

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

5028 HRES SB 459 - SB 472

600



STATE OF ALASKA
OFFICE OF THE GOVERNOR
BILL ANALYSIS

DEPARTMENT	Fish & Game	DIVISION	Commercial Fish.	BILL NUMBER	SB 459	SPONSOR	Zharoff	
SHORT TITLE OF BILL Confidentiality of shellfish stock abundance surveys								
DEPARTMENT POSITION Neutral								
PREPARED BY	Al Didier	DATE	3/16/88	COMMISSIONER'S SIGNATURE	<i>A. Didier</i>		DATE	3-16-88

SUMMARY

OTHER AGENCIES AFFECTED BY BILL None	CONSTITUENT GROUPS AFFECTED BY BILL Unknown
ORGANIZATIONAL SUPPORT FOR BILL Unknown	ORGANIZATIONAL OPPOSITION TO BILL Unknown

FISCAL IMPACT: NONE FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT

This bill would make confidential until the end of the current fishing season, all information from shellfish abundance surveys which show the abundance of shellfish by sampling location.

ANALYSIS OF BILL/PROGRAM EFFECTS

See Attached

AMENDMENTS PROPOSED

crab
(c) Shellfish stock abundance survey information that reveals shellfish catch by sampling location is confidential and is not subject to inspection or copying under AS 09.25.110 - 09.25.120 until the close of the fishing season for which the survey was conducted.

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

Analysis of Bill/Program Effects

PRO: This bill may permit the department to open seasons in areas which have small, localized shellfish populations. If the locations of these populations are publicized prior to the fishing season, effort could be concentrated and the department would be reluctant to allow a fishery. If some fishermen are not aware of these concentrations, effort may be more dispersed and a short opening might be possible without the risk of overharvest.

CON: Assessment surveys are often used to set guideline harvest levels prior to a fishery. The public has always had the opportunity to critique these surveys and confirm the validity of the guideline harvest levels before the season. This process will not be possible under the proposed legislation.

Shellfish populations are generally not highly mobile and shellfish surveys often indicate the availability of recruitment in future years. Since this information will only remain confidential during the current season, a fisherman could refer to the survey conducted the previous year to identify probable shellfish concentrations. This may tend to dilute the possible benefits cited above.

S B

4 6 8

AMENDMENT

To CSSB 468 (Res)/Ernie Haugen Public Use Area

On Page 1, Line 25, after "Resources." insert:

The Department of Fish and Game is responsible for the management of fisheries and wildlife resources within the Ernie Haugen Public Use Area.

On Page 2, Line 1, delete:

"consult with"

And Insert:

obtain the concurrence of

HOUSE COMMITTEE REPORT

(9)

Date referred: 3/28/88

FURTHER REFERRALS: Finance

DATE: 4-25-88

The Resources Committee has considered CSSB 468(Res)

"An Act establishing the Ernie Haugen Public Use Area; and providing for an effective date."

RECOMMENDS:

- replace with _____ the same title
- attached amendment(s) a new title
- dc pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Adelheid Herrmann

Jan Art

John [unclear]

Frank [unclear]

Sam Hoff

Cliff Davidson

Dick Sluts

Heinrich Springer

Jan Art

 Chairman's signature

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: ^{HCS/} CSSB 468 (Res)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act establishing the Ernie Haugen Public Use Area.
Sponsor: Senators Jones, Kelly, et al
Requestor: House Resources Committee

Agency Affected: Natural Resources
BRU: Land and Water Management
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	Y 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		30.0	15.0	5.0	5.0	5.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		30.0	15.0	5.0	5.0	5.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		30.0	15.0	5.0	5.0	5.0
FEDERAL FUNDS						
OTHER						
TOTAL		30.0	15.0	5.0	5.0	5.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Janet Furlson Phone: 465-3400
Division: Land and Water Management Date: 4/25/88

Approved by Commissioner: [Signature] Date: 4-26-88
Agency: Natural Resources

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

AMENDMENT
To CSSB 468 (RES)/Ernie Haugen Public Use Area

On Page 1, Line 25, after "Resources." insert:

The management of sport and subsistence fishing, hunting, or trapping allowed under a regulation of the Board of Fisheries or the Board of Game within the Ernie Haugen Public Use Area is the responsibility of the Department of Fish and Game. Nothing in AS 41.23.150 - 180 prohibits the Department of Fish and Game from engaging in rehabilitation, enhancement, and development of fish and wildlife habitat within an area described in AS 41.23.180.

On Page 2, Line 1, delete:

"consult with"

And Insert:

obtain the concurrence of

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

November 8, 1985

Honorable Esther Wunnicke
Commissioner
Department of Natural Resources
Pouch M
Juneau, Alaska 99811

Honorable Don W. Collinsworth
Commissioner
Department of Fish and Game
P.O. Box 3-2000
Juneau, Alaska 99811

~~cc Tom Howard King~~
BILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

DEPARTMENT OF
NATURAL RESOURCES

NOV 13 1985

COMMISSIONER'S OFFICE
JUNEAU

Re: Game refuges, game sanctuaries, and fish & game critical habitat areas: authorities of the Department of Natural Resources and the Department of Fish and Game
Our files: 366-045-84 and 366-122-84

Dear Commissioners Wunnicke and Collinsworth:

I. INTRODUCTION

Both the Department of Natural Resources ("DNR") and the Department of Fish and Game ("ADF&G") have asked questions regarding their respective authorities in game refuges, game sanctuaries, and fish and game critical habitat areas (collectively referred to as "special areas"). Our analysis reveals that

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the two departments 1/ have complementary statutory authorities in that each has separate, independent permitting authority, as well as other responsibilities which are to be carried out in conjunction with or after consultation with the other department. (The attached chart summarizes the authorities of DNR and ADF&G in special areas.) In addition, for activities located in or affecting the coastal zone, both departments must implement their authorities in a manner consistent with the Alaska Coastal Management Program. This opinion follows the following outline:

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1/ As discussed later in this memorandum, ADF&G and the Boards of Fisheries and Game each have been delegated slightly different authorities in special areas. Those will be outlined in detail, but throughout this opinion, the combined authorities will be generally referred to as belonging to ADF&G. In addition, the Commissioner of ADF&G will be referred to as "ADF&G."

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	Chart summarizing DNR/ADF&G authorities in special areas	attached

II. THE STATUTORY FRAMEWORK

There are several different sets of statutory provisions relevant to this matter, and they will be discussed by category: those setting up the special areas, those setting out DNR's general authorities, those setting out DNR's authorities specific to special areas, those setting out ADF&G's authorities in special areas, and those describing the coastal zone consistency review procedure.

