ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672
3550 HRES HB 273 - HB 280

426

The false end line doctrine is applicable to the discovery vein only, and cannot be applied to secondary veins so as to create more than one set of end lines for a location.[17] Within this limitation, however, any vein can be pursued extralaterally.[18]

[3] Location with Vein Departing Through Side Line or Stopping Within Location

A common cause of a location with a discovery vein which stops within a location is miscalculation of its direction so that the vein is later found to depart from the claim through a side line. Apparently this situation was not contemplated by the Mining Law of 1872, but courts have supplied a solution by a legal fiction. The judicial declaration is that extralateral rights obtain, defined by an imaginary line drawn from the point the vein passes out of the claim, opposite and parallel to the end line through which the vein passes.[19] The rule is that the end line which is crossed remains an end line for all purposes, and extralateral rights are granted within the area bounded by parallel planes drawn from the end line and the imaginary line.[20]

The same rule applies if a vein abruptly terminates within a claim after entering through an end line, except that the imaginary line is drawn parallel to the end line at the point the apex terminates.[21]

If an apex both begins and ends within a claim, the authorities are generally agreed that subsurface rights attach within imaginary planes drawn parallel to the end lines at the points the vein terminates.[22] If the vein runs more nearly parallel to the end rather than the side lines, courts will apply the false end line doctrine to the permit the exercise of extralateral rights.[23]

---

17 *Id.* at 89 (the end lines as fixed relative to the discovery vein constitute an absolute limit relative to the appropriation of all other veins within the mining location); Clark-Mont. Realty Co. v. Butte & Superior Copper Co., 233 F. 547 (D. Mont. 1916), *aff'd*, 248 F. 609 (1918), *aff'd*, 249 U.S. 12 (1919).

18 *See* § 37.04, *infra*.

19 Clark v. Fitzgerald, 171 U.S. 92 (1898); Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 89 (1898); London Extension Mining Co. v. Ellis, 134 F.2d 405 (10th Cir. 1943); Bourne v. Federal Mining & Smelting Co., 243 F. 466 (C.C.D. Idaho 1908); Rico-Argentine Mining Co. v. Rico Consol. Mining Co., 74 Colo. 444, 223 P. 31, 33 (1923).

20 Clarke v. Fitzgerald, 171 U.S. 92 (1898); London Extension Mining Co. v. Ellis, 134 F.2d 405 (10th Cir. 1943); Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447 (1903).

21 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898); Tyler Mining Co. v. Sweeney, 54 F. 264, 293 (9th Cir. 1893); Carson City Gold & Silver Mining Co. v. North Star Mining Co., 73 F. 597 (C.C.N.D. Cal 1896); Wakeman v. Norton, 24 Colo. 192, 49 P. 283 (1897).

22 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898). *See* Work Mining & Milling Co. v. Doctor Jack Pot Mining Co., 194 F. 620, 629 (8th Cir. 1912).

23 *See* § 37.03[2], *supra*.

[4] Location With Vein Entering and Departing Through the Same Boundary

Few cases have ruled on the problem presented by a vein which enters and departs a claim through the same boundary line, and they conflict. However, there would appear to be no less reason for granting extralateral rights in this circumstance than when a vein enters a claim through an end line and departs through a side line.[24] The United States Supreme Court apparently sees no difference between the two situations,[25] and a series of federal cases suggest that extralateral rights may be obtained, as defined by lines drawn parallel to the end lines at the points the vein departs through the side line.[26] If a vein enters and departs through an end rather than a side line, the false end line doctrine can apply.[27]

In any event, extralateral rights are restricted to the amount of apex actually within the claim.[28] Hence, if a vein returns to a claim after departing through a side line and then departs through an end or side line, extralateral rights will not be granted for the portion of the apex outside the claim[29] unless the legal apex doctrine applies.[30]

Unfortunately, in the only case directly on point the Colorado Supreme Court stated that extralateral rights could not be obtained when a vein enters and de-

---

24 *See* § 37.03[3], *supra*.

25 In *Montana Mining Co. v. St. Louis Mining & Milling Co.*, 204 U.S. 204, 211 (1906), the Court states that "the right of the St. Louis Company to follow its vein, although it enters at the side line and departs through the same line, has been established by this court in other cases." It cites *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683 (1895), which concerned a claim with the vein entering through an end line and departing through a side line.

26 St. Louis Mining & Milling Co. v. Montana Mining Co., 104 F. 664 (9th Cir. 1900) (granting extralateral rights in secondary vein). While this case is distinguishable in that subsurface rights already existed by virtue of the discovery vein which cut both end lines, it would seem that if extralateral rights are obtained in a secondary vein, they would also be obtained in a discovery vein. The decision results in the St. Louis Mining & Milling Company acquiring extralateral rights to a vein which enters and departs a claim through the same side line. The United States Supreme Court, on a writ of certiori, reviewed the case and did not question the theory of extralateral rights established by the lower court. Montana Mining Co. v. St. Louis Mining & Milling Co., 204 U.S. 204 (1906). Subsequently, in an appeal of the same case, the Ninth Circuit Court of Appeals expressed the view that the Supreme Court affirmed its decision that the St. Louis Mining Company had "the right . . . to extralegal rights . . . to the extent that the vein apexes within the St. Louis claim. . . ." Montana Mining Co. v. St. Louis Mining & Milling Co., 183 F. 51, 61 (9th Cir. 1910). Unfortunately, the matter is never discussed as being in dispute in any of these decisions.

27 *See* § 37.03[2], *supra*.

28 Mining Co. v. Tarbert, 98 U.S. 463 (1879). *See also* Waterloo Mining Co. v. Doe, 82 F. 45, 55 (1897) ("The grant is to lodes having their apex in the ground patented. The fact that a part of the apex may be in the ground granted would not give any right to that part of the apex which is not therein. . . .").

29 Waterloo Mining Co. v. Doe, 82 F. 45 (9th Cir. 1897).

30 *See* § 37.02[2], *supra*.

parts through the same boundary.[31] This case has been disregarded by the federal courts,[32] repudiated by dicta in a later Supreme Court of Colorado case,[33] and rejected by scholars.[34] However, the case has never been directly overruled.

[5] Extralateral Rights to Lodes with a Wide Apex

Some lodes have wide apexes so that, when located, they lie within more than one claim, divided by a common side line. Three positions have been taken as to whether extralateral rights can be obtained in these circumstances. First, it has been strictly ruled that in order for a mining locator to be entitled to subsurface rights, he must include within his claim the entire width of the apex.[35] Under this view, both mining locators would be denied extralateral rights to a vein bisected by their common boundary line. The second approach is to grant extralateral rights to the senior claimant when the end line extensions of both claims correspond.[36] A third, more liberal, position has been adopted which would permit both locators to obtain extralateral rights when the end lines do not correspond. Under this view, the senior locator obtains rights to any conflict area and a junior locator obtains his extralateral rights outside of the conflict area.[37]

The third rule includes the priority concepts of the second and also recognizes extralateral rights in the junior locator when there is no conflict. It has the advantage of not establishing underground areas from which minerals are unlikely to be developed, and it is more consistent with the intent of the statute and the

---

31 Catron v. Old, 23 Colo. 433, 48 P. 687 (1897) (court emphasized the fact that very little of the apex was actually within the claim, and that it did not run parallel with the side lines).

32 Montana Mining Co. v. St. Louis Mining & Milling Co., 204 U.S. 204 (1906); St. Louis Mining & Milling Co. v. Montana Milling Co., 104 F. 644 (9th Cir. 1900).

33 Rico-Argentine Mining Co. v. Rico Copper Mining Co., 74 Colo. 444, 223 P. 31, 33 (1923) (the court, although dealing with a vein crossing an end line and a side line, said it was compelled "to conclude that extralateral rights are conferred where the discovery vein crosses . . . the same side line twice.").

34 G. Costigan, *Mining Law* § 118g at 63 (1908), suggests the propriety of refusing to follow" the *Catron* case. *See also* Clayberg, "Extralateral Rights to Quartz Veins Granted by the Act of Congress of May 10, 1872," 1 *Calif L. Rev.* 336, 345-347 (1913); Note, "Extralateral Rights in Mining," 15 *Notre Dame Law.* 68, 75-76 (1939).

35 Grand Cent. Mining Co. v. Mammoth Mining Co., 29 Utah 490, 83 P. 648 (1905) (extralateral rights may not be predicated upon such bisected broad lode desposits). The court said: "What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex, to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner." *Id.* at 677. *Accord* Big Hatchet Consol. Mining Co. v. Colvin, 19 Colo. App. 405, 75 P. 605, 606 (1904).

36 Argentine Mining Co. v. Terrible Mining Co., 122 U.S. 478 (1887); United States Mining Co. v. Lawson, 134 F. 769 (8th Cir. 1904), *aff'd*, 207 U.S. 1 (1907); St. Louis Mining & Milling Co. v. Montana Mining Co., 104 F. 664 (9th Cir. 1900).

37 Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 114 F. 417, 419 (9th Cir.), *cert. denied*, 186 U.S. 482 (1902).

policy of the courts to grant extralateral rights whenever there has been reasonable compliance with the law. It appears to be the standard rule.[38]

§ 37.04 Extralateral Rights in Secondary Veins

[1] Application of Extralateral Rights to Secondary Veins

"Secondary," "accidental," and "incidental" are terms commonly applied to apexing veins or lodes other than the one upon which a mining location is based, known as the "primary" or "discovery" vein.[1] The Mining Law of 1872 constitutes a grant of rights in all veins or lodes which apex within the surface lines of a mining location,[2] and it is settled law that extralateral rights are conferred in secondary as well as primary veins.[3] Thus, extralateral rights may be based upon "blind" veins or lodes, unknown or undiscovered at the time of location.[4] In general, the same conditions and limitations apply to extralateral rights conferred in secondary veins as apply to discovery veins,[5] except that rights in secondary veins are further conditioned upon the validity of the location on the discovery vein.

[2] End Lines of Discovery Vein Control

There can be but one set of end lines for a location, and they limit all veins apexing within the surface lines.[6] Hence, extralateral rights in secondary veins are fixed by the end lines of the discovery vein.[7] Courts will not create new lines

---

38 *See* § 12.03[2][b], *supra*.

1 *See* Cosmopolitan Mining Co. v. Foote, 101 F. 518 (C.C.D. Nev. 1900).

2 30 U.S.C. § 26 (1982). Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 88 (1898):

> Every vein whose apex is within the vertical limits of his [a locator's] surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits, he can pursue that vein as far as he pleases in its downward course outside the vertical side lines.

3 Ajax Gold Mining v. Hilkey, 31 Colo. 131, 72 P. 447 (1903).

4 Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U.S. 499, 508 (1901).

5 *See* §§ 37.01, .02, .03, *supra*, and § 37.05, *infra*.

6 Walrath v. Champion Mining Co., 171 U.S. 293, 308, 311 (1898); Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898); Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447 (1903).

7 Work Mining & Milling Co. v. Doctor Jack Pot Mining Co., 194 F. 620, 629 (8th Cir.), *cert. denied*, 226 U.S. 610 (1912); Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447, 449 (1903) ("The end lines constitute a barrier beyond which a locator cannot follow a vein on its strike, whether it be a discovery or secondary vein. . . .").

for secondary veins.[8] Thus, if the discovery vein crosses both side lines, the side lines will be regarded as end lines and will determine extralateral rights in all veins which apex within the claim, even though a secondary vein might perfectly bisect the original end lines.[9] Nor can a locator relocate his claim using new end lines so as to expand his extralateral rights in secondary veins which dip outside of the bounding planes of the location of the discovery vein. When such an attempt is made, the side lines of the new location, will be regarded as end lines.[10] Hence, it is not possible to obtain extralateral rights in a secondary vein which lies at a right angle to the discovery vein, parallel with the located end lines.[11]

[3] Amount of Apex of Secondary Vein within the Claim

Extralateral rights attach to any secondary vein or lode which apexes within a location without regard to the extent of extralateral rights obtainable in the discovery vein. Hence, the apex of a secondary vein need not be in the same part of a claim as the apex of the discovery vein, and whether it is or not, extralateral rights to the dip of a secondary vein are defined by vertical planes fixed by the original end lines.[12] This is illustrated by the not uncommon situation of a claim inaccurately located so that the discovery vein passes through an end line and a side line. Extralateral rights to the discovery vein are bounded by a vertical plane extended downward from the crossed end line and, under the false end line doctrine, another vertical plane parallel thereto drawn from the point the vein crosses the side line.[13] These planes, however, do not limit extralateral rights in the secondary vein, which are governed by planes drawn from the original end lines.[14]

Since the end line bounding planes of the discovery vein fix extralateral rights to secondary veins, it has been argued that the dip of a secondary vein may

---

[8] Walrath v. Mining Co., 63 F. 552, 557 (C.C.N.D. Cal. 1894) ("The Act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new lines for such other veins."), *aff'd*, 171 U.S. 293 (1898). *Accord* Cosmopolitan Mining Co. v. Foote, 101 F. 518, 523 (C.C.D. Nev. 1900).

[9] Northport Smelting & Ref. Co. v. Lone Pine-Surprise Consol. Mines Co., 278 F. 719 (9th Cir. 1922). *See* § 37.03[2], *supra*.

[10] Cosmopolitan Mining Co. v. Foote, 101 F. 518, 521-23 (C.C.D. Nev. 1900). *See* Walrath v. Mining Co., 63 F. 552, 557 (C.C.N.D. Cal. 1894) ("When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location.").

[11] Cosmopolitan Mining Co. v. Foote, 101 F. 518 (C.C.D. Nev. 1900). *See also* § 37.04[4], *infra*.

[12] Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447, 450 (1903).

[13] *Id. See* § 37.03[3], *supra*.

[14] Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447, 449 (1903) ("This, however, does not mean that all such veins have exactly the same extralateral rights, nor can it be said that only so much of a secondary vein as apexes within that part of the claim where the apex of the discovery vein is found has such rights."). *See* § 37.04[4], *infra*.

be followed anywhere between their extensions regardless of the amount of apex within the location. This result has been permitted by the United States Supreme Court,[15] but is contrary to the generally accepted principle of mining law that only so much of the dip of a vein may be followed as there is apex within the surface boundaries of the location.[16] The legal apex doctrine is an exception to this rule.[17]

[4] Relation of Location to Course of Secondary Vein

The rules concerning extralateral rights in discovery veins also apply to extralateral rights in secondary veins. Variations in the position of secondary veins in relation to the discovery vein do not alter these rules, but may limit their application.

