native population on the 1970 census enumeration date. Id., § 12(a)(1) and 14(a). The Secretary of the Interior was directed by Congress to withdraw large quantities of lands around each eligible village so that selections could be made of lands within the withdrawn area. Id., § 11. Village corporations were to receive the surface estate to their selected lands; the respective regional corporations were to receive the subsurface estate of the village corporation lands. Id., § 14(b) and (f).

Congress resolved the dispute about the nature of the State's title to tentatively approved lands by making not more than 69,120 acres (three townships) of State selected or tentatively approved lands available for a village corporation's selection. Id., § 12(a)(1). Thus, the quality (i.e., value) of a regional corporation's subsurface acreage entitlement was not only dependent on whether a particular village was eligible for ANCSA land benefits, but also dependent on where the village was located. Id., §§ 12 and 14(b). It is worth noting that section 14(f) of ANCSA gives a village corporation the right to consent to any regional corporation exploration or development of minerals from the subsurface estate in the lands within the boundaries of the village. The exact meaning of the consent requirement is sometimes in dispute between village and regional corporations. ASRC, like most regional corporations, has taken the position that the consent requirement is restricted to the core location of the village, and that in any event the consent may not be unreasonably withheld. However, ASRC has nonetheless entered into various advance consent agreements with its village corporations. Also, it should be noted

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that regional corporations were also entitled to select other lands over and above their entitlement to the subsurface estate underlying village corporation lands.

C. Creation of ASRC Village Corporations for Point Lay and Nuiqsut.

Both "Nooiksut" and "Point Lay" were listed in ANCSA. However, these two villages and certain others claiming ANCSA eligibility but not listed as villages in ANCSA received a great deal of press attention in the early 1970s because of many allegations of fraud and accusations that they were "phantom" villages.

Point Lay was an old village, abandoned by the villagers when BIA forced their children to school in Barrow. It is now the location for Cully Corporation, the ANCSA village corporation.

As to Nooiksut, in April 1973 about 200 people moved from Barrow in a highly publicized event to "re-establish" Nooiksut in the Colville Delta. The "re-established" village is now spelled Nuiqsut. It became the headquarters for the ANCSA village corporation Kuugpik Corporation, now spelled Kuukpik.² What the press accounts, and apparently some State and federal employees, misunderstood was that under Department of Interior regulations the eligibility of Nooiksut was evaluated at its purported location in 1970 in Township twelve North, R5E, U.M., not at Nuiqsut's current location in Township ten North. In other words, the "re-establishment" of Nuiqsut was not all that relevant to the ANCSA Nooiksut eligibility issue. And, Department of Interior rules for determining eligibility were quite liberal, too liberal in some minds. Some alleged the rules were very leniently applied, too.

In October, 1973 the Juneau Area Director of the Bureau of Indian Affairs initially determined both Nooiksut and Point Lay, and their respective village corporations, eligible for ANCSA land and money benefits. In early November, 1973 the State protested the proposed Bureau of Indian Affairs' determinations. In the same month both Cully and Kuugpik Corporations filed ANCSA land selections which covered approximately three townships (69,120 acres) of lands in their areas and for which the State had already received tentative approval under the Statehood Act. Eventually the United States Department of Navy joined the State's protest of Nooiksut's ANCSA eligibility claim. These protests made their way to the United States Department of the Interior's Alaska Native Claims Appeal Board.

² Kuukpik apparently means "big river", i.e., the Colville River. The present municipality of Nuiqsut is at the junction of the Colville River and Nechelik Channel.

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D. Settlement of Point Lay and Nooiksut Challenges.

Eventually ASRC initiated settlement negotiations concerning the protests with the State. An Agreement was executed between ASRC, Kuugpiik Corporation, and the State of Alaska in March 1974 resolving the protests.

The 1974 Agreement (copy in the binder) required the State to drop its eligibility challenges to the two village corporations (i.e., to Kuugpiik and Cully Corporation), which the State promptly did in late March 1974. The Agreement also called for ASRC to "promptly quitclaim" to the State its interest in the subsurface estate in the 69,120 acres of tentatively approved State lands located in the Colville River delta which Kuugpiik Corporation had selected, and for the State to "promptly quitclaim" to ASRC "all its right, title, and interest in the fee simple estate" to certain State tentatively approved lands in the Point Lay area. The exchange was to be one under the State's now repealed and replaced land exchange law, AS 38.95.060.³ The Point Lay lands were outside the ANCSA withdrawals for Cully Corporation and ASRC selection, so the effect of the Agreement was to make lands available to ASRC which it could not otherwise select in the Point Lay area.

The principle negotiator on the State's side was Department of Natural Resources ("DNR") Commissioner Charles F. Herbert; the principal negotiator on the ASRC side was James Wickwire, Esq., who is still an ASRC's counsel. Apparently only a few other State people were aware of the negotiations, including then Assistant Attorney General, now Juneau Superior Court Judge Rodger Pegues, and Governor Egan. Note that Egan ran for re-election in 1974, so there is always the possibility that politics played a role in the settlement.