A. Special areas

In AS 16.20, the legislature created three categories of special geographic areas which are the main subject of the related questions posed by DNR and ADF&G: game refuges, game

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sanctuaries, and fish and game critical habitat areas. Each has similar purposes, but the statutory provisions establishing each vary somewhat.

The purpose of state game refuges 2/ is to "protect and preserve the natural habitat and game population[s] in certain designated areas of the state." AS 16.20.020. 3/

Two game sanctuaries have been established, the Walrus Islands state game sanctuary and the McNeil River state game sanctuary, both consisting of the land described in the statute and adjacent state waters. AS 16.20.110 and AS 16.20.160. 4/ The purpose of the sanctuaries is "to protect" the game found

2/ The state game refuges include 17 units which had been in the national wildlife refuge system at the time Alaska achieved statehood, and the tide and submerged land adjacent to two of the units. AS 16.20.030(a). Seven other units are also encompassed, comprised of the state-owned land and adjacent water in the Potter Point state game refuge, AS 16.20.030(b), the Goose Bay state game refuge, AS 16.20.030(c), the Palmer Hay Flats state game refuge, AS 16.20.032, the Mendenhall Wetlands state game refuge, AS 16.20.034, the Susitna Flats state game refuge, AS 16.20.036, the Trading Bay state game refuge, AS 16.20.038, and Creamer's Field migratory waterfowl refuge, AS 16.20.039.

3/ The legislature established additional purposes for three of the refuges: to protect specific fish and wildlife populations and habitats, and also to protect public uses, including viewing, photography, and recreation in a high quality environment. AS 16.20.036(b) (Susitna Flats), AS 16.20.038(b) (Trading Bay), and AS 16.20.039(c) (Creamer's Field).

4/ We are informed that the land described in the two sanctuaries is all state owned.

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therein, and their "vital habitat ... so that these resources may be preserved for scientific, esthetic and educational purposes." AS 16.20.100; sec. 1, ch. 108, SIA 1967.

The purpose of fish and game critical habitat areas 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." AS 16.20.220. 5/

Although the stated purposes for the special areas specify protection and preservation of fish and wildlife 6/ and their habitat, the legislature clearly did not intend them to remain untouched and unused. For game refuges, a number of approved uses are specifically listed in the statutes. 7/ Within game sanctuaries, oil and mineral exploration and

5/ Twelve fish and game critical habitat areas are established in AS 16.20.230: Port Moller, Port Heiden, Cinder River, Egegik, Pilot Point, Kalgin Island, Fox River Flats, Chilkat River, Kachemak Bay, Clam Gulch, Copper River Delta, and Anchor River and Fritz Creek. Except for the most recently designated fish and game critical habitat area, all land, including privately owned land, within the described areas is included. Anchor River/Fritz Creek critical habitat area is the exception and contains only the state land and water within the described area. AS 16.20.230(12).

6/ The terms "game" (used in reference to refuges, AS 16.20.020, and sanctuaries, AS 16.20.100) and "wildlife" (used in reference to critical habitat areas, AS 16.20.220) appear to mean the same thing. The definition of "game" in AS 16.05.940(14) is very broad, encompassing virtually "any species of bird, reptile, and mammal... found or introduced in the state."

7/ For example, in the Mendenhall Wetlands state game refuge,
(Footnote continued)

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development are authorized, subject to certain requirements and limitations which will be discussed later. AS 16.20.130, AS 16.20.140, and AS 16.20.170. Within the most recently established fish and game critical habitat area, Anchor River/Fritz Creek, the use and appropriation of water rights for a municipal and community water source are specifically protected, and the possibility of constructing a dam and reservoir is specifically reserved. AS 16.20.230(b).

In summary, the legislature created the special areas to protect fish and game and their habitat, but not to exclude all other uses of the areas.

B. DNR general authorities

The Alaska Land Act, AS 38.05, grants to DNR a number of responsibilities and authorities over land in the state. The

(Footnote continued)

hunting and recreational activities are "expressly permitted," if consistent with a plan adopted by ADF&G, and authorized by the Board of Game. AS 16.20.034(e) and (f). Gravel extraction is also allowed, subject to the ADF&G plan. AS 16.20.034(h). Acquisition by the City and Borough of Juneau of refuge land for expansion of the municipal airport, establishment of additional transportation corridors, and establishment of publicly owned and operated docking facilities, is provided for. AS 16.20.034(i). In the Susitna Flats state game refuge, entry for exploration and development of oil and gas resources is permitted if compatible with protection and public uses of fish and wildlife habitat and populations. AS 16.20.036(b) and (c). Similar provisions apply to the Trading Bay state game refuge. AS 16.20.038(b) and (c). In the Creamer's Field migratory waterfowl refuge, recreational and agricultural activities are expressly permitted if consistent with ADF&G's plan to promote the protection and enhancement of habitat for migratory birds and opportunities for viewing. AS 16.20.039(c) and (d).

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The Alaska Land Act, AS 38.05, grants to DNR a number of responsibilities and authorities over land in the state. The authority of the commissioner of DNR includes the power to establish procedures and adopt necessary regulations, enter into agreements, review orders or actions of the division of land and water management (originally the "division of lands"), and exercise other powers and do other acts necessary under the Alaska Land Act. AS 38.05.020. Under AS 38.05.005, the commissioner of DNR controls and supervises the division of land and water management, which has, under AS 38.05.035, a number of mandatory and discretionary duties 8/ regarding the overall

8/ The mandatory duties are described in AS 38.05.035(a) and include 9the responsibility to:

(2) manage, inspect and control state land and improvements on it belonging to the state and under the jurisdiction of the division;

(4) prescribe application procedures and practices for the sale, lease or other disposition of available land, resources, property, or interest in them;

(6) ... issue deeds, leases or other conveyances disposing of available land, resources, property or any interests in them;

(7) have jurisdiction over state land, except
(Footnote continued)

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management, retention, and disposal of state land. In addition, the Alaska Land Act contains other specific provisions relating

(Footnote continued)

that land acquired by the Alaska World War II Veterans Board and the Agricultural Loan Board or other departments or agencies succeeding to their respective functions through the foreclosure or default; to this end the director possesses the powers and, with the approval of the commissioner, shall perform the duties necessary to protect the state's rights and interests in state lands, including the taking of all necessary action to protect and enforce the state's contractual or other property rights;

...