There is no doubt that extralateral rights attach to secondary veins if they are approximately parallel to the discovery vein and are within the parallel planes which measure extralateral rights to it.[18] On the other hand, if a secondary vein crosses a location at a right angle to the discovery vein, extralateral rights in the secondary vein cannot be obtained because there is no right to pursue the strike or onward course of the vein.[19]

Between the two extremes, when the discovery vein and secondary vein do not have the same extent or direction, three views have been expressed. One, now in general disrepute, was to deny extralateral rights beyond the portion of the claim covered by extralateral rights in the discovery vein.[20] Another view, founded upon dicta in a Supreme Court decision, would permit extralateral rights within the area bounded by the end lines even though portions of the apex were outside the claim.[21] The view accepted by most authorities allows extralateral rights in secondary veins to the extent of their apex within a claim, limited by bounding planes drawn through the original end lines for the discovery

---

15 Walrath v. Champion Mining Co., 171 U.S. 293 (1898). The effect of the decision was to grant a greater extent on the dip of a secondary vein than there was apex within the mining claim; the extralateral rights were bounded by the end lines of the discovery vein. This decision is criticized in Zane, "A Problem in Mining Law: Walrath v. Champion Mining Company," 16 *Harv. L. Rev.* 94 (1902). Lindley denied that this result was intended by the court. 2 *Lindley on Mines* § 593 (3d ed. 1914).

16 Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Dev. Co., 109 F. 538 (C.C.D. Idaho 1900), *aff'g* 108 F. 189 (C.C.D. Idaho 1900).

17 *See* § 37.02[2], *supra*.

18 Walrath v. Champion Mining Co., 197 U.S. 193 (1897). *Accord* Jefferson Mining Co. v. Anchoria-Leland Mining & Milling Co., 32 Colo. 176, 75 P. 1070 (1904).

19 Cosmopolitan Mining Co. v. Foote, 101 F. 518 (C.C.D. Nev. 1900). *See also* § 37.04[2], *supra*.

20 Jefferson Mining Co. v. Anchoria-Leland Mining Co., 32 Colo. 176, 75 P. 1070 (1904). *See* § 37.04[3], *supra*.

21 Walrath v. Champion Mining Co., 197 U.S. 193 (1897). *See* Zane, "A Problem in Mining Law: Walrath v. Champion Mining Company," 16 *Harv. L. Rev.* 94 (1902).

vein.[22] Under this approach, the fact that the apex of a secondary vein does not cross an end line would be of no consequence,[23] nor would its position in a claim, whether the claim be patented or unpatented.[24]

§ 37.05 Subsurface Conflicts as to Extralateral Rights

[1] General Rules

Conflicts as to extralateral rights may occur underneath mining or non-mining land. In general, all mining lands, whether unpatented or patented, are subject to the exercise of valid extralateral rights, even though the apex itself may be located at a later date than the land under which it dips.[1] On the other hand, previously patented non-mining lands are not subject to extralateral rights, provided that on the date patent issued the land was not known to be valuable for minerals.[2] Unpatented non-mining lands are subject to extralateral rights regardless of the date of mining location.

As a general proposition, the locator of an apex may assert his statutory right to the dip irrespective of priority of location and may follow the dip underneath mining land previously located.[3] Some courts have held to the contrary in order to prevent intrusion upon the common law rights of a prior dip locator.[4] Since statutory enactments modify the common law, intraliminal rights recognized under the common law are subject to the statutory grant of extralateral rights.[5] Nevertheless, courts might be particularly reluctant to adhere to this concept against a prior dip locator when a junior apex locator's rights are predicated

---

22 Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447 (1903) (the extralateral rights of the locator of a secondary vein which had a longer apex than the discovery vein with which it united on the dip and passed out the north side line under adjoining land were determined by a line to the east parallel with the west end line). *See also* Anaconda Copper Mining Co. v. Pilot-Butte Mining Co., 52 Mont. 165, 156 P. 409 (1916).

23 Work Mining & Milling Co. v. Doctor Jack Pot Mining Co., 194 F. 620, 629 (8th Cir.), *cert. denied*, 226 U.S. 610 (1912).

24 Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447 (1903).

1 *See* Clark v. Fitzgerald, 171 U.S. 92 (1898).

2 *See* § 37.05[2], *infra*.

3 Colorado Cent. Consol. Mining Co. v. Turck, 50 F. 888, 895 (8th Cir. 1892) ("The statute conferring the right to follow a lode outside the side lines of a location, when the top or apex of the lode lies within the boundaries of the location, does not, in terms or by necessary implication, limit the exercise of that right, especially where mining claims are involved, to cases where the adjoining claims are held under junior locations or patents, and we think we would not be justified in placing such a limitation upon the right by construction."). *Accord* Cheesman v. Hart, 42 F. 98 (C.C.D Colo. 1890). See § 37.01[2], *supra*.

4 *E.g.*, Van Zandt v. Argentine Mining Co., 8 F. 725 (C.C.D. Colo. 1881) (jury instructions). *See* § 36.03[2], *supra*, discussing common law rights in mining locations.

5 *See* § 37.01[2], *supra*.

upon the fiction of a judicial apex[6] or patent has already issued.[7]

[2] Patented Non-Mining Lands

The Mining Law of 1872 grants extralateral rights to locators and patentees of lode claims, and also makes mineral patents subject to the extralateral rights of subsequent valid apex locations.[8] Nonmineral patents, however, neither confer extralateral rights nor are made subject to extralateral rights by statute.[9] Consequently, disputes as to the exercise of extralateral rights may arise whenever nonmineral patents have been issued for land in the vicinity of either patented or unpatented lode claims.

Courts have approached such conflicts using the principle that the United States cannot convey what it no longer owns or what has been specifically reserved from transfer by statute.[10] The extralateral rights accompanying a valid mining location cannot be defeated by a subsequent nonmineral patent because the rights vested when the mining claim was perfected and from then on were not the government's to grant.[11] On the other hand, when a nonmineral patent has been issued prior to the perfection of a valid mineral location, unless miner-

---

6 *See* § 37.02[2], *supra*.

7 While there is a presumption that patented nonmineral land does not contain an apex, the presumption is rebuttable, and patent proceedings establishing surface rights do not necessarily determine extralateral rights. *See* Butte & Superior Copper Co. v. Clark-Mont. Realty Co., 248 F. 609 (9th Cir. 1918), *aff'd*, 249 U.S. 12 (1919). *But see* Pacific Coast Mining & Milling Co. v. Spargo, 16 F. 348 (C.C.D. Cal. 1883), and Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., 36 F. 668 (C.C.D. Cal. 1888). Both cases hold that the extralateral rights of appropriators of veins apexing outside a patented claim apply only when the appropriator's claim was in existence at the time of entry and payment during patent proceedings.

8 *See* § 37.05[1], *supra*. *Cf.* Walrath v. Champion Mining Co., 171 U.S. 293 (1898) (a mineral patent is read as if the statute were written in it, whatever the terms of the patent may be).

9 *See* Empire Star Mines Co. v. Grass Valley Bullion Mines, 99 F.2d 228, 234 (9th Cir. 1939); Empire Star Mines Co. v. Butler, 72 Cal. App. 2d 466, 145 P.2d 49 (1944).

10 *See* Davis's Adm'r v. Weibold, 139 U.S. 507, 529-30 (1891) ("but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved from sale, the department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void"); Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., 36 F. 668, 669 (C.C.N.D. Cal. 1888) ("The United States can undoubtedly grant easements, and other limited rights, in any portion of the public lands, and subsequent purchasers must take them burdened with such easements or other rights, but when it has once disposed of its entire estate in the lands to one party, it can, afterwards, no more burden it with other rights than any other proprietor of lands."); Ames v. Empire Star Mines Co., 17 Cal. 2d 213, 110 P.2d 13, 16 (1941) ("Under the act they acquired legal title to such extralateral rights provided such rights had not been previously conveyed away by the government, for the Mining Act could not, of course, operate to divest private owners of existing vested rights.").

11 Hecla Mining Co. v. Atlas Mining Co., 92 Idaho 476, 445 P.2d 225, 227-228 (1968) (prior validly located claims which contained an apex carried extralateral rights as against subsequently issued nonmineral patent, and to the extent of conflict the nonmineral grant is void). *See* Ames v. Empire Star Mines Co., 17 Cal. 2d 213, 110 P.2d 13 (1941).

als were reserved or known to exist, the entire interest in the land vested in the patentee, and the subsequent mineral locator obtains no extralateral rights to minerals within the land.[12]

Nonmineral land grants and patents in the Western mining states generally reserve minerals to the United States, and it has been held that known minerals cannot pass in a nonmineral patent.[13] However, it is also a rule that, as against subsequent mineral locators, the absence of valuable minerals is conclusively established by the issuance of a nonmineral patent.[14] Therefore, a subsequent mineral locator cannot obtain extralateral rights in patented nonmineral lands by claiming that minerals were in fact known to occur at the time of patent.[15] A mineral locator who has perfected his claim prior to issuance of the nonmineral patent, however, will prevail on such a claim by virtue of the fact that his rights vested upon discovery of the minerals.[16]

Except for cases involving railroad patents,[17] the cases are not in agreement

---

12 Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., 36 F. 668 (C.C.N.D. Cal. 1888); Reeves v. Oregon Explor. Co., 127 Or. 686, 273 P. 389, 391 (1929) ("The right of a junior lode claimant, whether his claim be patented or unpatented, to follow the dip of his vein into an adjoining patented or unpatented lode claim, is one which arises under the mining laws, and is confined to titles acquired under the mining laws, and has no application to a case where the vein of a lode claim on its dip extends to lands the title to which has been acquired under agricultural patents.").

13 Davis's Adm'r v. Weibold, 139 U.S. 507 (1891), Deffeback v. Hawke, 115 U.S. 392 (1885); Lonely v. Scott, 57 Or. 378, 112 P. 172, 174 (1910) ("The rule is, that a patent to government land transfers to the patentee all veins, lodes or other minerals, within its boundaries, unless such mineral deposits were known to exist at the time of the issuance of the patent, in which latter case the known mineral deposits do not pass by the patent.").

14 Burke v. Southern Pac. R.R., 234 U.S. 669, 691-92 (1914) ("when a patent issues it is to be taken . . . as affording conclusive evidence of the non-mineral character of the land"); Davis's Adm'r v. Weibold, 139 U.S. 507 (1891); Dredge v. Husite Co., 78 Nev. 126, 369 P. 2d 676, 682 (1962); Reeves v. Oregon Explor. Co., 127 Or. 686, 273 P. 389, 391 (1929).

15 *See* Burke v. Southern Pac. R.R., 234 U.S. 669, 692 (1914) ("Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it.")

16 Helca Mining Co. v. Atlas Mining Co., 92 Idaho 476, 445 P.2d 225 (1968). *Accord* Ames v. Empire Star Mines Co., 17 Cal. 2d 213, 110 P.2d 13, 16 (1941) (an agricultural patent is conclusive as to the character of the land as against mining claims subsequently located, but such a patent, "issued merely on the basis of an ex parte hearing on behalf of the claimant to the land, can in no way abrogate the existing vested extralateral rights of parties who had nothing to do with the proceedings"); Chicago Quartz mining Co. v. Oliver, 75 Cal. 194, 16 P. 780 (1888).

17 Burke v. Southern Pac. R.R., 234 U.S. 669 (1914). *See* Wyoming v. United States, 255 U.S. 489 (1921). *See also* Northern Pac. Ry., 56 L.D. 201, 203 (1937) (the land department may inquire into the mineral character of railroad land at any time prior to the issuance of patent).

as to the date for determining when the rights of a nonmineral claimant vest so as to prevent subsequent mineral claimants from acquiring extralateral rights. Some cases hold that the date of issuance of the nonmineral patent controls,[18] while others follow the rule governing mineral patents and hold that the rights of the nonmineral claimant vest once he has done all that he was required to do to receive legal title.[19]

The specific language in the patents involved and the statutory authority for those patents are important in determining the relative rights of mineral and nonmineral patentees. Although most nonmineral grants and patents are in absolute terms and typically transfer to the patentee all unknown veins, lodes, and minerals within the boundaries of the land,[20] the language of a particular grant or patent should always be consulted for a reservation of minerals. In addition, the legislation authorizing the patent or grant should be consulted because the statute controls, and reservations required by statute are effective whether or not expressed in the patent.[21]

[3] Intersecting Veins

The Mining Law of 1872 provides that:

> Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of

---

18 Davis's Adm'r v. Weibold, 139 U.S. 507 (1891) (the patent to a townsite location is conclusive as to the character of the land as against mining claims subsequently located); Reeves v. Oregon Explor. Co., 127 Or. 686, 273 P. 389, 392 (1929) (a patent issued under the Timber and Stone Act "is conclusive upon all third parties whose rights did not attach before a patent was issued"). In both bases a mineral entry was made subsequent to the nonmineral patent, and, therefore, it was unnecessary to hold that the nonmineral patentee's rights vested prior to patent issuing in order for the nonmineral patentee to prevail. The *Davis* case, however, states at p. 528 that, "proceedings for the acquisition of title to a mining claim within a townsite, commenced before the issuance of a townsite patent, could undoubtedly be prosecuted to completion afterwards," and also asserts at p. 521: "There must be some point of time, when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing patent." It is clear in *Davis* that the date of patent is considered the date when rights vest in a nonmineral patentee.

19 Wyoming v. United States, 255 U.S. 490 (1920) (nonmineral character of school grant lands determined and rights vested when lands selected even though minerals were subsequently discovered prior to issuance of nonmineral patent); Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., 36 F. 668, 669 (C.C.N.D. Cal. 1888) (the equitable title to agricultural lands vests in the purchaser immediately upon the lawful entry, payment of purchase money, and issue of certificate of purchase thereon and cannot be defeated by subsequent mineral grants). *See* § 12.02[5], *supra*.

20 Such purported grants are ineffectual against prior valid unpatented mining claims to the extent that extralateral rights in the claims are vested. Hecla Mining Co. v. Atlas Mining Co., 92 Idaho 476, 445 P.2d 225 (1968) (nonmineral patent purporting to grant all rights to the subsurface area, including mineral rights without regard to apexes of veins or lodes, did not negate vested extralateral rights).

21 *See* § 9.02, *supra*. See Chapter 9, *supra*, for comprehensive discussion of federal reserved mineral interests.

> intersection; but the subsequent location shall have the right-of-way through the space of intersection for the purposes of the convenient working of the mine.[22]

A basic difficulty in applying this statute is the wide variation and unconventional patterns of most veins and lodes which defy ready classification as intersecting or crossing veins.[23] The statute clearly applies where there is an intersection, which ideally involves the crossing of two vein segments resembling the letter "X," but this is in contrast to a uniting which involves three vein segments resembling the letter "Y."[24] A determination of intersection is always a question of fact which involves the position of the strike, dip, and other physical characteristics of the vein.[25] An intersection can exist within the meaning of the statute even though it is geologically impossible to tell one intersecting vein from the other, as when there is a difference in age and hence an uncertainty as to which vein in fact cuts across the other.[26] Exacting geological tests and determinations are unnecessary, however, in that title to the "ore or mineral contained within the space of an intersection" is granted by statute to the prior location.[27]

In considering the nature and extent of a junior locator's right of way through the "space of intersection," a question arises whether the statute applies to intersections on the strike as well as on the dip of a vein. The statute is clearly applicable to dip intersections. The senior locator takes the ore in the "space of intersection," subject to a right of way in the nature of an easement in the junior locator to go through the intersection[28] and take ore on the dip of his vein.[29] The latter's

---

[22] 30 U.S.C. § 41 (1982).