Notwithstanding the mineral conveyance prohibition in section § 6(i) of the Statehood Act, it is very clear that Commissioner Herbert personally intended that ASRC receive the subsurface, including the whole mineral estate, in the Point Lay lands under the Agreement. He has so testified in deposition. ASRC also claims it understood the Agreement to require that, and expected to receive the mineral estate at Point Lay, being unaware of the 6(i) problem. This is somewhat hard to believe. Rodger Pegues told us in an private interview "everyone" was aware of the 6(i) problem, but thought "who will complain"?

Despite the attendant publicity to the "Nooiksut" re-establishment, the Agreement itself received virtually no public attention. It was not publicly disclosed in 1974, as far as we

³ The current law is at AS 38.50.

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know, through any routine public notice. And, notwithstanding each party's promise to "promptly" convey each's interest in the respective parcels of land, it was not until late October 1974 (just before the election) that ASRC (through a Wickwire letter to Commissioner Herbert) offered to quitclaim its interest in the Nuiqsut subsurface to the State. At that time Commissioner Herbert suggested, by return letter to Wickwire and based on Rodger Pegues' advice, that the parties wait until "Native title is established" before deeds were exchanged.

E. Implementation of 1974 Agreement.

Deeds were not exchanged in 1974, and thus the matter sat until 1985, for reasons which the parties were to hotly dispute. Of course, few expected the ANCSA implementation process to be plagued by the litigation and land ownership problems as it has been. To obviate some delays, 43 C.F.R. § 2650.0.-5(h) created the ANCSA "interim conveyance" as a document of title, of sorts, while village and regional corporations waited for boundary surveys prior to patent. ASRC, like most regional corporations, took the position that interim conveyances were equivalent to patent, but this issue was not decided until Congress passed the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), Pub. L. 96-487, December 2, 1980, § 1410 (amending § 22(j) of ANCSA to make an "interim conveyance" equivalent to "title" ownership). Nonetheless, ASRC did not receive its first interim conveyance of but a small amount of Nuiqsut subsurface until 1978.

Between 1974 and 1976 the State was involved in a dispute with another regional corporation, Cook Inlet Region, Inc. ("CIRI") over CIRI's selection rights to State lands. The settlement of this problem resulted in the infamous "Terms and Conditions Agreement" ("T&C") between the State of Alaska, the United States and CIRI. The T&C was eventually approved by the State of Alaska Legislature through the passage of a statute in January 1976, following Congressional approval of the exchange in December 1975. Congress amended section 22 of ANCSA to allow the State to convey its mineral interests free of the restrictions in section 6(i) of the Statehood Act so that the CIRI deal could happen. Approval of the T&C was accompanied by much public scrutiny, and outcry from some quarters, and led to the challenge of the T&C in Lewis, supra. It also led in March 1976 to the passage of a new State exchange law, AS 38.50 et seq. and repeal of the old one, AS 38.95.050. AS 38.50 now requires legislative approval of any exchange of lands of value in excess of \$5 million dollars. AS 38.50 was not made retroactive, however. See AS 01.10.090.

ASRC claims that the CIRI deal and attendant public outcry to the deal led to ASRC's first recognition of the potential 6(i) problem. It claims further that a potential lessee of ASRC's expected interest in the Point Lay lands (Chevron, Inc.) opined in

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a March 1977 title report letter that ASRC could not convey any interest in the mineral estate in the Point Lay lands to Chevron because of the section 6(i) restriction. ASRC claims that this title report letter brought the section 6(i) problem clearly to the fore.

In March, 1977 ASRC's oil and gas consultant Thomas Kelly (former DNR Commissioner) contacted Assistant DNR Commissioner Jack Roderick. The DNR files reflect a brief letter from Roderick to Kelly, dated in March, 1977, saying that the Attorney General's Office was looking into the 1974 Agreement, and the State's position would later be made known to ASRC. Roderick has no recall of the letter or the Kelly contact, and says he left State government very quickly thereafter. In any event, apparently no one in ASRC, including Kelly, ever heard any more about the State's "position."

What appears to us happened ⁴ is that the Department of Law was contacted in 1977 and a case file was opened by former Assistant Attorney General Thomas Meacham. The Meacham file reflects Meacham's handwritten notes highlighting potential statutory problems with the Agreement (e.g., lack of public notice, no pre-exchange appraisal, and section 6(i), AS 38.50, AS 38.95.060 violations). There may have been an assumption made, too, that the AS 38.50 would apply and thus require legislative approval, since even though AS 38.50 was not expressly retroactive, the exchange of record title to the lands had not yet occurred.

In July, 1977 Roderick's successor, Michael C. T. Smith, requested that DNR's Division of Geophysical and Geological Survey compare the value of the Point Lay and Nuiqsut lands. Smith was the former Director of the DNR Division of Lands, later called the Division of Forest, Land and Water Management and now the Division of Land and Water Management. He had, some people now say, virtually single handedly orchestrated the controversial CIRI T&C. Smith certainly took his lumps in getting the T&C approved in the Legislature, and was thus well aware of the new AS 38.50 legislative approval and equal value exchange requirements. This is why we think he requested DGGS evaluation of the lands, although in our interview with him he said he could not recall.