(9) maintain such records as the commissioner considers necessary...

...

(12) be the certifying agent of the state to select, accept and secure by whatever action is necessary in the name of the state, by deed, sale, gift, devise, judgment, operation of law, or other means any land, of whatever nature or interest, available to the state; and be the certifying agent of the state, to select, accept or secure by whatever action is necessary in the name of the state any land, or title or interest to land available, granted, or subject to being transferred to the state for any purpose

The discretionary duties include granting preference rights for lease or purchase of state land in certain circumstances, selling and disposing of land by lottery in certain circumstances, and quit-claiming land to the federal government if it was erroneously conveyed from the federal government to the state. AS 38.05.035(b).

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to DNR's duties and authorities. 9/

The Water Use Act, AS 46.15, grants to DNR the authority to determine and adjudicate rights in state waters, and in its appropriation and distribution. AS 46.15.010. This responsibility is accompanied by a mandate to adopt necessary procedural and substantive regulations, taking into account the statutory responsibilities of ADF&G and the Department of Environmental Conservation. AS 46.15.020. The statutes set out a number of guidelines which direct how DNR handles water appropriation. 10/

Thus, the Water Use Act and the Alaska Land Act grant DNR many authorities over state water and land. 11/ These authorities must be exercised in a manner consistent with the

9/ For example, sale of land is covered by AS 38.05.045 -- AS 38.05.069. Leasing of lands other than for extraction of natural resources is governed by AS 38.05.070 -- AS 38.05.105, disposal of timber and materials by AS 38.05.110 -- AS 38.05.120, leasing of mineral lands by AS 38.05.135 -- AS 38.05.184, and mining rights by AS 38.05.185 -- AS 38.05.275.

10/ For example, the determination of priority is generally governed by AS 46.15.050, existing rights by AS 46.15.060 and AS 46.15.065, criteria for permit issuance by AS 46.15.080, preferred uses by AS 46.15.090 and AS 46.15.150, and transfers of appropriations by AS 46.15.160 and AS 46.15.170.

11/ The Department of Transportation and Public Facilities and the Board of Regents of the University of Alaska are specifically excepted from the provisions of the Alaska Land Act and can acquire, use, lease, dispose of, or exchange real property independently from DNR, to the extent permitted by their own enabling legislation. AS 38.05.030.

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state constitution and with the guidelines set out in the statutes. For example, AS 38.05.235 mandates that disposal and use of state land shall conform to the state constitution and "the principles of multiple purpose use consistent with the public interest." Although "multiple purpose use" is not defined, "multiple use" is defined in AS 38.04.910(4) as

the management of state land and its various resource values so that it is used in the combination that will best meet the present and future needs of the people of Alaska, making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; it includes

(A) the use of some land for less than all of the resources, and

(B) a combination of balanced and diverse resource uses that takes into account the short-term and long-term needs of present and future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historic values . . . ,

The requirement that disposal and use of state land take into account the present and future needs for natural resources is consistent with article VIII, sections 1 and 2, of the Alaska Constitution, which declare that the state's policy is to encourage settlement of land and development of resources by "making them available for maximum use consistent with the public interest," and that the legislature shall provide for the

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utilization, development and conservation of state land "for the maximum benefit" of Alaskans. These sections are augmented by article VIII, section 4, which directs that fish and wildlife be "utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."

There are other relevant provisions of the state constitution that affect the exercise of DNR's (and ADF&G's) authority. For example, article VIII, section 7, provides that the legislature may reserve from the public domain "areas of natural beauty or of historic, cultural, recreational, or scientific value" for the "use, enjoyment, and welfare of the people." Another example is article VIII, section 13, which mandates that, except for the public water supply, "an appropriation of water shall be ... subject ... to the general reservation of fish and ... wildlife."

In setting out DNR's authorities, the legislature has recognized Alaska's unique constitutional mandates regarding fish and wildlife and their habitat. For example, in AS 38.04.005(b), the legislature directs that, in making state land available for private use, adverse effects on significant resources, including wildlife and fishery resources, must be minimized. Further, in AS 38.04.015 the legislature lists protection of "critical wildlife habitat and areas of special scenic, recreational, scientific, or other environmental concern" as one of the five

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primary public interests in retaining areas of state land in public ownership. In carrying out its responsibility to classify state land, DNR has recognized this concern and has established "wildlife habitat land" as one of the classification categories. Described in 11 AAC 55.230, wildlife habitat land is land primarily valuable for fish and wildlife production or "a unique or rare assemblage" of one or more species. With regard to water, DNR must always consider the effect on fish and game resources in making its public interest determination as a component of reviewing water appropriation permit applications. AS 46.15.080 (b)(3). This is consistent with article VIII, section 13, and is in addition to the ability of DNR, after adjudicating a request from ADF&G, to reserve a specified instream flow or level of water under AS 46.15.145 for protection of fish and wildlife habitat, migration, and propagation, which in adjudicating later claims is treated by DNR as a prior appropriation under AS 46.15-.080(a)(1).

Thus, DNR has broad authority over almost all state-owned land, including the authority to acquire, hold, and transfer. These authorities are to be exercised not in a vacuum, but under constitutional and statutory directives to promote various policies. For example, as discussed above, (1) all natural resources, including land, wildlife and fisheries, shall be available for the maximum use consistent with the public

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interest, (2) natural resources shall be utilized for the maximum benefit of the people of the state, (3) the value of fish and wildlife shall be recognized and maintained, and (4) adverse effects upon them shall be minimized. DNR must balance competing interests and policies and, in disposing of any interest in land, is required to determine if the disposal is in the best interest of the state. AS 38.05.035(e).

C. DNR authorities specific to special areas

Apart from DNR's general authorities and responsibilities with regard to state-owned land, a number of specific provisions in AS 16.20 address DNR's authority in special areas.