[23] E. De Soto & A. Morrison, *Mining Rights on the Public Domain* 177, 178 (16th ed. 1936): "The U.S. Mining Acts concerning lode claims are based on the supposition or theory that a lode is a straight vein whose course can be redily ascertained and indicated by a straight line or a series of straight lines; and that occasionally such a vein is crossed by another in a similar straight line, merely requiring the right of way to give each claim its proper lode. But in fact the lode is rarely a straight line; it is seldom to be traced without confusion for more than a few hundred feet; and in its course other veins are absorbed into it; and offshoots (not only spurs, but perhaps better developed veins than itself) run about it; and in its extension downward, it invariably dips laterally; and often shows a fork of which both parts approach the surface; and it will divide, and may or may not unite at another point; and it will abut suddenly upon country rock and so be thrown far to one side; and instead of showing distinct lines, mineral veins are as irregular, as disproportioned in length and width, as much intermingled, though on a larger scale, as are the veins in a block of marble."

[24] *See* § 37.05[4], *infra*.

[25] *See* Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 145 P.2d 49, 62 (1944).

[26] *Id.* "[I]t seems apparent that, while the words 'intersect' and 'intersection' are used to describe the geological process by which one vein cuts across another of earlier formation, in which sense a time element inheres in the use of these words, that they were not used with that limited meaning in the statute. . . . The statute was designed to regulate subsurface ownership, rather than to describe geological development."

[27] *See id.* at 61-62.

[28] Twenty-One Mining Co. v. Original Sixteen to One Mine, Inc., 255 F. 658 (9th Cir. 1919); Watervale Mining Co. v. Leach, 4 Ariz. 34, 33 P. 418, 422 (1893) ("the ore within the space of intersection" is the body of ore contained within "the foot and hanging walls of one lode extended in a general course of that lode, and the foot and hanging walls of the intersecting lode extended upon its general course").

right is confined to a right of way to drift through, with no estate in, the vein crossed, and all ore must be left as the property of the crossed lode claimant.[30] It also seems clear that although the statute speaks of "two or more veins," the same rule applies to a dip intersection of two locations made upon different portions of one vein.[31]

With regard to the intersection of the strikes of two veins with conflicting locations made over each, there has been confusion as to the application of the statute. Early Colorado cases interpreted the statute to both grant a junior locator a right to the portion of his vein within the senior location's boundaries and a right of way for the purpose of its excavation.[32] The supreme courts of Arizona[33] and California[34] rejected the Colorado interpretation of the statute on the basis that under the Mining Law of 1872 the senior locator had by statute[35] already acquired the exclusive right to possess the ground covered by his location and all veins which apex within it. This approach was subsequently adopted by the Colorado Supreme Court in overruling its prior decision.[36] The court went on, however, to interpret "space of intersection" in the statute to mean the "intersection of the claims," and found that the statutory provision operates to reserve an easement that allows a junior locator a right of way across the senior location.[37] The decision was affirmed on review by the United States Supreme Court which agreed with the finding of a right of way but reserved its ruling as to its extent.[38]

---

29 Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 121 F. 973 (9th Cir. 1903); Davis v. Shepherd, 31 Colo. 141, 72 P. 57 (1903).

30 Pardee v. Murray, 4 Mont. 234, 2 P. 16 (1882); Watervale Mining Co. v. Leach, 4 Ariz. 34, 33 P. 418 (1893); Wilhelm v. Silvester, 101 Cal. 358, 35 P. 997 (1894); Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 27 Colo. 1, 59 P. 607 (1899), *aff'd*, 182 U.S. 499 (1901).

31 *See* G. Costigan, *Mining Law* § 120 (1908), "The principle of the statute covering lodes crossing on the dip is applied, on the theory that the statute is simply declaratory of that law of mining which would apply in the absence of a statute."

32 Hall v. Equator Mining Co., 11 F. Cas. 222 (C.C.D. Colo. n.d.) (No. 5,931); Branagan v. Dulaney, 8 Colo. 408, 8 P. 669, 671 (1885). *See also* Pardee v. Murray, 4 Mont. 234, 2 P. 16 (1882).

33 Watervale Mining Co. v. Leach, 4 Ariz. 34, 33 P. 418, 422 (1893) ("The statute does not in any place contemplate a crossing of locations.").

34 Wilhelm v. Silvester, 101 Cal. 358, 35 P. 997, 998 (1894) (inclining towards the view that the statute only applies to intersections on dip).

35 30 U.S.C. § 26 (1982).

36 Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 27 Colo. 1, 59 P. 607, 613, 616 (1899).

37 *Id.* at 615.

38 Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U.S. 499, 505 (1901): "Section 2332 [30 U.S.C. § 41] does not conflict with § 2322 [30 U.S.C. § 26], but supplements it. Section 2322 imposes a servitude upon the senior location, but does not otherwise affect the exclusive rights given the senior location. It gives a right of way to the junior location. To what extent, however, there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the Supreme Courts of California, Arizona and Montana, or through the space of intersection of the claims, as held by the Supreme Court of Colorado in the case at bar. It is not necessary to determine between these views. One of them is certainly correct, and therefore the contention of the plaintiff in error is not correct, and, more than that, it is not necessary to decide on this record."

[4] Uniting Veins

The Mining Law of 1872 provides that "where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."[39] It has been uniformly ruled in vein junction cases that the senior locator takes the entire vein below the point of union,[40] including forks and other splits below the junction into which the vein might later divide.[41] The rule of priority of location applies even though a junior locator has been granted a prior patent.[42] If two veins unite on their dip and enter into a third mining claim, the third claimant has no right to the veins.[43]

Whether a junction actually exists is a question of fact, and the same considerations apply as for intersections.[44] Sufficient doubt as to the existence of a junction will defeat the assertion that there is one, and it is not necessary to show as a defense that the vein structure is an intersection or otherwise.[45] If a junction is shown to exist, however, the junior locator may take the ore in his vein to the boundary of the union, and there is no duty to leave a barrier of ore for the convenience of the senior locator.[46] The statute's provision does not apply to veins uniting on the strike, and such veins belong to the senior location in which they apex.[47]

[5] Conflicts on Different Portions of the Same Vein

Two or more mining claims may be staked upon a single vein without conflicting because their end lines may be placed so that, when projected in the direction of the dip, they do not cross and include extralateral territory belonging to the other claim. Conflicts as to extralateral rights on a single vein can arise,

---

39 30 U.S.C. § 41 (1982).

40 Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U.S. 499 (1901); Little Josephine Mining Co. v. Fullerton, 58 F. 521, 522 (8th Cir. 1893); Consolidated Wyo. Gold Mining Co. v. Champion Mining Co., 63 F. 540 (C.C.N.D. Cal. 1894); Watervale Mining Co. v. Leach, 4 Ariz. 34, 33 P. 418 (1893); Wilhelm v. Silvester, 101 Cal. 358, 35 P. 997 (1894); Stinchfield v. Gillis, 96 Cal. 33, 30 P. 839 (1892); Rico-Argentine Mining Co. v. Rico Consol. Mining Co., 74 Colo. 444, 223 P. 31 (1923).

41 Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 145 P.2d 49, 56-57 (1944).

42 *See* Champion Mining Co. v. Consolidated Wyo. Gold Mining Co., 75 Cal. 78, 16 P. 513 (1888). *See also* Little Josephine Mining Co. v. Fullerton, 58 F. 521 (8th Cir. 1893); Consolidated Wyo. Gold Mining Co. v. Champion Mining Co., 63 F. 540 (C.C.N.D. Cal. 1894); Lee v. Stahl, 13 Colo. 174, 22 P. 436 (1889); Anaconda Copper Mining Co. v. Pilot-Butte Mining Co., 51 Mont. 443, 153 P. 1006 (1915).

43 Roxanna Gold Mining & Tunneling Co. v. Cone, 100 F. 168 (C.C.D. Colo. 1899).

44 *See* § 37.05[3], *supra*.

45 Clark-Mont. Realty Co. v. Butte & Superior Copper Co., 233 F. 547, 559 (D. Mont. 1916). *See also* Keely v. Ophir Hill Consol. Mining Co., 169 F. 601 (8th Cir. 1909).

46 Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 145 P.2d 49, 82-83 (1944).

47 Book v. Justice Mining Co., 58 F. 106 (C.C.D. Nev. 1893); Lee v. Stahl, 13 Colo. 174, 22 P. 436 (1889).

however, if the end lines of two locations are laid at such angles to each other that their extensions in the direction of the dip cross each other. This may occur if the strike of the vein is iregular, or even if the strike is straight if the end lines of the locations are laid at an angle, perhaps because the direction of the strike was misapprehended.

The general rule applicable to the crossing of extralateral rights on the dip of a vein is that priority of location governs as to the conflict area, so the senior locator prevails.[48] It is also recognized that a junior locator has the right to follow his vein to the point of conflict, that he has an easement through the conflict area, and that he is entitled to extralateral rights in the extension of his vein beyond the point of conflict.[49] This is true even when a junior locator's extralateral plane of rights is wholly bisected by the senior locator's extralateral plane.[50] The right of a junior locator to his vein beyond the conflict area obtains from a literal reading of the statute that possessory rights in veins are granted "throughout their entire depth" between the end lines of a location.[51] While an easement through the conflict area is not given by the statute, granting such an easement is consistent with the portion of the statute applicable to cross lodes,[52] providing the same result for one vein as for two.

---

48 Argentine Mining Co. v. Terrible Mining Co., 122 U.S. 478 (1887). *See* § 37.05[3], *supra*.

49 Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Dev. Co., 134 F. 268 (C.C.D. Idaho 1903); Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 121 F. 973 (9th Cir. 1903); Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 114 F. 417 (9th Cir. 1902). *Accord* Davis v. Shepherd, 31 Colo. 141, 72 P. 57 (1903).

50 Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 121 F. 973, 976 (9th Cir. 1903).

51 30 U.S.C. § 26 (1982). Even if it were supposed that the junior locator has no right of easement through the conflict area, that would be a mere inconvenience to the junior locator and not a limitation upon his title beyond the area of conflict.

52 *See* § 37.05[3], *supra*. The easement granted by the statute in the case of cross lodes, or intersecting veins, is declaratory of the mining law and "would probably be recognized in the absence of a statute. . . ." Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 121 F. 973, 977 (9th Cir. 1903). Since the government owns title to all of the land and all of the vein, grants of a portion to *A* and a subsequent portion to *B* would be subject to the rule relative to private conveyances that a right of access is reserved even though not explicitly stated. *See* Montana Mining Co. v. St. Louis Mining & Milling Co., 204 U.S. 204, 219 (1907).

1 Alaska 311

Rule 16, subd. 2 (31 C. C. A. clx, 90 Fed. clx), also provides that the respondent may docket the case in the Circuit Court of Appeals, and file a copy of the record there, at any time after the appeal has been perfected in the lower court, and may have the same heard upon its merits. This would have enabled the plaintiff in this cause to have determined the question of the appealable nature of the order complained of upon the failure of the appellants to perfect their appeal within the 30 days. The attorneys who now ask to vacate the order allowing the appeal have been the respondent's attorneys since April 16th, and could have adopted the correct practice during the open season, but did not do so. For the reason that the cause has been regularly appealed to the Circuit Court of Appeals, and for the want of jurisdiction to do so, this court is now compelled to overrule the motion to vacate, and leave the respondent to his remedy in the Circuit Court of Appeals. The motion to vacate is denied.

THE ALASKA GOLD MIN. CO. v. BARBRIDGE et al.

(First Division. Juneau. December Term, 1901.)

No. 49a.

1. TIDE LANDS—MINES AND MINING.

Lands lying below ordinary high tide on the shore of the ocean and arms of the sea in the District of Alaska are not subject to location under the mining laws of the United States.

2. MINES AND MINERALS—EVIDENCE—PATENT.

As a general rule the recitals in a mining patent are conclusive evidence of the extent and boundaries of the claim; other evidence may be admitted to determine the location of the monuments and boundaries called for by the patent.

3. INJUNCTION—TRESPASS.

One who, within the District of Alaska, trespasses upon the tide lands not subject to location under the mineral laws of the United States, may be enjoined from sinking shafts thereon, and

causing an increased flow of water into, and threatening the complete flooding and irreparable injury to, lower levels excavated by an adjoining mine owner underneath the same tide lands in following his vein or lode beyond his boundary line.

Action to Restrain Damage to Mine.

Maloney & Cobb, for plaintiff.
Crews & Hellenthal, for defendants.

BROWN, District Judge. This action was brought to restrain and enjoin the defendants from sinking a certain shaft situated at a point where the surface of the earth is below mean high tide on Gastineau channel, and immediately above the workings of the plaintiff corporation on a vein or lode, the apex of which is within the surface boundaries of the mining claim of the corporation. It is alleged that, by following the vein or lode on the dip thereof, the plaintiff has passed beyond the side line of its lode mining claim and beyond the shore line of Gastineau channel, which said channel is an arm of the sea, and is now working under said arm of the sea, the greatest working depth attained being about 900 feet; that the defendants, in sinking their shaft and discharging blasts in that behalf, cause the ground beneath to vibrate and the waters of the sea to flow through fissures in the rock that forms the roof above the workings of the plaintiff, thereby causing large quantities of the water of the sea to flow in upon the plaintiff, to its great and irreparable injury; and that unless the defendants are restrained from further pursuing the work of sinking their said shaft, the plaintiff's mine will become flooded and made valueless. The defendants deny these matters generally, but admit they are engaged in sinking a shaft, etc.; allege it to be on a lode mining claim properly located by them, and that their work in no wise damages plaintiff. This is practically the case before the court.

The evidence shows that plaintiff has a patent to its certain mining claim, and the patents offered in evidence show by reference to points, distances, courses, etc., that the line of said claim, at some points, is some little distance from the shore line of mean high tide of said channel. It further appears that the defendants have sunk shafts a few feet in depth, the surface at the point of sinking being above mean high tide, and have exposed rock in place of some value, the quartz taken therefrom showing good value; that shafts have been sunk at one or more places, the defendants claiming a lawful location of a lode mining claim, and that they are entitled to work the same even though some injury should result therefrom to the plaintiff. It is admitted that the particular shaft complained of is on what defendants claim to be the strike of their vein, and that the surface where said shaft was begun is below mean high tide. It further appears from the evidence, the admitted facts, and the personal observation of the court when present upon the ground, on invitation of the parties to this action, that only a few feet of the vein claimed by defendants extends, at either end thereof, above mean high tide, and that, following the strike of the vein or lode a few feet from the point of discovery, the vein passed below the tide line, and that the apex of the vein, except at low tide, other than these few feet, is beneath the sea, and a considerable portion is below even low tide.

It is contended by the defendants that, under the mining laws of the United States, all of the public mineral lands of the United States are subject to exploration and location; that mineral lands below high tide are a part of the public mineral lands of the United States, and therefore subject to exploration and location the same as the like character of land above high tide; that, beginning at or near the shore line, the defendants have a right to follow a vein upon the

strike thereof beyond the shore line beneath tide waters for the entire length of a claim. As before stated, except for a few feet, the apex of the entire vein claimed by the defendants is below the tide line. The above proposition is denied and contested by plaintiff. It is further claimed by plaintiff that plaintiff's land runs to the shore line of Gastineau channel and to mean high tide thereof; that the points designated by stakes constitute the meander line, and, though these are a few feet back from the point of mean high tide, their patented land in fact runs to mean high tide; and that therefore there is no land above shore line on which defendants could sink a shaft, make explorations, or locate a lode mining claim or any part thereof.