DGGS evaluated the Point Lay surface and subsurface estate against the subsurface at Nuiqsut, and in August of 1977 found them to be of equal value. The report was very brief and produced in less than three weeks. Of course, it is next to impossible to truly appraise subsurface without at least some

⁴ A few years ago we interviewed all critical witnesses who are still available. Memories of events were vague or non-existent for the most part.

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exploration. The study may have been result oriented----no one remembers the motivation behind it. Smith surmised in our interview that upon his discovery of the 1974 Agreement he might have wanted to see if it was worth pursuing given the passage of time, the need for legislative approval and the questions raised about it.

Apparently Tom Meacham had by July 1977 transferred his file to James Reeves, another Assistant Attorney General. In July 1977 by memorandum Reeves opined to DNR that the 1974 Agreement was legal. Neither the Reeves' memorandum nor the DGGS report were, as far as we can determine, ever communicated to ASRC, as Jack Roderick may (?) have promised.

In December 1977 Ron Swanson, DNR Land Management Officer (and sometimes carrying the title "ANCSA Coordinator") described in a memorandum to Michael C. T. Smith the DGGS report and Reeves' opinion. He then opined "I did not arrive at a definite conclusion as to whether this exchange is good or not. One prohibitive factor to consider is the consequences of trying to break this agreement. The politics of the whole exchange are an uncertainty to me." On January 11, 1978 Swanson and Smith met, and Swanson's handwritten file note reflects "following discussion with Mike today it was decided to sit tight and wait for Nooksut-ASRC to make first move." By this time ASRC had not yet received any Nuiqsut subsurface interim conveyances from the U.S., but it was just about to.

ASRC is aware of all of the foregoing history. ASRC claims this history, and later events which we'll recount below, prove the State abandoned⁵ the 1974 Agreement upon its own recognition of the 6(i) problem. It is not aware of the existence of the Meacham file. ⁶ In May 1978 the Meacham file was

⁵In the context of contract law, "abandonment" is the intentional relinquishment of a known right coupled with some act or failure to act that indicates an intent to abandon. See, e.g., *Jakober v. E.M. Loew's Capitol Theatre, Inc.*, 265 A.2d 429 (R.I. 1970); *Miran Investment Co. v. Medical West Bldg. Corp.*, 414 S.W. 2d 297 (1967). Once a party abandons a contract, the other party to the contract can sue for the breach of performance of any remaining duties owed under the contract by the abandoning party, or simply walk away from the contract, in effect accepting the performance to date as complete satisfaction of the contract.

⁶In fact, we did not discover the Meacham file until well after the first round of discovery in the litigation with ASRC over the 1974 Agreement was completed, it being resurrected in one of our State Archives' searches. We refused in our discovery responses to identify attorney work product or attorney client communications,

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transferred to Shelley Higgins, former Assistant Attorney General, when Reeves departed State employment.

On July 12, 1978 ASRC got its first interim conveyance of Nuiqsut subsurface, of 300+ acres.⁴ The State's tentative approval was rescinded on that acreage, as required by ANCSA. Ideally, the exchange of lands under the 1974 Agreement would have started right then, or had the State any objections or new plans these would have been made known to ASRC and the issues would have been joined for litigation or resolution. The exchange did not begin occurring, however, and in fact the State did nothing.

In late 1979 ASRC's counsel, James Wickwire, contacted Don Argetsinger, Administrative Assistant to the Governor, about the 1974 Agreement. Argetsinger asked Geoff Haynes, Deputy DNR Commissioner, for an update. Ted Smith, then Director of DNR's Forest, Land and Water Management, opined in a memorandum to Haynes dated November 15, 1979 that the 1974 Agreement was of "questionable legality." Ron Swanson sent a memorandum to Haynes dated November 21, 1979, in which he recounted the history and stated that "I still feel that the Nuiqsut agreement is impossible to carry out." ASRC has these memoranda. No State employee got back to ASRC in response to the Wickwire-Argetsinger contact, or contacted ASRC after it received its first interim conveyance in 1978.

Shelley Higgins' own file notes in the Meacham file reflect that she and Swanson talked about the Agreement on November 7, 1980. Her file memo states:

Status report from R.M. Swanson:

Kuugpik Corp. has not to date taken any initiative to implement the exchange. State does not want to start implementation because

and thus did not supplement our responses to ASRC on discovery of the file before we sought and received ASRC's agreement to stay discovery pending settlement negotiations. We anticipated, however, that ASRC would have, had litigation discovery continued, moved to compel identification and disclosure of all documents withheld, and most certainly would have taken Mssrs. Smith and Swanson's depositions.

Under the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), section 902(a), 43 U.S.C. 1632, decisions of the Secretary of the Interior are not subject to challenge unless the challenge is made within two years of the decision. The State did not challenge this interim conveyance or subsequent interim conveyances to ASRC or to Kuukpik Corporation.