DNR may adopt zoning regulations for private land contained within the Potter Point, Goose Bay, Palmer Hay Flats, Susitna Flats, and Trading Bay game refuges. AS 16.20.030(b) and (d), AS 16.20.032(d), AS 16.20.036(e), and AS 16.20.038(e). Access corridors to and from private property within the Goose Bay, Susitna Flats, and Trading Bay game refuges are to be established through agreement between DNR, ADF&G, and the private property owners involved. AS 16.20.030(e), AS 16.20.036(f), and AS 16.20.038(f). In the Mendenhall Wetlands game refuge, management of the surface and subsurface estate is explicitly delegated to DNR, although any DNR actions which affect the habitat must conform to a plan adopted by ADF&G. AS 16.20.034(g). DNR and ADF&G are both required to assist the City and Borough of Juneau in filling

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bodies of water adjacent to the Juneau municipal airport runway to eliminate sites attractive to waterfowl which could create hazards to aircraft. AS 16.20.034(h). Any deed, contract of sale, lease, or other instrument evidencing disposition by DNR of land in the Mendenhall Wetlands game refuge must include a condition that the land is restricted for three specified purposes (airport expansion, transportation corridors, and docking facilities). AS 16.20.034(i). Finally, DNR and ADF&G are to jointly evaluate any offer of proof by the City and Borough of Juneau that there is a superior public need for use of land within the Mendenhall Wetlands game refuge, other than as refuge land. AS 16.20.034(j).

With regard to the two state game sanctuaries, there are also explicit references to DNR authority. DNR may not sell sanctuary land, and may lease it only as mineral land pursuant to DNR regulations. AS 16.20.140 and AS 16.20.170. DNR and ADF&G are authorized to jointly determine limitations additional to state or federal laws and regulations on oil and mineral exploration and development in the sanctuaries, to assure compatible multiple land use practices. AS 16.20.130 and AS 16.20.170.

There is one direct reference to DNR in the statutes governing critical habitat areas. In the recently established Anchor River/Fritz Creek critical habitat area, ADF&G is to develop, in consultation with DNR, a plan for the area to be

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submitted to the legislature.

Thus, in addition to its general powers, DNR is specifically mentioned in the statutes governing special areas. Some of those specific references assign particular tasks, some grant discretionary authority, and others limit the general authorities.

D. ADF&G authorities in special areas

In the special areas, the legislature has in AS 16.20 given certain authorities to ADF&G and the Boards of Fisheries and Game ("boards"). The authorities for each type of special area are set out somewhat differently.

In game refuges, the Board of Game is to adopt regulations governing the taking of game for "conservation and protection purposes." AS 16.20.040. On the other hand, ADF&G is delegated a different kind of authority. AS 16.20.050 provides:

Where the use, lease or disposal of real property in state game refuges created by AS 16.20.010 -- 16.20.080 is under the control or jurisdiction of the state, whether through federal permit or state ownership, the responsible state department or agency shall notify the commissioner of fish and game before initiating any use, lease or disposal of real property. The commissioner shall acknowledge receipt of notice by return mail.

The purpose of this notice is clarified by AS 16.20.060, which

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grants authority 12/ to ADF&G to ensure protection of fish and game:

If the commissioner so determines, the commissioner shall, in the letter of acknowledgment, require the person or governmental agency to submit full plans for the anticipated use, full plans and specifications of proposed construction work, complete plans and specifications for the proper protection of fish and game, and the approximate date when the construction work is to commence, and 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. The commissioner shall abide by the principle which recognizes preferences among beneficial uses as more particularly set forth in art. VIII of the state constitution.

As discussed in detail in section IV below, this provision gives ADF&G permit authority over any activity on refuge lands which ADF&G determines may affect fish or wildlife or their habitat. 13/ This authority is separate from and in

12/ In addition to the provisions of AS 16.20.050 and AS 16.20.060, which apply to all the refuges, in at least two of the refuges ADF&G is mandated to develop a plan to further the purposes of the refuges. The plan is to be used to determine whether certain activities are consistent with those purposes. AS 16.20.034(g) (Mendenhall Wetlands) and AS 16.20.039(c) (Creamer's Field).

13/ In this opinion, terms like "may affect" will be used to refer to ADF&G's authority to require plans, which is triggered by a determination of possible effects on fish, game, or habitat. Permit restrictions or denials by ADF&G must be based on facts supporting a conclusion that there is a reasonably likely connection between an activity and probable adverse effects on fish, game, or habitat.

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addition to any review and approval responsibilities held by DNR.

The authorities in critical habitat areas are similar to those in refuges. Under AS 16.20.240, the boards are to adopt regulations governing taking of fish and game for "conservation and protection purposes." As for refuges, ADF&G is to receive notice of any anticipated use, lease, or other disposal of land; 14/ but unlike in refuges, land in private ownership is included in critical habitat areas, and activities involving private land as well as state land must be brought to the attention of ADF&G. Further, while in refuges ADF&G determines if additional information should be submitted, in critical habitat areas the boards have that authority. 15/

14/ Under AS 16.20.250:

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.

15/ AS 16.20.260 provides:

(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:

(Footnote continued)

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The two statutory procedures for notice and submission of additional plans and specifications for game refuges and for critical habitat areas are similar to the structure established for ADF&G's review of projects in anadromous fish streams. 16/

(Footnote continued)

- (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.

16/ AS 16.05.870 provides:

(a) The commissioner shall, in accordance with the Administrative Procedure Act (AS 44.62), specify the various rivers, lakes and streams or parts of them that are important for the spawning, rearing or migration of anadromous fish.

(b) If a person or governmental agency desires to construct a hydraulic project, or use, divert, obstruct, pollute, or change the natural flow or bed of a specified river, lake, or stream, or to use wheeled, tracked, or excavating equipment or log-dragging equipment in the bed of a specified river, lake, or stream, the person or governmental agency shall notify the commissioner of this intention before the beginning of the construction or use.

(Footnote continued)

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Under AS 16.05.870, a person desiring to use an anadromous fish stream in certain specified ways must notify ADF&G, which can require additional information. The plans and specifications are then evaluated to determine whether they are sufficient for proper protection of fish and game. Just as in refuges and

(Footnote continued)

(c) The commissioner shall acknowledge receiving the notice by return first class mail. If the commissioner determines that the following information is required, the letter of acknowledgement shall require the person or governmental agency to submit to the commissioner:

(1) full plans and specifications of the proposed construction or work;

(2) complete plans and specifications for the proper protection of fish and game in connection with the construction or work, or in connection with the use; and

(3) the approximate date the construction, work, or use will begin.

(d) The commissioner shall approve the proposed construction, work, or use in writing unless the commissioner finds the plans and specifications insufficient for the proper protection of fish and game. Upon a finding that the plans and specifications are insufficient for the proper protection of fish and game, the commissioner shall notify the person or governmental agency which submitted the plans and specifications of that finding by first class mail. The person or governmental agency may, within 90 days of receiving the notice, initiate a hearing under AS 44.62.370. The hearing is subject to AS 44.62.330 -- 44.-62.630.