Thus are outlined the main points contested in this case. To what extent it is necessary for the court to follow these in order to determine the rights of the parties under the pleadings, the court does not at this time determine. It is sufficient to say that some of them will be examined. The arguments of counsel have been long, learned, and highly interesting, but, if counsel will excuse the court for so saying, unnecessary to follow at length in order to determine this case.

It seems to be expedient to determine, first, whether a mining claim can be located on lodes situated on the shore of the sea below mean high tide, or whether, where the vein or lode extends on its strike beyond the shore line under the sea, the discoverer can lawfully locate the part of the lode above mean high tide, and include in such location the larger part thereof that lies below the waters. Stating the proposition in another way, can the locator of a mining claim lawfully include in his claim any mineral lands of the United States that may extend into and under the sea below mean high tide, or must his claim end at the shore line?

Section 2319 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1424] provides that:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States," etc.

It is claimed that the language of the section is broad enough to include land below, as well as above, high tide. Considering the language of the section, it might possibly include any of the mineral lands of the United States; but, under the policy of our government, the tide lands have never been sold by the general government. The original states, upon the formation of the Union, held the tide lands subject to their several control. In order that new states, carved out of the various portions of the public domain, should, when admitted as states of the Union, be admitted on an equality with all the other states, it has been deemed wise —and perhaps obligatory upon the general government—to so hold these tide lands that, when the new states should be formed, they should be transferred to the sole control of such states, to be disposed of as might seem wise to them. Considering this policy of the government in dealing with this class of lands, it would seem that the legislation by Congress relative to the disposition of its agricultural and mineral lands should be treated as subject in this respect to this general policy. It has been frequently said by our courts of last resort that these tide lands do not really belong to the United States, and are not subject to disposition, but are simply by the United States held in trust for the new states that shall be carved out of the public domain. Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428. See, also, Shively v. Bowlby, 152 U. S. 47, 14 Sup. Ct. 548, 38 L. Ed. 331; Knight v. The U. S. Land Ass'n, 142 U. S. 163,

12 Sup. Ct. 258, 35 L. Ed. 974; Weber v. Commissioners, 18 Wall. 65, 21 L. Ed. 798.

While this doctrine is supported by high authority, it seems to me that it is true only in the sense that the general government has established this policy in dealing with its lands. That the general government is the owner, and might, if it chose, dispose of them as it pleased, I have no doubt. But it is not difficult to perceive that the disposition of the tide lands in the outlying district of the United States might, when new states should be carved out of the public domain, create difficulties in the admission of the same as states of the Union; hence the policy of the government. It is fair to conclude, in construing the act of Congress providing for the disposition of the public lands of the United States, that the Congress only intended to provide for the disposition of such lands as have been held for disposition under the general policy of the government. In Weber v. Harbor Commissioners, 18 Wall. 57, 21 L. Ed. 798, Mr. Justice Field, delivering the opinion in the case, said:

"Although the title to the soil under the tide waters of the bay was acquired by the United States by cession from Mexico equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union on an equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits, passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters."

In Knight v. U. S. Land Association, Mr. Justice Lamar said:

"It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states, were reserved to the several states, and that the new states since admitted have the same rights, sover-

eignty, and jurisdiction in that behalf as the original states possessed within their respective borders."

In the case of Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, Mr. Justice Bradley, speaking for a majority of the court, said:

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state in which they are situated, if a state has been organized and established there."

In many other cases in the Supreme Court, the dictum is frequently found that the lands belonging to the United States, in territories, below high-water mark, are held in trust for the future state, and title therein is not vested in the United States, to the extent that the same might be sold. If this should be deemed to be true as a legal proposition, then, of course, as before stated, the laws of Congress providing for the disposition of the public mineral lands could by no possibility include the lands below ordinary high tide.

But another result might follow if this were true. If the general government has no title in these lands, and holds them simply in trust, the title being in the future state, then a person having a lode location near the shore of the sea might not be permitted to follow his ledge on the dip beyond the shore line, because it is very apparent that, if the United States cannot dispose of this land, any grant it may convey in the sale of a mining claim must stop at the line of the grant, and cannot extend into lands that the United States does not own. It is well settled that, where agricultural lands have been conveyed by patent, a party obtaining title to a contiguous mining claim cannot follow the dip of his vein beyond a point where a line let fall perpendicularly from the boundaries of the agricultural land would strike the lip of the vein. This is true because, where agricultural

land is conveyed by the United States, it carries everything with it, not only within its boundaries upon the surface, but to any depth which the party may seek to go to explore it. But, as before stated, it is not believed that these dicta—by our very learned Supreme Court in many cases—can be the true theory of the law in these matters.

Mr. Justice Gray, in Shively v. Bowlby, 152 U. S. 47, 14 Sup. Ct. 565, 38 L. Ed. 331, after quoting many of the decisions on this question, says:

"Notwithstanding the dicta contained in some of the opinions of this court already quoted to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true."

Judge Gray in this case, referring to the opinion of Chief Justice Taney, says:

"One delivering an opinion already cited, after the subject has been much considered, in cases from Alabama, said, 'Undoubtedly Congress might have granted this land to a patentee, or confirmed his Spanish grant, before Alabama became a state.'"

Again, Judge Gray says:

"By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories so long as they remain in a territorial condition"—citing many cases. "We cannot doubt, therefore," continues Judge Gray, "that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territories. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek."

Speaking of the policy of the general government in reference to these particular lands, Judge Gray says:

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways, and, being chiefly valuable for the purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states."

Concluding this opinion, which is very learned and reviews all the cases upon this subject, Judge Gray says:

"The United States, while they hold the country as a territory, having all the powers both of national and municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws, and, unless in some cases of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters and the soil under them to the control of the states, respectively, when organized and admitted into the Union."

From the discussion of this question by the learned Mr. Justice Gray, we think it is evident, considering the general policy of the government, that Congress never intended, by its act giving to citizens the right to go upon the public lands and explore the same for mineral, and obtain title thereto on proper discovery and location, that such right should ever extend to the lands lying below ordinary high

tide on the shore of the ocean and the arms of the sea. The conclusion of the court, therefore, in this case, is that, if the defendants have acquired any right in the lands upon the shore of Gastineau channel, so soon as their vein on the strike thereof goes beyond the shore line and below mean high tide, they can make no claim whatever thereto; and in going upon a ledge or lode at any such place, and undertaking to occupy the same and acquire title, they place themselves in the position of trespassers having no rights whatever in the land or the lode, and no right to occupy or possess the same.

Second. It is claimed on the part of the plaintiff that the patented lands constituting their several lode mining claims run to the shore of Gastineau channel, and that there is no land between their lode claim and the said channel upon which the defendants could lawfully enter to make exploration or discovery; that the apices of any veins that can be found above mean high tide along the shore of said channel, opposite their several patented claims, are all within the boundary lines of their several patented claims; that the meander line fixing the boundaries of their several claims, while indicated in the patent and survey by several stakes and monuments, is in fact the meander line of Gastineau channel, notwithstanding such fixed boundary points as are described in the patent. In aid of the description of the land covered by their several patents, they offer the field notes of the survey made by the United States mineral surveyor Garside, and also the oral testimony of Garside, to show the intent and purpose of said survey in fixing said boundary line along Gastineau channel. When this evidence was offered, objection was made by the defendants, on the ground that the same was incompetent, and that the patent is the only competent evidence that can be offered in this case to show the lands embraced by the same. It is believed that

the legal effect of a conveyance must be determined by the terms employed therein, and that nothing can be added to or taken from the same by parol testimony. This is undoubtedly the general rule controlling the question of testimony. Fletcher v. Phelps, 28 Vt. 262; Platt v. Jones, 43 Cal. 219; Bartlett v. Corliss, 63 Me. 287. But if there is a latent ambiguity in the description itself as furnished by the deed or patent, then the true intent and meaning may be added by parol. White v. Lunning, 93 U. S. 515, 23 L. Ed. 938; Pride v. Lunt, 19 Me. 115.

As to patent for mining claims, as a general rule, a patent is conclusive as to the limits of a location, and it cannot be assailed by showing that its actual boundaries are different from those described in the patent. In Waterloo Min. Co. v. Doe, 27 C. C. A. 50, 82 Fed. 45, it was claimed that a certain portion of the ground had been omitted from the patent through the fraudulent acts of one Bohton. The acts of Bohton, the court thought, did not amount to fraud, and, in the absence of fraud, it was held that the patent was conclusive evidence as to the limits of the claim patented. In 27 C. C. A. 50, 82 Fed. 45–50, the question arose as to whether the party in possession under the patent could follow the dip of their vein beyond the side lines extended down vertically. The defendant in that case contended that the plaintiff had no extralateral rights, as his end lines were not parallel. The plaintiff's patent, however, described the end lines as being parallel. The court held that, since the patent described the end lines as parallel, the court was bound by the terms thereof, and no evidence could be received that tended to show that the end lines were not parallel. The court said:

"The presumptions are in favor of the correctness of the land department in issuing these patents. Its action was within its jurisdiction, and we cannot go behind the same in a collateral action."

Again, in Golden Reward Min. Co. v. Buxton Min. Co., 38 C. C. A. 228, 97 Fed. 413, the contest was between two patented claims—the Bonanza and the Silver Case. Fraud was alleged, but not proven. The court held that, in the absence of fraud or mistake, the boundaries as described in the patent were conclusive.

It is said in the case at bar that the field notes that have been offered in evidence make reference to the meander line of Gastineau channel, but the patent offered in evidence makes no reference to Gastineau channel whatever, and determines the lines by the monuments and courses and distances run. The contention of the defendants is that the field notes of the surveyor cannot be introduced to help out the lines established by the patent, or to explain the same; that there is no latent or patent ambiguity in the conveyance issued by the government, and that there is therefore nothing to explain. It is not claimed by the plaintiff that there is any mistake in the patent. And not only are the field notes of the surveyor that were offered in evidence objected to by the defendants, but also the oral testimony of Surveyor C. W. Garside as to what his intentions were in fixing the line of the claim owned by plaintiff bordering on Gastineau channel. My recollection is that the field notes referred but once to the tide water of the channel. Nothing in the field notes and nothing in the patent is found fixing the boundaries of the claim on that side by the line of the sea or the shore line of Gastineau channel. The court is unable to see in what particular the field notes of the surveyor aid or explain the directions and distances given in the patent itself. The field notes are therefore rejected as evidence in this case, as also are the statements of the witness Garside as to his intentions in making the survey of said claim. It is evident that the surveyor's intentions did not enter into the consideration of the land department when title was con-

veyed to the land in question. They cannot, therefore, be considered in determining what land the government intended to convey by its patent. Garside's testimony, however, that he placed the different stakes that bounded the claim on the side next to Gastineau channel, upon the line of ordinary tide is, perhaps, testimony of importance in the case.

Third. Another fact that may be considered of some importance in determining the rights of the parties to this action is the width of the claim that was patented, and that is now owned by the plaintiff. An examination of the maps offered in evidence, and the patent itself, as to the distances, shows that the claim is not 600 feet wide, and that the claimants did not take 300 feet on each side of their vein, as was their right under the law. Having taken less than the full width on the side bordering on Gastineau channel, the only possible reason that could exist to indicate why the claim was not taken of its usual width must have been the limit that was fixed by natural conditions, viz., the shore line of Gastineau channel.

The defendant Barbridge, in testifying in this case, says that a certain stake, that was pointed out to the judge of this court when examining the ground in person and while the attorneys and officers and parties were present, is now where it has stood for many years and where it was originally placed. This stake was placed upon the bank, as close to the edge of the same as it could be planted, and where the bank from the beach rises abruptly some six feet or more, and as close to the tide line as it could well be placed without danger of being washed away by the waves that would roll up at times from the sea, the waves having evidently at times washed away the ground up the edge of the embankment on which the post was placed. MacDonald, the manager of the plaintiff corporation, stated in the presence of the court that this stake, so far as he knew, was one of the posts

marking the boundary of plaintiff's claim. Another point marked and designated on this line as at the corner of the mill was evidently below mean high tide before the beach at the shore of the sea had been filled in by débris and waste from the mill. But at the point where the stake is there was a controversy between MacDonald, on behalf of the corporation, and Barbridge, one of the defendants, as to whether the shaft of the defendants, a hole about six or eight feet deep that had been sunk near the post referred to, was in part within the boundaries of the patented claim, or whether the same was all outside. The court is of the opinion that it is not important whether said shaft is in part within, or in part or wholly without, the lines of the patented claim. In Railroad Co. v. Schurmeier, 7 Wall. 272, 10 L. Ed. 74, it is said:

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser."

It is very earnestly contended by counsel for the plaintiff that this case is an authority in support of his claim that the line as indicated by the patent, and the survey as shown by the field notes, were simply the establishment of a meander line on the shores of Gastineau channel for the convenience of the government in determining the acreage of land within the proposed claim, and not with a view of excluding from the patent any portion of the land which might rightfully come within said claim that was above the tide waters of Gastineau channe.. Many cases of this character are presented, but they all refer to surveys of the public agricultural lands of the United States and certain rules of the department that require the United States surveyors, in subdividing

sections where a portion thereof would border upon the sea or upon lakes or river or tide waters, not with a view of excluding any of the land from the fractional portion of the section, but to determine the price to be paid, etc.; and that, notwithstanding such meander line so established on the shore of a lake or sea, the land should run to the sea. But I fail to see the force of the principles and theories announced by the court in Railroad v. Schurmeier, and many other cases to the same effect, when applied to the case at bar. No authority has been shown vesting in the United States mineral surveyor any right or authority to establish a meander line, and the department very evidently refrains from any mention of such a line in the patent. No authority is shown under the rules of the Department of the Interior, having the sale of the public lands in charge, for arranging or establishing any such meander lines upon the mineral lands. It would, therefore, seem that in this case the court is bound by the usual rule that the language of the patent governs, and I am therefore compelled to hold practically that the lines of the claim in controversy are established according to the points, lines, courses, and distances mentioned in the patent.

In White v. Luning, 93 U. S. 524, 23 L. Ed. 938, the court says:

"It is true that, as a general rule, monuments, natural or artificial, referred to in a deed, control, on its construction, rather than courses and distances; but this rule is not inflexible. It yields wherever, taking all the particulars of the deed together, it will be absurd to apply it."