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there are legal problems in light of 38.05.50 (sic) and State probably got a bad deal. DNR decision--sit tight and ignore 1974 agreement unless and until village corp. or Arctic Slope Regional takes action to implement. DNR file is in "dead" file although matter is subject to possible future action and reopening.

Since there has been no action at all for 2 1/2 years when I inherited the file and DNR does not expect action in the next 6 months, I am closing the AGO file.

As far as we know, ASRC is not aware of this conversation or Shelley Higgins' file memorandum, which we would, in any event, claim were not discoverable.

In a January 1987 interview with Ron Swanson, Swanson indicated to us that the position adopted by Michael C. T. Smith in 1977 was that it was better to keep a known, coal at Point Lay, than to take an unknown, the unexplored Nuiqsut lands, presumably given that DGGs thought the lands of equal value. In the spring of 1977, coincidentally, the State decided not to challenge the village enrollment ⁸ numbers for Nuiqsut. It looked to us as if DNR, at least at the Assistant Commissioner level (Mike Smith), had decided to leave well enough alone as early as January 1978.

In fact, ASRC claims that the State's failure to respond to its 1977 and 1979 inquiries led it to assume that the State had decided to abandon the Agreement.⁹ This was probably fine with ASRC, since the Chevron, Inc. 1977 legal opinion suggested ASRC could not acquire good title to the mineral estate at Point Lay anyway. Also, we might safely surmise that by 1982 ASRC may have

⁸ The number of villagers enrolled to a village corporation determines the corporation's total land entitlement under ANCSA. In other words, the more villagers, the more land to which the village corporation would be entitled to select under ANCSA.

⁹ The common law of contract abandonment suggests that the party to the contract asserting that the other party has abandoned it has the burden of proving the other party took or failed to take action which positively demonstrates an intent to abandon. The intent to abandon need not be communicated to the other party, however. See cases cited in footnote 5. Thus, in this setting ASRC would argue that the State's lack of communication with it despite its repeated inquiries and State action taken inconsistent with its ownership claims under the 1974 Agreement demonstrate the State's intent to abandon the 1974 Agreement.

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had its own information suggesting that some of the Point Lay lands may have been overrated for oil and gas, although we do not know this for a fact.

Having allegedly reached that "abandonment" conclusion, in 1982 ASRC entered into an agreement with Kuukpiik Corporation to set up a gravel extraction business near Nuiqsut----in other words, ASRC began acting as if it was going to retain ownership in the Nuiqsut subsurface notwithstanding the provisions of the 1974 Agreement. This followed shortly after ASRC began getting much larger interim conveyances of Nuiqsut subsurface in November 1982. State officials in DNR responsible for Coastal Zone Management Act review of the proposed gravel extraction operation gave approval to ASRC's plans in early 1983. Note that while under ANCSA sand and gravel is considered part of the subsurface estate, the state considers it owned by the surface estate owner, i.e., does not consider it a mineral or otherwise owned by the subsurface estate owner. Thus, at least arguably the State's acquiescence in the gravel extraction arrangement was not inconsistent with the State's later claim that ASRC was obligated to convey the Nuiqsut subsurface to the State under the 1974 Agreement.

At roughly the same time, DNR's Division of Minerals and Energy Management ("DMEM") (later called the Division of Oil and Gas) announced its five year oil and gas leasing schedule, as required by Alaska law. AS 38.05.180. The leasing schedule proposed a lease sale in 1988 of a good portion of the Nuiqsut lands the State was to receive from ASRC under the Agreement, without mentioning the 1974 Agreement. However, the lease schedule also inconsistently proposed a future State oil and gas lease sale of the Point Lay lands ASRC was to receive, again without mentioning the 1974 Agreement.

To complicate matters further, in June 1983 DMEM transferred to ASRC administration of certain pre-existing State oil and gas leases covering a portion of Nuiqsut lands conveyed to ASRC by interim conveyance¹⁰. This transfer was permitted, but not necessarily required, by section 14(g) of ANCSA. The transfer, signed by DMEM's Kay Brown¹¹, followed an extensive review of the history of the Agreement by DMEM's employees, a request for advice to the Department of Law, and Law's oral advice (through Messrs. Bob Maynard and Tom Koester) that the 1974 Agreement was legal.

¹⁰As of 1986, ASRC had received interim conveyances of about 40,000 acres of subsurface estate of the 69,120 acres promised to the State under the 1974 Agreement.

¹¹Ms. Brown is now in the State House of Representatives. When litigation arose over the 1974 Agreement, she was interviewed and could not recall the "why" of the lease transfers to ASRC.

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In transferring the leases DMEM erroneously did not segregate out submerged lands which ASRC was not entitled to receive under ANCSA.¹² Nor did it tell ASRC it expected to get the leases back if the Agreement was effectuated. In fact, the 1974 Agreement was not mentioned in the lease transfer document at all, despite the fact that DMEM had resurrected its history and sought legal advice on it. DMEM line employees told us they thought it "logical" to transfer the leases to ASRC after the State's tentative approvals were rescinded.