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critical habitat areas, written approval is required before the activity can commence.

In refuges and critical habitat areas, as well as for anadromous streams, ADF&G's conditioning or denial of a permit is limited to the probability of adverse impacts on fish, game or habitat. In contrast, DNR must balance effects on fish, game, or habitat as one of many, sometimes competing, factors in deciding under AS 38.05.035(a) whether a land disposal best serves the state's interests, a policy decision subject to very limited judicial review. Hammond v. North Slope Borough, 645 P.2d 750, 758 - 759 (Alaska 1982).

For sanctuaries, the statutory framework is quite different. The legislature in AS 16.20.120 delegated to the boards the broader authority to adopt regulations for sanctuaries governing

entry, development, construction, hunting, fishing, and all other uses or activities not in conflict with AS 16.20.130 and 16.20.140 for the purpose of preserving the natural habitat and the fish and the game of the Walrus Islands State Game Sanctuary.

This also applies to the other sanctuary, at McNeil River. AS 16.20.170. Land in neither sanctuary may be sold, and under AS 16.20.140 may be leased only as mineral land, as authorized in DNR regulations. Oil and mineral exploration and development are subject to state and federal laws and regulations and additional

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limitations jointly determined by ADF&G and DNR. 17/ (In developing additional limitations, ADF&G is governed by its statutory charge with regard to fish, game, or their habitat, while DNR again operates under the best-interest-of-the-state standard in AS 38.05.035(e).)

E. Coastal zone consistency review

Any exercise of authority by a state agency in the state's coastal zone 18/ must be consistent with the Alaska Coastal Management Program. AS 46.40.090(a), 46.40.100(a). For activities occurring in the state's coastal zone for which two or more state permits (or a federal permit or authorization) are required, a process is in place for coordinating permit applications between or among the relevant state agencies and

17/ AS 16.20.130 provides:

Oil and mineral exploration and development is permitted on the Walrus Islands State Game Sanctuary in accordance with state or federal laws and regulations, subject to the limitations of AS 16.20.140 and to additional limitations jointly determined by the commissioner of natural resources and the commissioner of fish and game to assure compatible multiple land use practices.

18/ Pursuant to 6 AAC 85.040, the boundaries of the coastal zone are initially based on Biophysical Boundaries of Alaska's Coastal Zone, incorporated by reference and described in the regulation, including the zones of direct interaction and direct influence, and may be modified consistent with specified guidelines by each coastal resource district in an approved district plan.

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rendering an overall determination, after which the state permits are either all issued (with appropriate conditions) or denied by the respective state agencies. 6 AAC 50. This procedure applies, then, to any activity in the coastal zone over which both DNR and ADF&G have permitting authority.

The Alaska Coastal Management Program ("ACMP") is, in effect, pursuant to AS 46.40.010 -- AS 46.40.210 and the federal Coastal Zone Management Act, 16 USC § 1451 et seq., and governs activities or uses located in or possibly affecting the coastal zone. The objectives of the ACMP include ensuring "the use, management, restoration and enhancement of the overall quality of the coastal environment," "the orderly, balanced utilization and protection of the resources of the coastal area consistent with sound conservation and sustained yield principles," and "the full and fair evaluation of all demands on the land and water in the coastal area." AS 46.40.020(1), (3), and (8).

The ACMP consists of standards contained in 6 AAC 80 and the district coastal plans formulated and approved under AS 46.40 and 6 AAC 85, and covering subjects such as coastal development, recreation, habitats, and air, land, and water quality. Permits may not be issued for activities in or affecting the coastal zone that are inconsistent with the ACMP. AS 46.40.200, 6 AAC 80.010.

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Interagency review of activities under the ACMP occurs in the context of an entire project, which may require several separate permits. The Office of Management and Budget ("OMB") is responsible for rendering a conclusive consistency determination for projects requiring two or more permits, leases, or authorizations. AS 44.19.145(a)(11), 6 AAC 50.030.

The procedures controlling this coordination are set out in 6 AAC 50 and are designed to facilitate inter-agency communication and consensus, with provisions for elevating consideration of a project from the regional to the directors' level, and on to the commissioners' level, if necessary. 6 AAC 50.070. OMB is closely involved in the review and discussions, and is ultimately responsible for rendering a final consistency decision. 6 AAC 50.070 and 6 AAC 50.120. ^{19/} Within five days after that determination, the agencies must issue relevant permits (except leases), which must contain any conditions required by the consistency determination. 6 AAC 50.130.

ADF&G and the boards in combination have been given specific authorities in special areas, the significance and scope

^{19/} If only permits from a single state agency, and no federal permits, are required, that agency takes the place of OMB in coordinating state review and rendering a final consistency determination. 6 AAC 50.030, 6 AAC 50.120. In that role, the agency is charged by 6 AAC 50.070 with encouraging and facilitating discussion among the state resource agencies, listed in 6 AAC 50.190 as including the Department of Environmental Conservation as well as DNR and ADF&G.

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of which are discussed in more detail in sections III, IV, and V below. Where special areas are in the coastal zone, the ACMP and the consistency review procedures would apply to the exercise of those authorities, and provide a mechanism for inter-departmental coordination.

III. PRIOR ATTORNEY GENERAL OPINIONS

Over the last 10 years, this office has analyzed and commented upon DNR and ADF&G responsibilities within special areas in several informal and one formal opinion. A review of those opinions provides a background to the present analysis.

In 1976, Assistant Attorney General Peter Froehlich discussed the legal requirements necessary for ADF&G to grant or deny approval of a proposed use on a state game refuge. 1976 Inf. Op. Att'y Gen. (Oct 25; J-66-045-77). The memorandum concluded that, under the facts addressed, ADF&G had acted legally in disapproving plans for a proposed transmission line across the Palmer Hay Flats, state game refuge.

In 1979, Assistant Attorney General Thomas Meacham evaluated a preference right within the Kalgin Island critical habitat area that was granted by DNR without notification to and approval by ADF&G. 1979 Inf. Op. Att'y Gen. (Dec 27; A-66-254-80). The opinion concludes that the grant of the preference right could not be considered complete until ADF&G had been

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notified under AS 16.20.250. 20/

In 1980, Assistant Attorney General Thomas Meacham evaluated whether a land exchange between DNR and private land holders which resulted in state-owned land within the Porter Marsh state game refuge entering private ownership was invalid because ADF&G had not been notified under AS 16.20.050. 1980 Inf. Op. Att'y Gen. (Oct 9; A-66-022-81). The memorandum notes that apparently DNR was not aware at the time of the exchange that the lands were "under the jurisdiction" of ADF&G and thus completed the exchange without giving the required notice. The mistake was not discovered until nearly two years later. The opinion concludes that the private party held the status of a bona fide purchaser, and that equity would not allow the exchange to be overturned because of a jurisdictional mistake made by a state agency which was in no way the fault of the private party.