At common law the ordinary high-water mark is the boundary of the adjoining lands. Commonwealth v. Alger, 7 Cush. 53; Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493. Had the land in question been bounded by the sea, the tide water, or by the harbor, bay, cove, creek, or any such words, or had the patent described a corner set upon the tide line at the

sea, and thence running with the sinuosities of the shore to another point, there would have been no question as to what land would have been included within the grant in this case. Whatever may be the rule for determining grants where they run to the sea—and unquestionably under all such descriptions they run to ordinary high tide and are bounded thereby—we have no such description in this patent, and we are bound to determine the boundaries of the land by the patent itself. But it is not always easy to determine to just what point the land embraced in the patent extends, because of the monuments being destroyed and thrown down or removed, as it is claimed in some instances they were in this case. We may be compelled to resort to parol evidence, surveys and measurements, to determine the point at which monuments were placed and should be found. Such evidence has been offered and received in this case. The testimony of Garside, the original surveyor of these claims, is to the effect that the posts and monuments, as originally set, were placed upon the tide line, and that the line indicated between the monuments was as near on the tide line as it could be placed. Considering this testimony, and considering further the width of this claim, its relation to the tide line, the quantity of land conveyed being less than is usually covered in a full-sized mining claim, 600 by 1,500 feet; the fact that the full 300 feet is not taken on the side line next to Gastineau channel—all these matters may be reasonably considered in determining where the line of this claim really was and is, and what and where the lands are as described in the terms of the patent. While this question is not one necessary for the court to decide in this case, I am inclined to the opinion that the patented claim owned by the plaintiff company ran to ordinary high tide and included all the land above high tide within its limits, and that there was, in fact, no land above high tide upon which a location could be properly

made by the defendants. But, as stated, this is not a matter of any special interest to the court, and one that the court does not now definitely pass upon.

Fourth. The proposition before the court is in reality a simple one. The defendants were about to sink a shaft at a point close to the shore of Gastineau channel, over which the tide ebbed and flowed every day, and which was immediately above some of the workings of plaintiff in this case. These people were here upon this land below mean high tide, where they could acquire no right whatsoever, and where they were trespassers upon the lands and rights of the United States. The plaintiff is the owner of several patented claims; has expended many hundreds of thousands of dollars in developing the same and in extracting minerals from the ores therein; has, it is said, distributed among its stockholders from $4,000,000 to $5,000,000; is employing about a thousand men; and has followed down on the dip of its vein until it is now beneath the waters of an arm of the sea called "Gastineau Channel," and immediately beneath this particular shaft of the defendants. It further appears that any work on the shaft of defendants in question, and the blasts being exploded there, so increase the flow of water through the roof above where the plaintiff is taking out ore that, if continued, it will drive plaintiff from its mine and prevent the further working of the same; and because of this result plaintiff asks that the defendants be restrained from such work.

If these defendants had an unquestioned right to occupy the ground where they now are, and to develop a lode which they may have undertaken to locate and that is situated below tide water, they could hardly use their own in such a way as to bring inevitable calamity on their neighbor. One may not sink on the line of his own ground and excavate it in such a way as to allow his neighbor's land to fall into

the excavation so made. Matters of this character have been so frequently determined that they now need no discussion and no citation of authorities; the proposition is settled beyond controversy. Can it be said, then, that these defendants, having no rights whatever below tide water in the location and development of a mine so situated, may be permitted to enter upon and so work the same as to destroy the property of the plaintiff, which is engaged in a like business, but has reached the point beneath the tide waters by following the dip of a vein the apex of which is within its patented land? While it is true that, under the general policy of the government, lands below tide water are not for sale and disposition, and have never been held for sale and disposition by the United States, these tide lands having been reserved to the states that might be organized out of the territories of the United States, the purposes for which these lands are held in trust for the future state are trade, commerce, navigation, and the convenience of the public, and for such purposes only. If the plaintiff is usurping any of the rights of the government in the land it now possesses, by the working of its mining claim beneath the water of the sea, no one, save the United States, through its proper channels, can complain. They are in possession, and by their efforts are adding millions to the wealth of the country. The defendants, though trespassers upon the rights of the United States in going upon and locating land below ordinary high tide, were they in nowise damaging any one else, could not be stopped, perhaps, except upon complaint by the government. But, as before stated, even if they were rightfully in possession of the ground where their shaft is being sunk, and were operating in a way to injure and destroy property owned by the plaintiff, the court is of the opinion that the defendants should be restrained and enjoined from further work. Under the facts and circumstances of this

case, the court is compelled to the conclusion that the defendants should be restrained and enjoined from further continuing the sinking of their shaft, or further interfering in this behalf with the rights of the plaintiff.

It may be said in this connection that the situation of the parties plaintiff and defendant are not the same. The plaintiff has a lawful location, and, under the mining laws of the United States, a lawful right to pursue its vein on its dips beyond the side lines of its claim and wherever it may run; and while, as before observed, the lands below mean high tide are reserved from sale, it is believed that the law giving a party the right to follow all veins, the apices of which are within the limits of his claim, even outside of the side lines thereof, would permit him to go below the waters of the sea in following such vein, without trespassing any law of property existing in the United States.

The temporary injunction heretofore issued under the order of this court will therefore be made perpetual, and the plaintiffs are awarded their costs and disbursements.

FOX, Administrator, et al. v. MACKAY et al.

(First Division. Juneau. December Term, 1901.)

No. 483.

1. PARTIES—ABATEMENT—ADMINISTRATOR—SURVIVORSHIP.

While, under section 956, Rev. St. [U. S. Comp. St. 1901, p. 697], an action may be continued by one surviving plaintiff against a surviving defendant without abatement, an administrator can neither continue nor defend an action of this character.

2. MINES AND MINERALS—ADVERSE SUIT—PUBLIC LANDS.

When an application is made to the United States Land Department for a patent to a mining claim, and an adverse claim

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

9/5/89
Date

02-519 (REV 8/78)


HB
280

Bradley
4/1/85✓

Original sponsors: Navarre and Goll

IN THE HOUSE BY THE RESOURCES COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 280 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act creating the Anchor River and Fritz Creek Critical Habitat Area."

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

* Section 1. AS 16.20.230 is amended by adding a new paragraph to read:

(12) Anchor River and Fritz Creek: All land and water contained in the following description:

(A) Township 4 South, Range 13 West, Seward Meridian
Section 25
Section 35
Section 36

(B) Township 5 South, Range 12 West, Seward Meridian
Sections 17 - 20

(C) Township 5 South, Range 13 West, Seward Meridian
Section 2
Section 3
Section 4: E 1/2
Section 8: S 1/2
Sections 9 - 11
Sections 13 - 20
Section 21: W 1/2
Section 24

(D) Township 5 South, Range 14 West, Seward Meridian
Section 13
Section 20: NE 1/4

Sections 21 - 24

Section 26: N 1/2

Section 27: N 1/2

Section 28: N 1/2

(New language)

* Sec. 2. AS 16.20.230 is amended by adding a new subsection to read:

(b) Notwithstanding AS 16.20.220 and the establishment of the Anchor River and Fritz Creek Critical Habitat Area under AS 16.20.-230(a)(12),

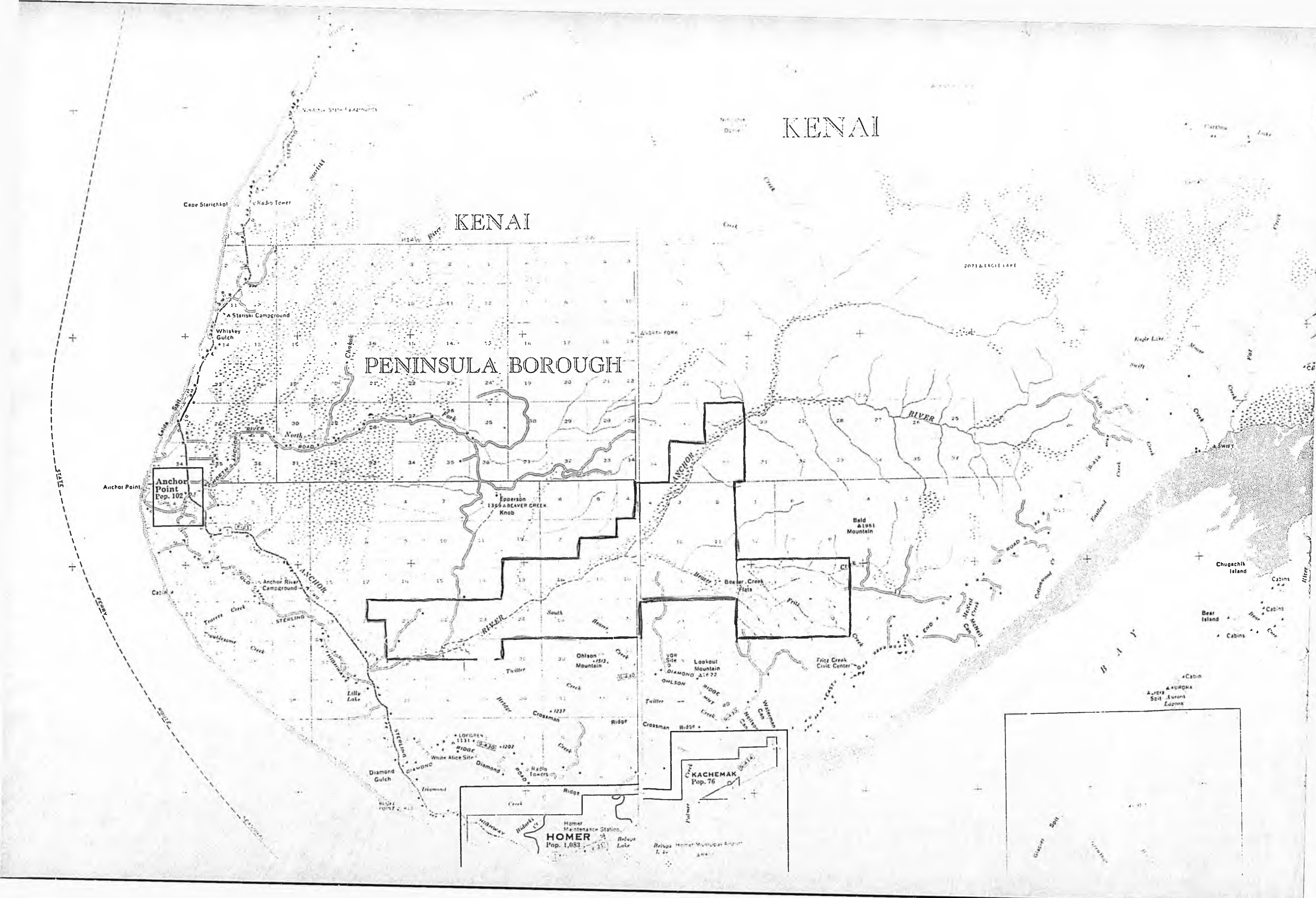
(1) the use of Fritz Creek as a municipal and community water source is protected within the Anchor River and Fritz Creek Critical Habitat Area;

(2) the possibility of the construction of a dam and reservoir on Fritz Creek is reserved within the Anchor River and Fritz Creek Critical Habitat Area;

(Deletion * (See Original Bill))

(3) the use and enjoyment of inholdings is guaranteed within the Anchor River and Fritz Creek Critical Habitat Area;

(4) the land owned by the Kenai Peninsula Borough that is located within the boundaries of the Anchor River and Fritz Creek Critical Habitat Area and that is committed to the Anchor River and Fritz Creek Critical Habitat Area by the borough is subject to joint management by the Department of Fish and Game and the Kenai Peninsula Borough.


KENAI
KENAI
PENINSULA BOROUGH
Cape Starichkof
Radio Tower
Stariski Campground
Whiskey Gulch
Anchor Point
Anchor Point
Pop. 102
Anchor River Campground
Epperson
Knob
Bald Mountain
Beaver Creek Flats
Ohlson Mountain
Lookout Mountain
Fritz Creek Civic Center
Chugachik Island
Bear Island
Cabins
Lilly Lake
Crossman Ridge
White Alice Site
Radio Towers
Diamond Gulch
KACHEMAK
Pop. 76
HOMER
Pop. 1,083
Homer Maintenance Station
Aurora Spit
Aurora Lagoon
Cabin

```
 CHAPTER   = 16.20
 SECTION   = 16.20.240
 TITLE     = 16
HEADINGS   TITLE 16.
           FISH AND GAME.
           CHAPTER 20.
           CONSERVATION AND PROTECTION OF ALASKAN WILDLIFE.
           ARTICLE 5.
           FISH AND GAME CRITICAL HABITAT AREAS.
CITATION   SEC. 16.20.240.
CATCH LINE
            REGULATIONS.
TEXT       THE BOARD OF FISHERIES AND THE BOARD OF GAME, WHERE APPROPRIATE,
           SHALL ADOPT REGULATIONS THEY CONSIDER ADVISABLE FOR CONSERVATION
           AND PROTECTION PURPOSES GOVERNING THE TAKING OF FISH AND GAME IN
           STATE FISH AND GAME CRITICAL HABITAT AREAS.
```

```
 CHAPTER   = 16.20
 SECTION   = 16.20.250
 TITLE     = 16
HEADINGS   TITLE 16.
           FISH AND GAME.
           CHAPTER 20.
           CONSERVATION AND PROTECTION OF ALASKAN WILDLIFE.
           ARTICLE 5.
           FISH AND GAME CRITICAL HABITAT AREAS.
CITATION   SEC. 16.20.250.
CATCH LINE
            MULTIPLE LAND USE.
TEXT       BEFORE THE USE, LEASE OR OTHER DISPOSAL OF LAND UNDER PRIVATE
           OWNERSHIP OR STATE JURISDICTION AND CONTROL, WITHIN STATE FISH
           AND GAME CRITICAL HABITAT AREAS CREATED UNDER THIS CHAPTER, THE
           PERSON OR RESPONSIBLE STATE DEPARTMENT OR AGENCY SHALL NOTIFY THE
           COMMISSIONER OF FISH AND GAME.  THE COMMISSIONER SHALL
           ACKNOWLEDGE RECEIPT OF NOTICE BY RETURN MAIL.
HISTORY    (SEC. 2 CH 140 SLA 1972)
R0601 * END OF DOCUMENTS IN LIST - ENTER RETURN OR ANOTHER COMMAND.
```

```
 CHAPTER   = 16.20
 SECTION   = 16.20.260
 TITLE     = 16
HEADINGS   TITLE 16.
           FISH AND GAME.
           CHAPTER 20.
           CONSERVATION AND PROTECTION OF ALASKAN WILDLIFE.
           ARTICLE 5.
           FISH AND GAME CRITICAL HABITAT AREAS.
CITATION   SEC. 16.20.260.
CATCH LINE
            SUBMISSION OF PLANS AND SPECIFICATIONS.
TEXT           (A)  WHEN A BOARD DETERMINES THAT THE FOLLOWING INFORMATION
           IS REQUIRED, IT SHALL INSTRUCT THE COMMISSIONER, IN THE LETTER OF
           ACKNOWLEDGMENT, TO REQUIRE THE PERSON OR GOVERNMENTAL AGENCY TO
           SUBMIT:
                    (1)  FULL PLANS FOR THE ANTICIPATED USE;
                    (2)  FULL PLANS AND SPECIFICATIONS OF PROPOSED
               CONSTRUCTION WORK;
                    (3)  COMPLETE PLANS AND SPECIFICATIONS FOR THE PROPER
               PROTECTION OF FISH AND GAME; AND
                    (4)  THE APPROXIMATE DATE WHEN THE CONSTRUCTION OR WORK
               IS TO COMMENCE.
               (B)  THE BOARD SHALL REQUIRE THE PERSON OR GOVERNMENTAL
           AGENCY TO OBTAIN THE WRITTEN APPROVAL OF THE COMMISSIONER AS TO
           THE SUFFICIENCY OF THE PLANS OR SPECIFICATIONS BEFORE
           CONSTRUCTION IS COMMENCED.
HISTORY    (SEC. 2 CH 140 1972; AM SEC. 28 CH 206 SLA 1975)
```

```
SELECT - QUERY
00001 ALL SECTION EQ 16.20.220

AS16.20.220  DOCUMENT=        1 OF         1

 CHAPTER   = 16.20
 SECTION   = 16.20.220
 TITLE     = 16
HEADINGS   TITLE 16.
           FISH AND GAME.
           CHAPTER 20.
           CONSERVATION AND PROTECTION OF ALASKAN WILDLIFE.
           ARTICLE 5.
           FISH AND GAME CRITICAL HABITAT AREAS.
CITATION   SEC. 16.20.220.
CATCH LINE
            PURPOSE.
TEXT       THE PURPOSE OF AS 16.20.220 - 16.20.270 IS TO PROTECT AND
           PRESERVE HABITAT AREAS ESPECIALLY CRUCIAL TO THE PERPETUATION OF
           FISH AND WILDLIFE, AND TO RESTRICT ALL OTHER USES NOT COMPATIBLE
           WITH THAT PRIMARY PURPOSE.
HISTORY    (SEC. 2 CH 140 SLA 1972)

R0601 * END OF DOCUMENTS IN LIST - ENTER RETURN OR ANOTHER COMMAND.
```