In the spring of 1985 Texaco, Inc. had an oil strike on State owned lands in the Colville River delta northeast of the Nuiqsut lands. At this point, since industry interest in the area increased, the DNR Division of Oil and Gas decided to accelerate its proposed 1988 oil and gas lease sale for the Nuiqsut lands in order to hold the sale in September 1986. Therefore, DNR notified ASRC that it would like to set up a conveyancing schedule for the Point Lay and Nuiqsut lands under the 1974 Agreement--the first State effort to implement its terms since 1974.

ASRC cried foul. It claimed that the State, like ASRC cognizant of legal problems with the Agreement since 1976-77, had abandoned the Agreement. ASRC pointed to the State's Coastal Zone Management Act approval of its gravel extraction business, the State's transfer to it of the oil and gas leases in 1983, and the State's 11 years of silence as evidence of the abandonment of the Agreement.

ASRC met with DNR Commissioner Wunnicke a couple of times. She suggested an interim accommodation----allow the 1986

¹² The State and the federal government are in a dispute whether the Submerged Lands Act, made applicable to the State at Statehood, conferred ownership of certain submerged lands in the Arctic to the State. Certain officials in the United States Department of Interior and ASRC claim that Public Land Order 82 reserved the submerged lands such that they were not conveyed to the State at the time of Statehood. Kucknik Corporation purposely avoided selecting submerged lands which would otherwise be subject to State ownership claims in making their selections in the Colville Delta area. In ANILCA, section 1431(n), Congress ordered that the Colville River bed and its five major channel beds remain in the "public ownership", without indicating whether "public ownership" meant that of the State or federal government. The Department of the Interior has allowed the State to select PLO 82 covered submerged lands, but because of PLO 82 the acreage so selected will be charged against the State's entitlement under the Statehood Act. The Solicitor to the Department of the Interior is now in the process of reviewing PLO 82's application in light of recent case law development in the area of navigability.

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oil and gas sale to go forward, escrow the bonuses, etc., and keep negotiating. At the end of these meetings ASRC rejected the escrow offer, and sued.

II. 1985 LITIGATION.

ASRC filed suit in Federal District Court in Juneau, naming DNR Commissioner Esther C. Wunnicke and Division of Land and Water Management Director Thomas Hawkins as the defendants. ¹³ ASRC claimed the 1974 Agreement violated section 6(i) of the Statehood Act, numerous other State laws, ¹⁴ and ANCSA § 22 (f) (requiring Secretarial approval of ANCSA exchanges). In addition, ASRC also claimed various common law reasons prevent enforcement of the 1974 Agreement, including the alleged "abandonment" of the Agreement by the State, mistake, estoppel, etc.

The State countersued in Anchorage Superior Court for specific performance of the 1974 Agreement. Copies of the Complaints are in the binder. ASRC in response raised as affirmative defenses all the claims it made for declaratory relief in its federal court litigation against Commissioner Wunnicke and Director Hawkins.

We had some initial skirmishes in both pieces of litigation. In Superior Court Judge Karen Hunt dismissed ASRC's affirmative defense that AS 38.50 (the new exchange law) applied to the 1974 Agreement and made it illegal. In federal court, Judge von der Heydt dismissed all of ASRC's State law claims, but not the 6(i) or ANCSA § 22(f) claim. We then filed an abstention motion in federal court on the two federal law claims.

At the same time we moved to dismiss ASRC's 6(i) and AS 38.05.125 affirmative defenses in State court. We argued that ASRC had no cause of action under 6(i), but this issue was later decided against the State in Trustees for Alaska v. State, 736 P.2d 324 (Alaska 1987), cert. denied 108 S.Ct. 2013 (1988). We also said

¹³This was done in attempt to avoid the U.S. Const. Eleventh Amendment prohibition on suing the State in federal court.

¹⁴ The most important of these State laws is AS 38.05.125, which the State contended automatically includes in any contract or deed the State issues a mineral reservation. We argued that the law is designed to protect against inadvertent section 6(i) violations. The significance of this view of AS 38.05.125 is that it makes Commissioner Herbert's personal intentions with respect to the Point Lay mineral estate unimportant. ASRC says, in rebuttal, that it just makes the deal illegal. For settlement purposes, AS 38.05.125 is important because any agreement the State strikes with ASRC will require the legislature to waive AS 38.05.125's strictures, as it did with respect to the CIRI T&C in 1976.

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that 6(i) wasn't violated, because AS 38.05.125 meant that any quitclaim deeds the State gives ASRC for Point Lay will automatically reserve the mineral estate, notwithstanding former Commissioner Herbert's "personal," mistaken intentions to the contrary. ASRC cross-moved for summary judgment in State court. In all of our briefing we exploited as much as possible the "odor" of ASRC's attorney, James Wickwire, and consultant, former DNR Commissioner Thomas Kelly, claiming ignorance of 6(i), ANCSA § 22(f), and numerous other State laws. The near universal case law rule, however, is that a party is never estopped from raising illegality as a defense to enforcement of an illegal contract.