20/ The opinion also notes in passing that the possible requirement for submission and approval of plans under AS 16.20.260 before construction is commenced would not bar the preference right and the conveyance. That observation may not be correct in all cases, since the requirement of notice to ADF&G in AS 16.20.250 would provide the opportunity for comment by ADF&G to DNR. Such statutorily mandated opportunities are not to be considered as merely a pro forma step that can be viewed lightly and avoided without consequence. See 1985 Inf. Op. Att'y Gen. (Sep. 11; 366-105-86), which discusses the need in each such situation to balance a number of factors, including the possibility of curing the neglected consultation and the relative potential harms, in determining the consequences of such a default.

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Thus, the analysis determined that ADF&G review was no longer authorized because the land had from the private party's perspective, apparently become private two years earlier, and only state-owned lands are included in refuges. 21/

In 1981, Assistant Attorney General Douglas Mertz noted that, in the Mendenhall Wetlands state game refuge, DNR and ADF&G both have "primary management authority, and hence necessarily decisionmaking authority," under AS 16.20.035(j). 1981 Inf. Op. Att'y Gen. (Nov 9; J-66-274-82). The memorandum addressed the fact that AS 16.20.034(j) specifies that both departments are granted final decision making authority over a request by the City and Borough of Juneau to use refuge land for another purpose.

In 1982, Assistant Attorney General Jonathan Tillinghast wrote a formal attorney general's opinion that discusses the authority of ADF&G and the boards to protect habitat. 1982 Op. Att'y Gen. No. 1 (Mar. 4). Most of that opinion deals with ADF&G's permit authority over anadromous streams, set out in AS 16.05.870, but the opinion also discusses permit jurisdiction in refuges, sanctuaries, and critical habitat

21/ As the more detailed analysis in section IV below concludes, in fact state land in refuges cannot be transferred in fee out of state ownership without specific legislative action.

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areas. At pages 3 through 4, the similar statutory format used for anadromous streams, refuges, and critical habitat areas is described. The analysis concludes that the notice and written approval provisions are clearly licensing statutes and that they had been regarded as such by the Department of Law for at least the preceding 18 years. The opinion notes that the statutory format is somewhat cumbersome and, at pages 9 through 12, concludes that the boards and ADF&G have the implied authority to adopt regulations implementing their respective permit programs. For anadromous streams, refuges, and critical habitat areas, that conclusion is based on implied powers. ^{22/} In sanctuaries, as noted in section II D above, the boards have explicit authority to adopt regulations "governing entry, development, construction, hunting, fishing, and all other uses or activities...." AS 16-20.120. Thus, for the sanctuaries, there is express authority to adopt regulations, which necessarily includes the authority to require permits before entry.

IV. INTERACTION BETWEEN DNR AND ADF&G AUTHORITIES

From the similar questions we have been asked by DNR and ADF&G, and from other contact with the two agencies, it is apparent that considerable confusion exists over the interaction

^{22/} The Administrative Procedure Act recognizes in AS 44.62.030 that regulatory authority may be express or implied.

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between DNR and ADF&G authorities in special areas. Administrators are seeking guidance on when they are required to consult with their counterparts in the other department before making a decision. Further, they seek clarification of when they may make an independent decision for their department which is controlling, and when an independent decision from the other department is necessary as well for an activity to occur.

A. Consultation requirements

As discussed in section II B above, DNR has various statutory authorities and responsibilities with respect to state-owned land, such as acquisition, lease, and sale. In exercising those powers, DNR makes its own decisions. However, in some cases when making its decisions DNR is required by statute to consult with ADF&G regarding the proposed action, although the ultimate decision rests with DNR. For example, under AS 38.50.010, DNR is authorized to exchange state land or interests in state land for other land, interest in land, or other consideration. However, "if land under the jurisdiction of a state agency other than the Department of Natural Resources may be involved," AS 38.50.090(a) requires DNR to "afford the head of that agency an opportunity to participate in the discussions respecting the lands." The Department of Law has previously concluded that this provision requires consultation with ADF&G when exchanges of interest in refuge land are being considered. 1980 Inf. Op.

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Att'y Gen. (Oct 9; A-66-072-81). 23/ Another example is the requirement that DNR "provide for meaningful participation in the planning process" by affected state agencies in developing land use plans by regions or areas. AS 38.04.065(b)(8). Further, before classification, zoning, or disposal actions, AS 38.05.945 requires notification of parties "known or likely to be affected."

In other cases, the duty to consult with ADF&G has been set out in regulation. For example, a 1981 memorandum by Assistant Attorney General G. Thomas Koester discussed DNR's authority to incorporate restrictions requested by ADF&G in a multiple land-use permit. 1981 Inf. Op. Att'y Gen. (Dec 15; J-66-352-82). That opinion discussed the then current version of 5 AAC 55.230, which allowed land classified as wildlife habitat to be used for mineral exploration "subject to restrictions which may be imposed by the commissioner [of DNR] at the request of the Commissioner of the Department of Fish and Game." The regulation further stated that lands classified as wildlife habitat could be leased and the disposal of timber and materials allowed if approved by DNR "after consultation with the Commissioner of the Department

23/ As discussed later in this section, land in refuges and sanctuaries cannot be transferred in fee out of state ownership without specific legislative authorization.

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of Fish and Game."

In addition to instances of mandatory consultation, we assume that DNR and ADF&G regularly consult about matters of mutual concern where either agency may be contemplating exercising one of its authorities or responsibilities.

B. Nature of separate, complementary authorities

With respect to special areas, ADF&G and the boards have some authorities and responsibilities which are independent of DNR's and some which overlap. If someone wishes to conduct an activity in a special area, often both DNR and ADF&G have separate rights of review and decision. In those cases, an affirmative decision by each agency would be needed before the activity could begin. This is similar to the situation discussed by Assistant Attorney General Jeffery Lowenfels in a 1981 memorandum evaluating AS 38.05.030(a).^{24/} 1981 Inf. Op. Att'y Gen. (Mar. 20; A-66-303-81). That provision specified that the disposal of university lands was to be made by DNR, but that "no sale, lease, exchange or other disposal of university lands may be made without the approval of the Board of Regents of the University of Alaska." The opinion concludes at page 3 that the issuance of a mining lease or mineral patent by DNR on university lands is

^{24/} This section was subsequently repealed by ch. 152, SLA 1984.