CITIZENS FOR RESPONSIBLE LAND USE

Co-Chairmen:
Roberta Highland
235-8214 (home)
235-5223 (work)

Michael Sheppard
235-7486 (home)
235-5397 (work)

P.O. Box 15227 • Fritz Creek, Alaska 99603

March 26, 1985

Richard Shultz
Pouch V
Juneau, Alaska 99811

Dear Richard:

I am writing this letter in regards to Bill #280 which is in your committee at this time. I've been very involved in promoting the Critical Wildlife Habitat. My husband and I live in the Fritz Creek area - this area is growing with leaps and bounds. We all know what population explosions can do tho the wildlife habitat. The Adhoc committee has proven the definite need for that area to be designated as Critical Habitat. That drainage area gets counts of hundreds of moose in the winter.

There has been talk about leasing part of that property to the Koreans to raise 5-10 thousand cattle which the community is very much against for various reasons. (I will not take the time to go into that issue now). The DNR is also in the process of trying to give 3700 acres of the proposed Critical Habitat to the Borough, of which they would probably develop and subdivide. There is also controversy right now regarding the damming of Fritz Creek for a future water supply for Homer, thus creating a need for watershed protection, which would be very compatible with a Critical Habitat.

I am becoming more and more fearful of our future with the trend development is taking. We've got to take action now, before it's too late. We've got to save land for the wildlife in these all to fast developing areas. I just hope we can prove we've learned something from the past mistakes made Outside.

Please give this Bill serious consideration and support.

Thanks for your time.

Sincerely,
Roberta Highland

Roberta Highland/Co-Chairperson
Citizens for Responsible Land Use

6611 Sherwood Circle
Anchorage, Alaska
99504
March 26, 1983

Richard Shultz
Pouch V
Juneau, Alaska
99811

Dear Rep. Shultz:

Please approve H B285, the Creation
of an Anchor River and Fritz Creek
Critical Habitat area.
Please pass it out of the Resource
Committee and please listen to us.

Sincerely Yours,
Mary Light

Jennifer Buckland
7371-H Huntsmen Circ
Anchorage, AK 9950

Richard Shultz
Pouch V
Juneau, AK 99811

Dear Rep. Shultz:

Please approve HB280, the creation of an Anchor River and Fritz Creek Critical Habitat Area. Please pass it out of the Resource Committee.

Jennifer Buckland

26 March 85

Richard Shultz
Pouch V
Juneau, Ak 99811

Dear Representative Shultz,

Please approve HB 280 - Creation of the Anchor River & Fritz Creek Critical Habitat Area. Please pass it out of the Resource Committee.

Warner Bradley
8021 Campbell Place
Anchorage Ak 99507

Michael Buckland
7371-H Huntsmen Circle
Anchorage, Ak, 99811

Richard Shultz
Route V
Juneau, Ak 99811

Dear Rep. Shultz

I urge you to approve HR 280, creating the Anchor River - Fritz Creek Critical Habitat Area.

Yours very truly,

Michael Buckland

5705 Sterling Way
Anch. Ak. 99504

Richard Shultz
Pouch V
Juneau, Alaska
99811

Dear Representative Shultz,

Please approve H.B. 280 for the creation of the Anchor River / Fritz Creek Critical Habitat Area.

Please pass it out of the Resource committee.

Sincerely,

Daniel Wagner

3/26/85

Richard Schultz
Couch V
Juneau, AK 99811

DEAR REP Schultz

Please support H.B. 280. As you know this bill would create a critical habitat area in the Fritz Creek-Anchor River area.

Please pass it out of the Resource committee.

Thank you for your consideration and support.

Sincerely,

David Hart
1400 Garden
Anch, AK 99508

HERMAN GEIGER
8414 LAKE OTIS PKWY
ANCHORAGE, AK 99507

26 MARCH 1985

RICHARD SHULTZ
POUCH V
JUNEAU, AK 99811

Dear Rep. Schultz,

I am gravely concerned about these wanton destruction of wildlife habitat in this state to the extent that I am sending my first letter to any legislature. You must support the passage of H.B. 290, Anchor River / Fritz Creek Critical moose habitat. When will the people of this state realize that our natural/wildlife and fisheries resources are our most valuable - long term renewable resources?

How many state dollars have been spent on agriculture? How many dollars have been brought into the state by this investment? Why is Alaska milk, eggs, etc more expensive than Seattle produce? What a waste!

Let's stop raping the natural resources of this state.

Thank you for the support.

Sincerely,
Herman Geiger

Dear Rep. Shultz

I am writing you in support of House Bill No. 282 which would allow temporary service to be counted toward public employees retirement. Seasonal workers now credit their work time toward retirement. Prior to 1980 seasonal employees were a rare classification in the Department of Fish and Game and people were hired as temporaries. Temporary employees could not credit their working time towards retirement even though the work temporaries did is the same work that seasonal employees are doing today and crediting towards retirement.

It only seems fair that temporary working time should be counted toward retirement if the employee is required to pay into the retirement system the amount which would have been required had he been in the retirement system. I sincerely hope you will support this bill.

Sincerely,

Len Schwarz

Len Schwarz
Box 1036
Nome, AK 99762

KENAI PENINSULA CRITICAL HABITAT
TASK FORCE

BOX 1236
HOMER, AK 99603

March 27, 1985

Rep. Hultz:

Enclosed are copies of endorsements for HB 280 from various groups, municipalities, and individuals. I hope the bill will have a speedy passage through the House Resources Committee.

Sincerely —

Allen A Davis
Task Force Member

CITY OF HOMER
HOMER, ALASKA

RESOLUTION 85-33

A RESOLUTION ENDORSING HOUSE BILL 280 "AN ACT CREATING THE ANCHOR RIVER AND FRITZ CREEK CRITICAL HABITAT AREA".

WHEREAS, the City of Homer has an interest in preserving the Fritz Creek Watershed for future use as a water supply for residents of the Southern Kenai Peninsula; and

WHEREAS, the City has an interest in preserving areas for wildlife habitat; and

WHEREAS, the City has an interest in protecting and preserving certain lands for public access and public recreation purposes;

NOW THEREFORE, the City endorses House Bill 280 "An Act creating the Anchor River and Fritz Creek Critical Habitat Area";

DATED, at Homer, Alaska this 25th day of March, 1985.

CITY OF HOMER

Wayne Kessler, Mayor

ATTEST:

Kathleen Herold

Kathleen Herold, City Clerk

To Whom It May Concern:

Whereas the South Central Regional Council represents 17 Local Fish and Game Advisory Commitees and;

Whereas those Advisory Committees are concerned with the moose population in South Central Alaska as well as Game Management Unit 15 C and;

Whereas the South Central Regional Council realizes the critical function of winter moose habitat and;

Whereas the South Central Regional Council understands that development in the Homer area has and will continue to spread and eliminate critical winter moose habitat and;

Whereas this critical habitat must be set aside before development begins in the area where this habitat exists;

Therefore be it Resolved by the South Central Regional Council, at a meeting on March 21, 1985 by unanimous vote, to support the ANCHOR RIVER/FRITZ CREEK CRITICAL HABITAT AREA.

Submitted by:

Daniel R. Calhoun

Daniel R. Calhoun
Vice-Chairman
South Central Regional Council

Homer Soil Conservation Sub-District
P.O. Box 415 · Homer, Alaska 99603 · Telephone: 235-8177

March 26, 1985

Dave Vanderbrink
Kenai Peninsula Critical Habitat
Task Force
P.O. Box 1236
Homer, Alaska 99603

RE: Critical Habitat - Anchor River & Fritz Creek Drainage

Dear Dave,

I am writing on behalf of the Board of Supervisors of the Homer Soil & Water Conservation District. As you well know, we have followed your committee's activities with regard to the formulation of the critical moose habitat legislation.

We wish to express our support and encouragement for the ultimate passage of this legislation. On 13 March 1985, we were given ample assurances by you and your committee that the critical habitat designation would allow continued management as a multiple resource, thus allowing open grazing of livestock and associated activities that would not conflict with or deplete the habitat. This assurance eliminated our primary concern.

We therefore wish to, once again, express our support for the critical habitat designation by legislation and hope that your activities will bring a successful conclusion to your efforts.

Sincerely,

Pat Marquis

Pat Marquis
Chairman

bg

United States Department of the Interior

IN REPLY REFER TO:

KENAI NATIONAL WILDLIFE REFUGE
P.O. BOX 2139
SOLDOTNA, ALASKA 99669-2139
(907) 262-7021

January 31, 1985

Kenai Peninsula Critical Habitat Task Force
ATTN. Mr. Allen Davis
P. O. Box 598
Homer, Alaska 99603

Dear Mr. Davis:

We have reviewed the proposal on "The Anchor River/Fritz Creek Critical Habitat Area" as submitted by the task force and offer these comments.

Designation of critical habitat areas in Game Management Unit (G.M.U.) 15C, other than lands contained within the Kenai National Wildlife Refuge, will be essential if viable populations of moose, brown bear, and wolves are to continue. Refuge lands in GMU15C do not contain all of the essential habitat components to support populations of these species year around.

Delineation of critical habitat areas off of the refuge is a logical and essential action, if the public desires to have moose and other wildlife species in GMU15C, coincidental with a variety of other uses on these lands.

This concept has our support. We feel it is the only practical alternative that will allow viable wildlife populations to coexist with increased human use and development within GMU15C.

Sincerely,

Robert L. Delaney
Refuge Manager

MBH/pf
0115p/7

Resolution No. 85-8

FRITZ CREEK WATERSHED

The cities of Homer and Kachemak City have a need for additional quantities of water for municipal use in the immediate future. The cities have identified Fritz Creek as the best source to meet their needs, evaluating water quantity, quality, and proximity of the stream. Because the use of Fritz Creek would be for a public water supply, a watershed protection plan would need to be established.

A possible solution would be to designate the watershed area as a wildlife reserve. This could serve two useful purposes: it would preserve some rapidly diminishing winter habitat for game animals on the lower Kenai Peninsula, and it would protect the watershed of the municipal water supply.

THE ALASKA WATER RESOURCES BOARD recommends that the Director of the Division of Land and Water Management put into motion the mechanism to designate the Fritz Creek Drainage as a wildlife refuge to preserve winter habitat for large game animals and to protect the watershed for the future municipal water supply for the cities of Homer and Kachemak City.

Adopted this 1st day of November, 1984

ALASKA WATER RESOURCES BOARD

David Vanderbrink, Chairman

6611 SHERWOOD
ANCH, AK.
99504

RICHARD SHULTZ
POUCH V
JUNEAU, AK.
99504

DEAR REP. SHULTZ,

PLEASE APPROVE HB 208, THE CREATION OF AN ANCHOR RIVER AND FRITZ CREEK CRITICAL HABITAT AREA. PLEASE PASS IT OUT OF THE RESOURCE COMMITTEE,

SINCERELY YOURS,

STEPH Marsh

****
*
* DELIVER TO: JPOM
*
*
* ORIGINAL
* SENT: 03/29/85 TIME: 10:37
* FROM: TCHOM
* SUBJECT: POM
* PRINT DATE: 03/29/85 TIME: 10:37
*
****

10

TO: REP. HERRMANN, SHULTZ, WALLIS, CATO, JENKINS, MIKE W. MILLER, PEARCE, SUND AND THOMPSON

FROM: NANCY LORD, BOX 558, HOMER, AK. 99603 235-8252

SUBJECT: SSHB 280

PLEASE SUPPORT THE CRITICAL HABITAT AREA. SSHB 280 REPRESENTS YEARS OF CONCERN AND WORK BY AREA RESIDENTS AND ENJOYS SOLID SUPPORT ON THE PENINSULA. CRITICAL HABITAT IS THE PROPER DESIGNATION. MOOSE RANGE OR OTHER WOULD NOT ADEQUATELY PROTECT FISHERIES.

EOM**********

****
*
* DELIVER TO: JPOM
*
*
* ORIGINAL
* SENT: 03/29/85 TIME: 15:55
* FROM: TCHOM
* SUBJECT: POM
* PRINT DATE: 03/29/85 TIME: 15:55
*
****

TO: REP. SHULTZ

FROM: KAREN BURY, 15115 F.C.B. HOMER, AK. 99603 235-8739

SUBJECT: HB 280

PLEASE SUPPORT HB 280. ANCHOR RIVER\FRITZ CREEK CRITICAL HABITAT AREA IS TRADITIONAL WINTER FEEDING AREA FOR MOOSE AND HABITAT FOR FISH AND WILDLIFE. THIS BILL INCLUDES TRADITIONAL USE BY PEOPLE--HUNTING, FISHING, SKIING, HIKING AND SNOWMOBILING. I WANT MY CHILDREN TO ENJOY THE TRADITION OF A RICH WILDLIFE HERITAGE.

EOM**********

****
*
* DELIVER TO: JPOM
*
*
* ORIGINAL
* SENT: 03/29/85 TIME: 16:07
* FROM: TCHOM
* SUBJECT: POM
* PRINT DATE: 03/29/85 TIME: 16:14
*
****

TO: REP. HERRMANN, SHULTZ, WALLIS, CATO, JENKINS, MIKE W. MILLER PEARCE, SUND AND THOMPSON

FROM: IRWIN RAVIN, BOX 3219, HOMER, AK. 99603 235-5456

I AM IN FAVOR OF HB 280.