We can give you a more detailed evaluation of the various legal issues raised in the case if you'd like. Suffice it to say now, however, that on some of the legal issues we were initially confident, and on some we gave the State at least an even chance of success. We so advised DNR Commissioner Wunnicke. Once ASRC sued, she decided to let the litigation proceed, rather than to try to strike a deal and solve a very knotty factual and legal problem created by a predecessor, any solution to which would be politically volatile in light of the controversies over the CIRI T&C. She thus early on in the litigation rejected an offer by ASRC that the uplands in dispute be split 50/50.

She later told Jacob Adams, President of ASRC, in a chance and very brief Anchorage meeting, that the problem was a "political" one that could not be resolved in an election year. He asked her to at least call the Department of Law off----to go slow with the litigation. We had been aggressive in pursuit of the case and received an early (April 1987) trial date. Going slow was not possible given court imposed pre-trial deadlines, as Attorney General Hal Brown later explained to the Commissioner.

In the meantime, however, we had completed our State Archives' records review, interviewed virtually all of the State agency people involved, discovered the Shelley Higgins' file memorandum, and thus had pieced the whole mess together as best we could. We advised Commissioner Wunnicke that ASRC's offer to split the uplands 50/50 suddenly looked very good to us in light of the abandonment evidence,¹⁵ and that it was better to get 50 percent of the uplands subsurface than perhaps nothing.

¹⁵ All of the critical State agency people are on both sides' witness lists. We thus anticipated that depositions of Swanson and Smith, coupled with discovery practice, would likely lead to very damaging testimony of abandonment. The other triable issue was mutual mistake, and it was very clear the State had made some major ones.

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She was nonetheless very cool to settlement because (we surmise) the August 1986 gubernatorial primary was approaching, any sudden deal would look contrived for political advantage, and she did not look forward to seeking legislative approval of a settlement, as we advised her would be necessary given ASRC's legal claims that the 1974 Agreement was an illegal "exchange" of lands. We suggested to her, therefore, that we approach ASRC with an offer to meet with it after the primary election, but in the interim discovery and motion practice would be stayed by mutual agreement. Obviously, we didn't want ASRC to find out about the abandonment problem beyond what it then knew, and we wanted to seek ASRC's agreement to a discovery stay once the problem became clear to us to insure that did not happen. She accepted that approach, and ASRC agreed to a September 1986 meeting.

ASRC then went to the Governor Sheffield, and asked that the meeting be moved up----to before the August gubernatorial primary. The Governor wrote ASRC a letter, after consulting with Commissioner Wunnicke, saying the State was committed to trying to settle the dispute, and a pre-primary meeting date was set.

When the pre-primary meeting was held, the idea of a 50/50 split was discussed again, and its concept adopted by DNR. How it would happen was left to later negotiations.

III. 1986 - 1989 SETTLEMENT NEGOTIATIONS AND FEDERAL COURT SETTLEMENT CONFERENCE.

A. Disputed Issues.

The tentative settlement reached by DNR Commissioner Wunnicke was enunciated in the form of a letter agreement of October 1986 (copy in the binder). The meat of this letter was the parties' conceptual agreement to merge title to and share revenues from the uplands and the beds of nonnavigable water bodies (hereinafter all called "uplands") at Point Lay and Nuiqsut equally, that is, 50 percent each. After entering into the letter agreement, the parties engaged in extensive discussions concerning who would manage what lands and under what standards, and concerning the extent of the State's wholly owned submerged lands under navigable water bodies. Without agreement on what were submerged lands wholly owned by the State, the parties would not know what were the uplands they were sharing 50/50.

In the early stages of negotiations, ASRC argued that it should be entitled to manage on both parties' behalf the Nuiqsut lands, and the State should do the same on both parties' behalf at Point Lay. When the State leases and manages lands, the process is competitive and public; ASRC, in contrast, is a private corporation

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which does its business in private. Thus, the State was very concerned about ASRC management of lands on both parties' behalf at Nuiqsut, since it could not know when ASRC might be tempted to, or might in fact, cheat. In order to ensure that ASRC's management would truly be in the State's behalf, the State's oil and gas counsel Charles Meyers, ¹⁶ advised that ASRC be held to certain very detailed prudent landowner standards such that the State would have a cause of action against ASRC if anything sneaky went on. As a quid pro quo, the State offered to have these same exacting standards apply to its management of the Point Lay lands. ASRC nonetheless chafed at the application of such standards to its management of the Nuiqsut lands. Extensive back and forth negotiation and trading of draft agreements concerning management rights and duties ensued.