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prohibited unless expressly approved by the Board of Regents. Thus, absent a "classification prohibiting staking which would cover all or part of the university grant lands ... such lands are open to mineral entry, i.e., claim staking, but removal of minerals without prior issuance of a Board of Regents approved lease would not be lawful." Id.

Similarly, in each of the three special areas, DNR and ADF&G have certain dual authorities, not identical in scope, which call for independent review; each agencies' approval is equally necessary for certain activities to occur.

C. Separate, complementary authorities in sanctuaries

In game sanctuaries, governed by AS 16.20.090 -- AS 16.20.170, the authorities given to ADF&G and the boards are set out in a format different from the format for refuges and critical habitat areas, and are much broader. As discussed in section II D above, in sanctuaries the boards are given broad regulatory authority over "entry, development, construction, hunting, fishing, and all other activities or uses...." AS 16.20.120 and AS 16.20.170. These regulations must be for the "purpose of preserving the natural habitat and fish and game" Id. The only other restriction is that they shall not be inconsistent with AS 16.20.130 and AS 16.20.140, which in concert with AS 16.20.170 prohibit the sale of sanctuary land and allow leasing only as mineral land under DNR regulations.

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Thus, the boards' regulations under AS 16.20.120 could not prohibit authorized oil and mineral exploration and development but could condition it as long as the conditions were not inconsistent with federal and state laws and regulations, nor with other limitations determined jointly by DNR and ADF&G. AS 16.20.130. Additionally, the boards can in all other respects govern uses and activities so as to preserve the habitat or fish or game of the area. ^{25/} As discussed in section III above, this authority includes permitting authority. In sanctuaries, then, DNR's role is limited to regulation and limitation of oil and mineral exploration and development.

D. Separate, complementary authorities in refuges and critical habitat areas

For refuges and critical habitat areas, as discussed in section II D above, the statutory framework which gives authority to ADF&G and the boards differs from the one just reviewed for sanctuaries, and the standard under which the authority is exercised is limited to possible effects on fish, game or their habitat. The powers and duties of ADF&G and the boards in those two types of special areas are quite similar.

^{25/} Therefore, activities inconsistent with preserving the habitat could not be authorized by the boards, and we see no occasion for board regulations to conflict with general land management statutes.

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ADF&G is given a general permitting authority for refuges 26/ and shares that authority with the boards for critical habitat areas. Whenever the "use, lease or disposal of real property" in refuges is "under the control or jurisdiction of the state," AS 16.20.050 requires the responsible state department (in many cases, DNR) to notify ADF&G before "initiating" the use, lease or disposal. Under AS 16.20.250, in critical habitat areas private land as well as state-owned land is subject to the requirement, 27/ and thus, the statute imposes the duty to notify ADF&G upon the private party as well as the responsible state agency.

After notice is received by ADF&G, the person or governmental agency may be required to submit full plans and specifications. For refuges, ADF&G makes that decision, and for critical habitat areas, the boards decide. AS 16.20.060 and AS 16.20.260. The description of what can be required is identical

26/ In addition, with respect to game refuges, ADF&G has a further statutory mandate. For the Mendenhall Wetlands state game refuge and Creamer's Field migratory waterfowl refuge, ADF&G is explicitly directed to develop a plan to promote the purposes of the refuges, and activities in those refuges are permitted only if compatible with the overall plan. AS 16.20.034(e), (f), (g) and (i), and AS 16.20.039(d).

27/ As discussed in section II C above, DNR is authorized but not required to adopt zoning regulations on private land contained within five of the refuges. AS 16.20.030(b) and (d), AS 16.20.032(d), AS 16.20.036(e), and AS 16.20.038(e).

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for refuges and critical habitat areas: full plans and specifications for the anticipated use, for the proposed construction work, and for the proper protection of fish and game, as well as the approximate date when the construction or work is to commence. Id. Further, ADF&G (for refuges) and the boards (for critical habitat areas) are given the authority to require the person or governmental agency to obtain written approval from ADF&G "as to the sufficiency of the plans and specifications before construction is commenced." Id. As discussed in section III above, written approval that is a prerequisite to commencement of an activity has been determined previously by this office to be a permit. 1982 Op. Att'y Gen. No. 1 (Mar. 4). The legislature has thus required that the impact on fish and game in these areas, specifically established to protect and preserve the natural habitat and to perpetuate fish and wildlife, be evaluated by the agency charged with fish and game management, ADF&G.

Although the requirement in AS 16.20.060 and AS 16.20-.260 for approval before "construction is commenced" can be interpreted several ways, 28/ we believe the most supportable reading encompasses the commencement or continuation of any

28/ "Construct" means "to form, make, or create by combining parts or elements." Webster's Third New International Dictionary, 489 (1976).

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activity which ADF&G determines is likely to affect fish or wildlife or their habitat. In Alaska, a sliding scale for construction of statutes has been established. State v. City of Haines, 627 P.2d 1047, 1049, n.5 (Alaska 1981); accord State v. Alex, 646 P.2d 203, 208-09, n.4 (Alaska 1982). Alaska courts will now construe a statute in light of the overall purposes of the legislation as a whole and will not construe a statute in a manner inconsistent with the express objective of that very legislation. Anchorage Municipal Employment Association v. Municipality of Anchorage, 618 P.2d 575, 580 (Alaska 1980). As detailed in section II A above, the express purpose of refuges and critical habitat areas is to "protect and preserve" the natural habitats and fish and wildlife populations. AS 16.20.020 and AS 16.20.220. Further, for critical habitat areas, the objectives include restricting "all other uses not compatible with" that protection and preservation. AS 16.20.220. Thus, it is most likely that the legislature intended ADF&G's review and approval function in legislatively designated areas to be triggered by the likelihood of impact on fish or game or their habitat.

A narrower reading -- that the written approval applies only to the actual nailing of boards, digging of holes, or building of dikes, and not to cutting down trees or driving heavy vehicles across fragile tundra -- would be inconsistent with the

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clearly articulated legislative concern for the habitat and fish and game in special areas, and with the explicit review provided for the "anticipated use." It is unlikely that the legislature intended the notice and approval statutes to be so narrowly construed as to undermine fish and game protection.