EOM**********

6655 Macbeth Dr.
Anchorage AK
99516

March 25, 1985

Richard Shultz
Pouch V
Juneau AK
99811

Dear Representative Shultz:

I urge you to support H.B. 280. The establishment of a critical moose habitat in the Anchor Point - Fritz Creek area is essential both to the preservation and maintenance of the moose population and to control of development in a critical tourist area.

Please support House Bill 280, and pass it out of the resource committee.

Sincerely,

Julie W. deSherbinin

David + Suzy Boulware
750 Fairbanks
Anchorage, AK 99501

Richard Shultz
Pouch V
Juneau, AK 99811

Dear Mr. Shultz,

Please approve HB 280, the creation of an Anchor River-Fritz Creek critical habitat area. Please pass it out of the Resource Committee

Sincerely,
David E. Boulware
Suzy Boulware

REPRESENTATIVE
MIKE NAVARRE

DISTRICT 5A

CHAIR, LABOR & COMMERCE
VICE-CHAIR, STATE AFFAIRS

Alaska State Legislature

House of Representatives

HOME ADDRESS
P O BOX E
KENAI, ALASKA 99611
(907) 283-7813

WHILE IN SESSION
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3893

Representative Dick Shultz, Co-Chair
House Resources Committee

March 27, 1985

Dear Representative Shultz:

The winter moose habitat on the lower Kenai Peninsula is rapidly disappearing. House Bill 280 is an attempt to preserve some wintering area for moose, to insure their survival in numbers of any consequence.

Attached is a copy of the original proposal by the Kenai Peninsula Critical Habitat Task Force, a panel of concerned citizens of Homer. Some of these people are experts in the field of wildlife and resource management. This proposal outlines the reasons for the creation of the area, and points out what other forms of wildlife would also benefit. Traditional uses of the area, such as hunting, fishing and recreation would be unaffected.
Also, under HB 280, concerns of local municipalities in regard to the use of the Fritz Creek watershed as a water source are addressed.

I might add that I have received a petition that was circulated by Citizens for Responsible Land Use (another Homer group endorsing this proposal). The petition has over 900 signatures of Homer residents that support the creation of the Critical Habitat Area. While the legislation must stand or fall on its own merit, the fact this has such widespread community support should be given some attention.

I sincerely hope you'll read the attached informational packet, and give this measure your support when it is heard at the regular meeting of the House Resources Committee April 1, 1985.

Sincerely,

Mike

Representative Mike Navarre

MN/pm

KA STATE ALASKA STATE

REFUGES

KA STATE ALASKA STATE

CRITICAL HABITATS

<A STATE ALASKA STATE

NCTUARIES

<A STATE ALASKA STATE

The Alaska Legislature has protected portions of Alaska's outstanding natural habitat and associated fish and wildlife resources by establishing State Game Refuges, State Game Sanctuaries, and State Critical Habitat Areas. The statutes which authorize these special areas give the Alaska Department of Fish and Game authority to preserve and protect the unique aspects for which they were established.

STATE GAME REFUGES are established to make sure wildlife continue to populate specific areas and to insure the public continues to have use of these wildlife resources. These areas have fairly sizable concentrations, or many different types, of waterfowl, big game, shorebirds, or other species. One or more elements of habitat — such as food, vegetation, water, etc. — needed by this wildlife is present

The Alaska Department of Fish and Game manages state game refuges by focusing on a featured wildlife species or group of species. This may mean rehabilitating or improving the habitat on which the wildlife depends. Uses of refuge lands are controlled to prevent habitat changes which would be harmful to the wildlife. Activities are also controlled to prevent disturbance of the wildlife itself. Human uses — including recreational pursuits and harvest of wildlife resources — are permitted so long as they are in keeping with the primary reason for establishing the refuge.

STATE GAME SANCTUARIES are also established to protect fish and wildlife and their natural habitats. The primary reason for setting aside lands as state game sanctuaries is to give asylum to important wildlife populations. The wildlife in these cases normally uses the land in somewhat exclusive ways. A sanctuary may provide the only place where a certain population carries out some part of its annual life cycle such as feeding, nesting, hauling out, or migration. (Sanctuaries are special areas set aside to protect featured wildlife populations.)

In managing sanctuaries, other uses of the land are closely controlled, or are prohibited, in order to prevent changes in the habitat or disturbance of the protected species. Use of the wildlife itself is also closely controlled.

STATE CRITICAL HABITAT AREAS are places where protective emphasis is on the environment in which wildlife occurs. Critical habitat areas may be complete biotic systems — identifiable environmental units that operate as self-sustaining systems — or well-defined areas specifically needed by wildlife for certain functions such as nesting or spawning.

Management by the Alaska Department of Fish and Game is aimed primarily at providing protection for the habitat. All uses of the land which are not compatible with that aim are restricted. In most instances, harvest of wildlife is not precluded in a critical habitat area.

State critical habitat areas are set aside to protect the land and resources necessary for certain species of wildlife.

A PROPOSAL

THE ANCHOR RIVER/FRITZ CREEK CRITICAL HABITAT AREA

Submitted by:

Kenai Peninsula Critical Habitat Task Force

Dave Vanderbrink, Chairman P.O. Box 1236 Homer, Alaska 99603	235-8784
Lynn Whitmore	235-7220
Rob Moss	235-8788
John H. McLay	235-8816
Allen S. Davis	235-8626
Derek Stonorov	235-8273

December 17, 1984

AREA NAME

Anchor River/Fritz Creek Critical Habitat Area

PURPOSE

The primary purpose of the proposed special area is to protect and maintain critical moose winter habitat along the upper Anchor River and Fritz Creek drainages. A secondary purpose is to protect the habitats of salmonid fishes and other wildlife which occur along these drainages. These lands would be managed by the Alaska Department of Fish and Game (ADF&G).

LEGAL DESCRIPTION

46080

T4S, R13W, Seward Meridian
Sections: 25, 35 and 36.
T5S, R14W, Seward Meridian
Sections: 13, NE¼20, 21, 22, 23, 24, N½26, N½27 and N½23.
T5S, R13W, Seward Meridian
Sections: 2,3, E½4, S½8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, W½21 and 24.
T5S, R12W, Seward Meridian
Sections: 17, 18, 19 and 20

AREA DESCRIPTION

The proposed special area is located approximately 6 miles due north of the City of Homer on the lower Kenai Peninsula, Alaska (see Appendix A). It is approximately 19,000 acres in size, and includes most of the upper Anchor River valley and the adjacent sloping uplands, the area known as "Beaver Flats", and the headwaters of Fritz Creek. The main

valley consists of a relatively narrow valley floor with a meandering stream, moderately steep hillsides which flank either side of the valley floor, and numerous small tributaries. Vegetation along the Anchor River is comprised of a mosaic of willow thickets, grass/forb meadows, scattered Sitka spruce, and clumps of cottonwood; mature Sitka spruce forests and stands of alder on the adjacent hillsides; dense willow thickets along small tributaries; and spruce forests and open meadows on gently sloping ground above 1,000 feet elevation. The extensive muskeg along Beaver Creek supports low heath shrubs and willows. The terrain in the headwaters of Fritz Creek is gently sloping; and the vegetation consists of an open spruce forest with a dense understory of willows in the bottomlands, and mixed spruce forests and open meadows at higher elevations.

WILDLIFE RESOURCE VALUES

The Anchor River valley and Fritz Creek drainages function as moose winter habitat. Aerial survey information collected by the ADF&G indicates between 300 and 500 moose concentrate in this area during average winters. A density of 23 moose per square mile were documentated on Beaver Flats in 1983. The riparian habitats along these drainage systems provide moose with a concentrated food supply in the form of willow browse, adjacent resting and hiding cover in the form of spruce forests, and an environment where snow accumulations are normally small enough to not impede winter feeding activities. The existence of areas which provide these elements is absolutely essential to winter survival of moose on the lower Kenai Peninsula.

The Anchor River is spawning and rearing habitat for king salmon, coho salmon, steelhead/rainbow trout, and dolly varden char. These habitats are also essential with respect to the life cycle and perpetuation of these species.

Riparian habitats such as those found in the proposed special area are important to a variety of other wildlife. Spawning salmon along the Anchor River are important food sources for brown bear, black bear and bald eagles. Stands of mature cottonwoods at the western end of the proposed area have been used by bald eagles for nesting. The valley serves as a travel corridor for most species of big game, furbearers and small forms of wildlife.

RECREATIONAL USES

The Anchor River valley and Fritz Creek drainages are popular recreation areas. In recent years uses have included hunting, trapping, fishing, wildlife viewing and photography, general hiking, snowmachining, snowshoeing, and nordic skiing. ADF&G records show that in the 1983 moose season 25% of the bull harvest (n=61) was taken in the Anchor River drainage. Beaver, river otter, mink, coyote, and wolf are the furbearers most commonly taken in this area. Sport fishing for salmon is prohibited in the proposed special area, but trout and char fishing are allowed from July through December. Snowmachining, snowshoeing, and nordic skiing occur throughout the area during most winters. All of the above recreational activities would be encouraged in the proposed special area as long as they did not pose a serious threat to wildlife of habitat resources.

JUSTIFICATION

Moose are the dominant big game animal on the Kenai Peninsula. They occupy a vital position in the food chain of the boreal forest, and represent an important renewable resource. Moose are browsers which assimilate energy and nutrients from the plant material they eat. In turn, large predators such as the wolf and the brown bear and a host of smaller scavengers are dependent upon moose as a source of food. Moose are directly important to man through the viewing and hunting opportunities they provide and the revenue these activities funnel

into local economies. ADF&G records show that the moose resource on the Kenai Peninsula has generated a total of 92,018 hunter days of recreation and a total harvest of 3,162 moose worth an estimated 5.5 million dollars between 1978 and 1983. In a less tangible sense, most Alaskans feel that the mere presence of wildlife, of which the moose is symbolic, contributes highly to their quality of life. They want future generations of Alaskans to be able to enjoy the tradition of a rich wildlife heritage.

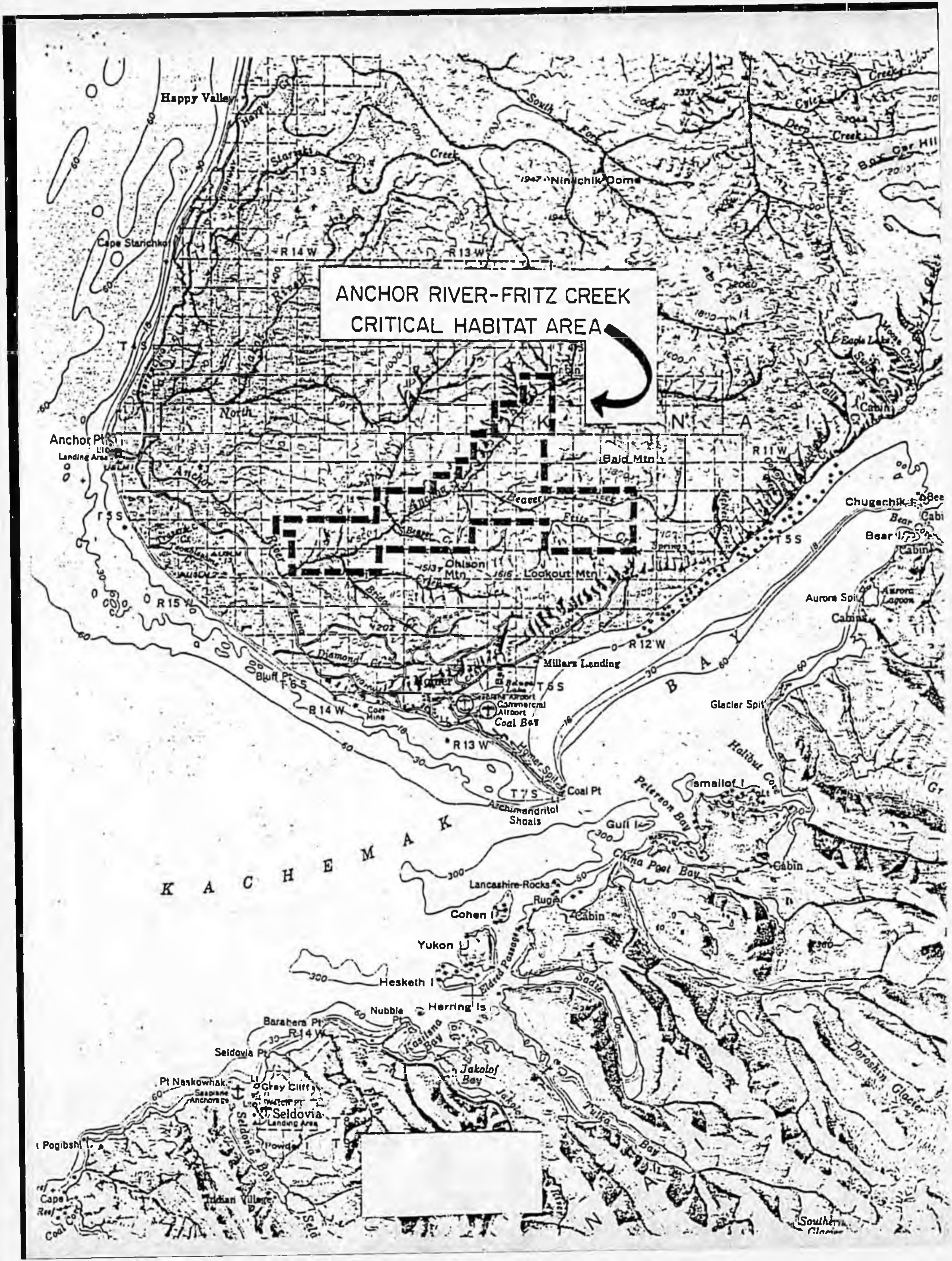
It is estimated that there are currently between 2,500 and 3,000 moose on the lower Kenai Peninsula (Game Management Subunit 15C). These moose range throughout most of the 760,000 acres of lowlands in Subunit 15C in summer and early fall, but are restricted to stream and river bottoms and south-facing benchlands below 800 feet elevation during winter. ADF&G tagging studies and aerial surveillance of moose show that the Homer Benchland, lower Fox River valley, lower Anchor River valley, lower Deep Creek/Ninilchik River valleys, Fritz Creek and the Coho Beach area are historic winter habitats. These areas provide the concentrated food, cover, and relatively small snow accumulation necessary for successful overwintering of moose. It is significant to note that the sum of these winter habitats comprise less than 10% of the surface area of all the utilized summer and early fall habitat in Subunit 15C. Virtually no overwintering of moose occurs in the Kenai National Wildlife Refuge south of Tustumena Lake.

Moose winter habitats on the lower Kenai Peninsula are mostly privately owned and have been seriously diminished in the quality and extent by human development in the last three decades. For instance, an estimated 4,500 people now compete with moose for space on the Homer Benchland, and considerable habitat alteration and loss have occurred. Consequently, this historically important winter habitat can now support only a fraction of the moose it once did. Substantial amounts of residential and commercial development have also occurred on the Coho Beach, lower Ninilchik, lower Deep Creek, lower Anchor River and Homer Benchland winter habitats.