As mentioned briefly above, perhaps a more important issue concerned the extent of the navigable waters in both areas, and therefore the extent of the State's wholly owned submerged lands to which ASRC would not be entitled to any interest. Under the "equal footing doctrine," see Pollard's Lessee v. Hagan, 44 U.S. (3 How) 212, 229, 11 L.Ed 564 (1845) and its codification in the Submerged Lands Act of 1953, 43 U.S.C. § 1301, the State at the time of statehood became owner of all submerged lands which, for title purposes, are "navigable" inland water bodies in the State. These submerged lands are not available for selection by ANCSA corporations, and are not chargeable against ANCSA corporations or against the State's Statehood Act land entitlements. In addition and of particular importance for the Nuiqsut area lands, in ANILCA, section 1431(n), Congress forbid any ANCSA conveyance of the bed of the Colville River and its five adjacent channels (¹⁷) insisting that they remain in "public ownership." ¹⁸ Finally, in addition

¹⁶ Mr. Meyers was hired by the State as a contract lawyer from the law firm of Gibson, Dunn & Krutcher in Denver, Colorado. He was a long time professor at the Stanford University Law School, and was considered the dean of American oil and gas law, having co-authored the multi-volume and premier treatise, Oil and Gas Law. Shortly after the 50/50 conceptual agreement was reached, Mr. Meyers was retained and helped negotiate with ASRC. After he died about 18 months ago, the State hired Hugh McIntosh of Vinson & Elkins in Washington, D.C., to assist the State in further negotiations and drafting of the settlement agreement. Mr. McIntosh remains on a small contract with the Department of Law.

¹⁷ The channels are the Nechelik, Kupigruak, Elaktoveach, Tamayayak, and Sakoonang.

¹⁸ While the State believes it is the owner of the beds of the Colville River and its five channels under the equal footing doctrine, and notwithstanding PLO 82, the State also has filed

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to the beds of navigable waters the State also owns submerged lands under tidally influenced waters. Tidally influenced waters are considered navigable in law even if not in fact. See Phillips Petroleum Company v. Mississippi, ___ U.S. ___, 108 S. Ct. 791 (1988).

Although the legal test for determining whether a water body is navigable is well settled, applying the legal test in practice is never easy. In Alaska there have been only three federal court cases to reach decision with respect to the navigability of inland water bodies: (1) the Gulkana River decision now on appeal; (2) a case involving the issue of whether float plane use could establish navigability (it can't, said the Ninth Circuit Court of Appeals); and (3) an unreported District Court judgment involving two rivers and two lakes in the Bristol Bay region found navigable. There are also a number of completed and pending Department of the Interior, Board of Land Appeals' cases involving navigability issues.

Once a water body is determined navigable, either in fact or because of tidal influence, and therefore the affected submerged lands are deemed owned by the State, one still faces the daunting task of determining the total acreage submerged. This requires establishing the ordinary high water mark for inland water bodies and the mean high tide mark for tidally influenced areas¹⁹. In the simplest of situations this may involve a survey and meandering of shore lines. Meander lines, however, are not determinant of ownership, and thus cannot be used to resolve a title navigability dispute unless the land owners involved are willing to accept the meander lines as boundaries. In areas like those north of the Arctic Circle, where there are a plentitude of water courses, even with a survey initially acceptable to the involved landowners, accretion and reliction pose the potential problems of shifting ownership and the creation of future disputes.

Moreover, there has not yet been a case concluded involving the navigability of an inland lake or stream north of the Arctic Circle. That much of the water north of the Arctic Circle remains in a frozen or flooded condition much of the year compounds the factual, if not the legal, questions associated with

selections for the beds under the Statehood Act.

¹⁹ See e.g., Oklahoma v. Texas, 260 U.S. 606, 625-40, (1923), defining State owned river bed as that which is "kept practically bare of vegetation by the wash of the waters of the river from year to year, in their onward course, although parts of it are dry for months at a time. . . ." Id. at 632. Measuring the extent of tidal influence is discussed in Phillips v. Mississippi, ___ U.S. ___, 108 S. Ct. 791 (1988).

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determining navigability for title purposes. Moreover, the existence of literally thousands of small ponds, seasonal creeks, ever changing rivers and unending "wetlands" pose unique problems for the application of the doctrine of title navigability, problems no doubt exacerbated in Alaska by Congress' attempt in ANCSA to finally and fairly settle Alaska Native land claims. Thus, ASRC and the State have very different views as to what is or is not a navigable water body, with ASRC pointing out at every opportunity that a liberal reading of the title navigability doctrine would leave ASRC and its village corporations' lands much like Swiss cheese, littered with unmanageable holes.

ASRC and the State recognized that an agreement splitting uplands only would not allow resource leasing to go forward unless the potential lessees could also be sure at the time of leasing of who owned what lands, i.e., could be sure of which lands were uplands and which lands were the State's wholly owned submerged lands. Moreover, the potential for later accretion and reliction could create future title problems. Therefore, the parties refocused their negotiations to include not just uplands but also submerged lands. Negotiation efforts in the last three years were therefore devoted to establishing a common database for (hopefully) settling by negotiation what are, at least arguably, the navigable water bodies and therefore what are the State owned submerged lands beneath them.²⁰ The parties' assumption was that if agreement could be reached on this issue, an appropriate revenue split could be established which would credit the State for its claimed ownership of the submerged lands, on a section by section or some other basis. With title merged between the parties, a revenue split decided, and a management scheme established, leasing could go forward and both ASRC and the State would benefit. Absent some kind of arrangement or final court judgment with respect to submerged lands, leasing of the uplands would not be possible, and thus neither party would benefit.

²⁰ ASRC, in an initial attempt to solve the submerged lands problem, proposed that the parties agree on an increment called the "disputed acreage", revenues from which would be escrowed, and all other revenues from the uplands and the "undisputed" submerged lands acreage would be split. The State rejected this approach because of fears about the difficulties of management, and because it would put off settlement of the submerged lands issues to an undefined time and context. The sense of opinion was that time would be on ASRC's side in any navigability dispute, and that if the agreement was going to have to go to the Legislature for approval, it would be worth an attempt to reach a complete resolution of all potential problems.

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B. Tentative Resolution Of Issues.

1. Land management.

As noted above, the parties negotiated at length about who would manage what lands and under what standard of care. Eventually ASRC, after insisting on being able to manage the Nuiqsut lands for both parties under few standards, conceded that the State could manage all lands but under the exacting standards the State developed. These standards are outlined in some detail in a May, 1990 settlement draft (copy in binder) prepared by ASRC's oil and gas counsel, Uriel Dutton of Fulbright & Jaworski. As drafted these standards will pose some significant burdens on the State's day to day management of the lands; the State's current oil and gas counsel has suggested some clarifications and modifications to ameliorate some potential problems. These changes have not yet been suggested to ASRC, however, and will have to be the subject of future negotiations.

2. Revenue splits.

The parties' attempt to resolve the submerged lands issue was bottomed on a basic settlement idea: title to the submerged lands and the uplands in each particular section of land would be merged, but the State's percentage share of revenue from each section would be calculated using the following formula in order to give it credit for whatever could be agreed were the submerged lands (i.e., tidally influenced and navigable waterbody acreage for title purposes) wholly owned by the State:

$$\text{State \%} = \frac{(\text{uplands acres} \times 50\%) + (\text{submerged acres} \times 100\%)}{\text{number of acres in agreement area section}}$$

Nuiqsut. Most of the parties' attention in attempting to reach a common database with respect to what are submerged lands has focused on the Nuiqsut lands because most of the water is there and presumably those lands are potentially much more valuable for oil and gas exploration purposes. For over 2 1/2 years both the State and ASRC engaged in an extensive----albeit not particularly fruitful----effort reviewing aerial photographs, BJM and USGS mapping information, and United States Fish and Wildlife Service data in an attempt to reach a common database.

In 1989, ASRC offered to settle using numbers derived by its subsidiary's (Arctic Slope Consulting Engineers Group) analysis of various sources of data in the Colville River delta, except for the two northwestern townships bordering on the NPRA, which ASRC proposed should reflect numbers derived from using DNR coastal datum generated in a 1982 DNR study, and the basis on which the

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State had previously sold Harrison Bay leases.^{21/} While the parties respective positions were ratcheting closer together, it took a settlement conference before Federal District Judge James von der Heydt in November, 1989 to induce the parties to split the difference 50/50 between their respective positions in the Colville River delta area and to agree to what would be the revenue share of the State and ASRC on a section by section basis. These revenue share percentages are now set out in a December 1989 letter from ASRC to us (copy in the binder).

Uncertain boundaries in the Nechelik delta, on the NPR-A, and on Point Lay shorelines were never the subject of negotiations, and therefore were not addressed or resolved in the settlement conference.

Point Lay. The State offered to settle the submerged lands issues by taking 51 versus 49 percent of the revenues generated from the entire area, rather than selecting out particular navigable water bodies and hoping mineral revenues would be derived from submerged lands under those water bodies. In the Point Lay area, DNR had asserted navigability of four lakes and a small portion of the Kukpowruk River, about 3% or so of the entire area; ASRC disputed the 3%. At the settlement conference, ASRC accepted the State's offer as to Point Lay, so the State will receive 51% of all future revenues.

IV. 1990 SETTLEMENT NEGOTIATIONS.

A. Uncertain Boundaries.

The parties had hoped, and in fact had promised United States District Judge von der Heydt, that they would take the settlement to the 1990 Legislature for approval. For various reasons, they were unable to do so.^{22/} Since then ASRC has proposed that the parties settle the uncertain agreement area boundaries noted above by "squaring" them off along protracted section lines, and adjusting the parties respective revenue percentages for the affected sections accordingly. For the Nuiqsut

²¹ DNR surveyors privately advised that in these two northwestern townships the trend seemed to be that accretion was occurring on the coast, creating uplands.

²² After the 1990 Session passed, a miffed Judge von der Heydt dismissed ASRC's case against the State without prejudice to its right to refile it if negotiations fail. The State's Superior Court suit, in which ASRC raises all the same claims it did in its own federal court suit as affirmative defenses, remains alive but dormant because of the mutually agreed upon stay. It is before Judge Karen Hunt.