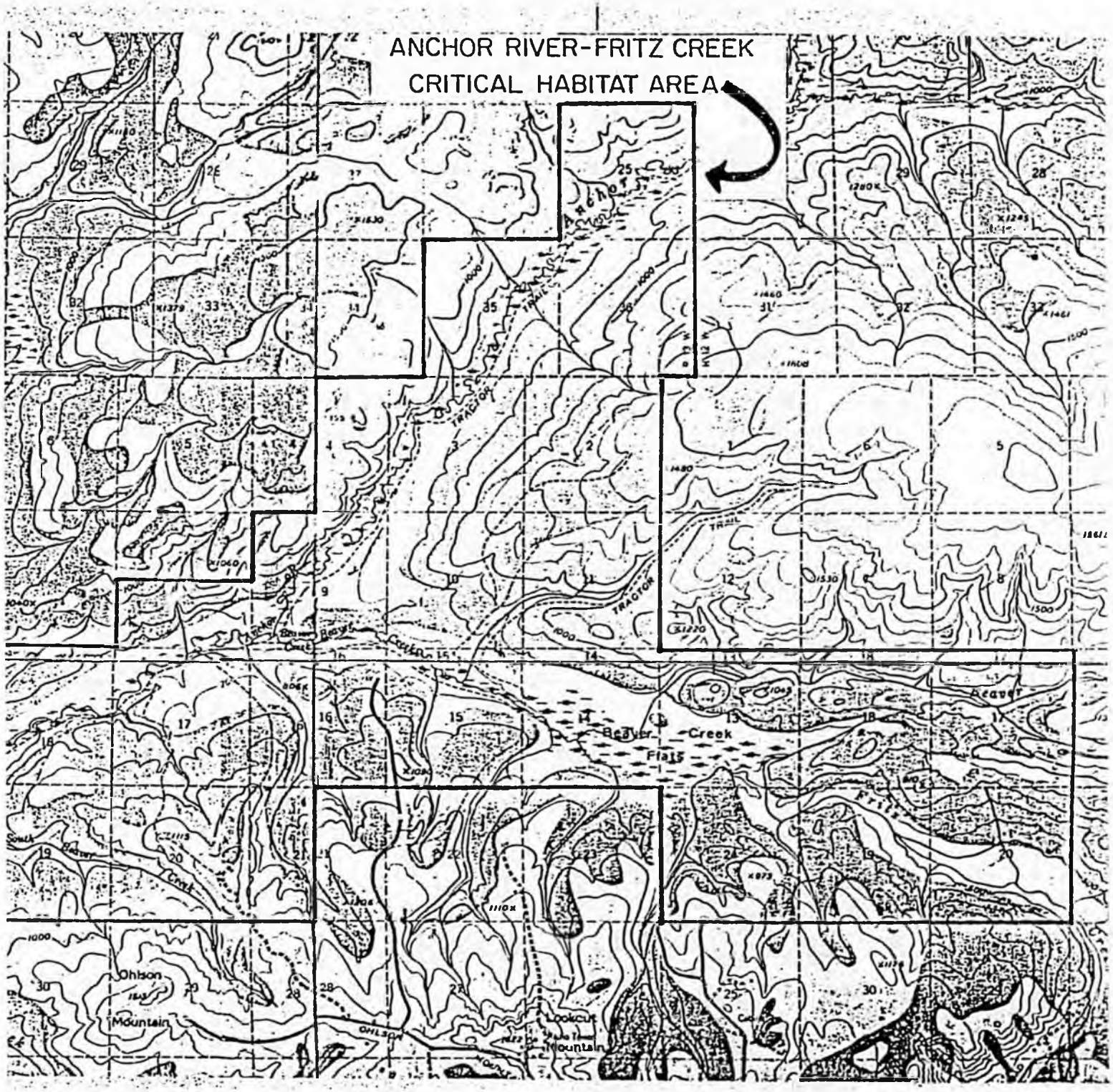
The lower Fox River winter habitat has been intensively grazed by horses and cattle since the 1940's, and supports a growing human population of approximately 200 people. It is reasonable to assume that these developments have lowered the winter carrying capacity of that area for moose. Water development and intensive cattle grazing are potential threats which have recently been proposed for the Fritz Creek winter habitat.

These trends are expected to worsen as the human population on the Kenai Peninsula continues to grow. Lands along the upper Anchor River valley and headwaters of Fritz Creek are in State ownership, and present the best opportunity to protect and maintain moose winter range on the lower Kenai Peninsula. Legislative designation as a State critical habitat area would keep these lands in public trust, and ensure the future of their wildlife resource and habitat values.

APPENDIX A



ANCHOR RIVER-FRITZ CREEK
CRITICAL HABITAT AREA
Happy Valley
Ninilchik Dome
Cape Starichkof
Anchor Pt
Bald Mtn
Chugachik I
Aurora Spit
Millers Landing
Glacier Spit
Coal Bay
Coal Pt
Archimandritof Shoals
Ismailof I
Peterson Bay
Gull I
China Poot Bay
K A C H E M A K
B A Y
Lancashire Rocks
Cohen I
Yukon I
Hesketh I
Herring Is
Nubble
Barabara Pt
Seldovia Pt
Pt Naskowhak
Gray Cliff
Seldovia
Lookout Mtn
Ohlson Mtn
Diamond Cr
Homer
Bluff Pt
Sadie Cove
Jakolof Bay
Kasitsna Bay
Tutka Bay
Doroshin Glacier
Halibut Cove
Eldred Passage
Indian Village
Seldovia Bay
R 14 W
R 13 W
R 12 W
R 11 W
R 15 W
T 3 S
T 4 S
T 5 S
T 6 S
T 7 S


ANCHOR RIVER-FRITZ CREEK
CRITICAL HABITAT AREA
Beaver Creek
Beaver Flats
Ohlson Mountain
Lookout Mountain

Anch. Daily News Thurs. March 28, 1985

Plan for creation of habitat area wins support of Homer council

By RONNIE CHAPPELL
Daily News reporter

A plan to create a 19,000-acre wildlife habitat area on the southern Kenai Peninsula has won the support of the Homer city council.

On a unanimous vote, the council Monday enacted a resolution urging the legislature to approve a bill placing the state-owned acreage under the management of the Alaska Department of Fish and Game.

Creation of the critical habitat area would halt development of a major cattle export project in the H mer area. It contains a 3,000-acre grazing lease in the Fritz Creek drainage that Han-A Samick America Corp. says is crucial to its plans for the production and exportation of 10,000 head of beef cattle a year.

According to state biologists, the grazing lease is part of the last big trac' of undeveloped winter moose range in the Homer area.

They warn that unless it and other important winter feeding areas are preserved, the number of moose on the southern Peninsula will decline dramatically.

"We need to preserve places for moose to live and for people to enjoy them," said Councilman John Calhoun. "With the continued development of rural subdivisions around the city, it is important to set aside a parcel of land that people can enjoy in its natural state."

The bill now pending before the legislature guarantees the city's right to dam Fritz Creek and use the resulting reservoir as a municipal water supply.

Similar assurances were offered under other plans for disposal of the Fritz Creek acreage. But city officials were skeptical, Calhoun said, that water quality in the watershed could be protected if the lease was used for intense livestock production.

By endorsing creation of the critical habitat area, Calhoun said, he and other council members were "trying to represent the views of a majority" of people in the Homer area.

More than 600 local residents have signed petitions endorsing the idea. Another 50 have written letters to lawmakers.

The bill protects the rights of inholders and gives the Kenai Peninsula Borough a say in the management of lands it nominates for inclusion in the habitat area. Hunting, trapping, skiing, hiking, camping and snowmachining would be allowed in the area, but residential and agricultural development would not.

1156

Box 1236
Homer, Alaska 99603
March 14, 1985

Commissioner Don Collinsworth
Dept. of Fish and Game
P.O. Box 3-2000
Juneau, Ak. 99802

Re: HB 280

Dear Commissioner Collinsworth:

Enclosed find a packet of letters and resolutions in support of HB 280, an Act creating the Anchor River and Fritz Creek Critical Habitat Area. We are pursuing additional ones and will forward them as we receive them.

Our task force has found strong support for the proposal. In fact, we have encountered no opposition to it. You will note that some of the endorsements are conditional upon the accor.odation of additional uses. We believe that there is no conflict in meeting such identified needs as water supply within the critical habitat area.

Please feel free to contact me or any member of our task force should you need any more information. We look forward to working with you towards passage of HB 280.

Sincerely,

Dave Vanderbrink, Chair
Kenai Peninsula Critical Habitat
Task Force

Alaska Center for the Environment
1069 W. 6th Avenue
Anchorage, Alaska 99501 274-3621

Position Statement

CITY OF KACHEMAK
KACHEMAK, ALASKA

RESOLUTION NO. 85-4

A RESOLUTION SUPPORTING THE CRITICAL MOOSE WINTER HABITAT

WHEREAS, the Common Council of the City of Kachemak recognizes the need to protect and maintain critical moose winter habitat along the upper Anchor River and Fritz Creek Drainages; and,

WHEREAS, the Kenai Peninsula Critical Habitat Task Force, working with the Alaska Department of Fish and Game proposes such; and,

WHEREAS, the area in question is approximately 19,000 acres, as proposed by this Task Force; and,

WHEREAS, the City of Kachemak recognizes that a watershed and critical habitat area are compatible; and,

WHEREAS, the City of Kachemak is appealling the Department of Natural Resources conveyance of 3,183.4 acres in the Fritz Creek drainage to the Kenai Peninsula Borough; and,

WHEREAS, the 3,183.4 acres in question is included in the proposal of the Kenai Peninsula Critical Habitat Task Force for the critical moose winter habitat;

NOW THEREFORE LET IT BE RESOLVED: that the Common Council of the City of Kachemak supports the Kenai Peninsula Critical Habitat Task Force, Dave Vanderbrink, Chairman, in its efforts to provide, protect and maintain critical winter moose habitat along the upper Anchor River and Fritz Creek Drainages AS LONG AS THE WATERSHED INTERESTS OF THE

Moose winter habitats on the lower Kenai Peninsula are mostly privately owned and have been notably reduced in both quality and quantity due to residential and commercial development in places such as Coho Beach, lower Deep Creek, lower Ninilchik River, lower Anchor River and Homer Benchland winter habitats. If we hope to insure a significant moose population in this region, it is essential to protect the remaining winter ranges on the state-owned lands along the upper Anchor River and Fritz Creek drainages

Finally, large portions of the proposed area are being threatened by a major cattle grazing and feedlot operation. Preventing this incapatible use by designating the critical habitat area would protect not only moose winter range but also water quality in both Fritz Creek, a source of water for Homer, and the Anchor River, one of Southcentral's top sportfishing streams.

Mary Cole

Mary Cole
Executive Director
March 11, 1985

February 27, 1985

To Whom it May Concern:

In a meeting on 2/19/85 the Homer Fish and Game Advisory Committee unanimously voted to support the establishment of the Anchor River/Fritz Creek Critical Habitat Area as proposed by the Kenai Peninsula Critical Habitat Task Force.

Daniel R. Calhoun

Daniel R. Calhoun
Chairman Homer Fish and Game Advisory Committee
Box 566
Homer, Alaska 99603.

CITIZENS FOR RESPONSIBLE LAND USE

Co-Chairmen:
Roberta Highland
235-8214 (home)
235-5223 (work)

Michael Sheppard
235-7486 (home)
235-5397 (work)

P.O. Box 15227 • Fritz Creek, Alaska 99603

March 5,1935

To: Mr. Dave Vanderbrink, Chairman

From: Ed Schumann

Subject: Anchor River- Fritz Creek Critical Moose Habitat Area

Dear Dave;

Citizens for Responsible Land Use respectfully submit our endorsment of the Kenai Peninsula Critical Habitat Task Force proposal to create the 19,000 acre Anchor River- Fritz Creek Critical Moose Habitat Area.

We offer our continual support on this matter. We have to date; held public meetings, attended meetings, initiated letter writing campains to our legislators, circulated petitions and written appeals to the Department of Natural Resources. What can be done, Will be done.

Sincerely,

Ed Schumann

Ed Schumann
commitee member
Citizens for Responsible Land Use

KACHEMAK BAY CONSERVATION SOCIETY
BOX 846
HOMER ALASKA
99603

March 1, 1985

Dave Vanderbrink
POB 123C
Homer, Alaska 99603

Dear Mr. Vanderbrink:

This is to inform you that the Kachemak Bay Conservation Society Board of Directors voted unanimously to support the Kenai Peninsula Critical Habitat Task Force's proposed "Anchor River/Fritz Creek Habitat Area." We have conveyed our support to Governor Sheffield and will do what we can to see that this vital watershed remains viable for moose and other wildlife.

Sincerely,

Edgar Bailey

Edgar Bailey

United States Department of the Interior

IN REPLY REFER TO:

KENAI NATIONAL WILDLIFE REFUGE
P.O. BOX 2139
SOLDOTNA, ALASKA 99669-2139
(907) 262-7021

January 31, 1985

Kenai Peninsula Critical Habitat Task Force
ATTN. Mr. Allen Davis
P. O. Box 598
Homer, Alaska 99603

Dear Mr. Davis:

We have reviewed the proposal on "The Anchor River/Fritz Creek Critical Habitat Area" as submitted by the task force and offer these comments.

Designation of critical habitat areas in Game Management Unit (G.M.U.) 15C, other than lands contained within the Kenai National Wildlife Refuge, will be essential if viable populations of moose, brown bear, and wolves are to continue. Refuge lands in GMU15C do not contain all of the essential habitat components to support populations of these species year around.

Delineation of critical habitat areas off of the refuge is a logical and essential action, if the public desires to have moose and other wildlife species in GMU15C, coincidental with a variety of other uses on these lands.

This concept has our support. We feel it is the only practical alternative that will allow viable wildlife populations to coexist with increased human use and development within GMU15C.

Sincerely,

Robert L. Delaney
Refuge Manager

MBH/pf
0115p/7

Resolution No. 85-8

FRITZ CREEK WATERSHED

The cities of Homer and Kachemak City have a need for additional quantities of water for municipal use in the immediate future. The cities have identified Fritz Creek as the best source to meet their needs, evaluating water quantity, quality, and proximity of the stream. Because the use of Fritz Creek would be for a public water supply, a watershed protection plan would need to be established.

A possible solution would be to designate the watershed area as a wildlife reserve. This could serve two useful purposes: it would preserve some rapidly diminishing winter habitat for game animals on the lower Kenai Peninsula, and it would protect the watershed of the municipal water supply.

THE ALASKA WATER RESOURCES BOARD recommends that the Director of the Division of Land and Water Management put into motion the mechanism to designate the Fritz Creek Drainage as a wildlife refuge to preserve winter habitat for large game animals and to protect the watershed for the future municipal water supply for the cities of Homer and Kachemak City.

Adopted this 1st day of November, 1984

ALASKA WATER RESOURCES BOARD

D Vanderbrink

David Vanderbrink, Chairman