However, we do not believe that an extremely broad reading -- under which ADF&G could require an ADF&G permit for any use, lease, or disposal of land in special areas -- is supportable. The language of AS 16.20.050, AS 16.20.060, AS 16.20.250 and AS 16.20.260 precludes an interpretation which would grant ADF&G permit authority over transactions which are not likely to affect fish or game or their habitat.

Consequently, we believe that the most logical reading of AS 16.20.060 and AS 16.20.260 gives ADF&G permit authority in special areas over any activity which ADF&G determines may affect fish or game or their habitat. That interpretation is consistent with the language of the statutes and the general rule articulated by the Alaska Supreme Court that "conservation laws such as fish and game laws should be liberally construed to achieve their intended purpose." Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897, 903 (Alaska 1981). It is reasonable to assume that the legislature intended to give meaningful review authority in refuges and critical habitat areas to the agency primarily responsible for fish and

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game conservation -- ADF&G. (In order to further clarify what activities are encompassed by ADF&G permit authority under AS 16.20.060 and AS 16.20.260, it would be strongly advisable for ADF&G to adopt a regulation identifying activities it has determined may affect fish or wildlife or their habitat in special areas.) 29/

For a use, lease, or disposal that will not affect fish or wildlife or their habitat, AS 16.20.050 and AS 16.20.250 still require that ADF&G be notified. The purpose of that notification is to provide ADF&G the opportunity to comment on the lease or disposal to DNR or other relevant agencies and, in critical habitat areas, the private land owner. That consultation may be very important to DNR or the private person in evaluating the wisdom of the transfer; for example, if ADF&G anticipates that it would not be able to permit the eventual use to which the land would be put, those involved are likely to benefit from that knowledge.

E. Water appropriation and use

DNR has the authority to adjudicate water rights among competing claimants and to issue water appropriation permits, as discussed in section II B above. AS 46.15. In doing

29/ See discussion of the need for regulations in section V, under question B, below.

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so, DNR is to consider a number of factors, including the effect on fish and game. AS 46.15.080(b)(2); Alaska Const. art. VIII, § 13. ADF&G, on the other hand, has no authority to appropriate water to particular individuals, although it has a role in commenting to DNR on permit applications and providing information which will assist DNR in fulfilling its constitutional and statutory responsibility to consider fish and game.

However, before use can be made of water appropriated by DNR to a particular claimant, in certain instances a permit must also be issued by ADF&G. If the water is from an anadromous fish stream, the procedures of AS 16.05.870, described in section II D above, must be followed, which may affect how the water appropriated by DNR can be taken. Similarly, if the water appropriated is in a special area, the provisions discussed in section IV C and D above apply. If the method of taking or the use within the special area may affect fish or game or their habitat in a refuge or a critical habitat area, ADF&G has permit authority under AS 16.20.060 and AS 16.20.260. If the use is in a sanctuary, the ADF&G permit authority is found in AS 16.20.120 and AS 16.20.170.

This distribution of complementary DNR and ADF&G authorities over water is analogous to those over land. For example, as discussed in section IV D above, DNR has the power to lease a piece of refuge land, as it has to appropriate water in a

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refuge. However, in this example, ADF&G has permit authority over any use of the leased land that might affect fish or game or their habitat, as it has over use of the appropriated water which could have those effects.

Given the related DNR and ADF&G water appropriation and use authorities over special areas and anadromous fish streams, it is very important that the two departments cooperate and communicate during the water permitting processes. This will ensure that an applicant is not accidentally misled into assuming that only DNR has permitting authority. Further, comment to DNR by ADF&G early in the DNR permitting process will ensure that an applicant is aware of ADF&G's separate and additional AS 16 permitting structures.

F. Prohibition on transfer of state land out of refuges

In refuges, a change in land status out of state ownership could threaten the overall legislative purposes for the refuge by virtue of the different statutory standards that come into play. ^{30/} In refuges, if state land were conveyed in fee out of state ownership, the land would no longer be refuge land and ADF&G would be unable to require review and approval of later

^{30/} This discussion does not apply to those refuges which have been incorporated by reference from the national wildlife refuge system, since they do not consist of state land. AS 16.20.030(a).

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use of the transferred parcel, regardless of the effect on fish, game or habitat. This result would do violence to the statutory scheme as a whole.

Moreover, if DNR had the authority to effectively extinguish a legislatively created refuge by transferring state land in fee, it would be contrary to the separation of powers doctrine. The doctrine of separation of powers is implicit in the Alaska Constitution, and precludes one branch of government from interfering with the proper functioning of another branch. State v. Williams, 681 P.2d 312, 315 n.2 (Alaska 1984). This doctrine places primary responsibility for the conduct of legislative activities upon the legislature. Van Brunt v. State, 653 P.2d 343, 346 (Alaska App. 1982). Thus, the executive branch (here, DNR) cannot undo (by transferring state land in refuges out of state ownership) the legislature's actions (providing certain protections for fish and game and their habitat on refuge lands).

Further, it is a fundamental principle of statutory construction that statutes are to be read as a whole, in context, and in a manner that avoids absurdities and carries out legislative intent. 2A N. Singer, Sutherland Statutory Construction §§ 45.12 and 46.05 (4th ed. 1984). We believe that, under those guidelines, refuge land may not be transferred in fee out of state ownership unless such transfer is specifically authorized

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by the legislature, as, for example, in AS 16.20.034(i), which provides for acquisition by the City and Borough of Juneau of state land in the Mendenhall Wetlands refuge for three specified purposes.

Critical habitat areas, unlike refuges, include both private and state land (except for the Anchor River/Fritz Creek area, which includes only state lands). AS 16.20.230. This fact probably reflects legislative recognition that statutory protections in critical habitat areas should extend beyond just state lands, and that multiple land ownership exists in these areas.

Because the legislature specified that the purposes for critical habitat areas include restricting all other uses not compatible with the primary purpose of protecting and preserving the habitat (AS 16.20.220), the legislature must not have intended to allow unrestricted conveyances (in fee) of land out of critical habitat status -- i.e., to federal or municipal entities that are not subject to the notice and permit requirements of AS 16.20.250 and AS 16.20.260. The legislature did not prohibit conveyances per se, but based on the same separation of powers principles articulated above, we interpret AS 16.05.220 as requiring that any fee transfers of state lands in critical habitat areas to private, municipal, or federal ownership, be subject to covenants running with the land that make the land subject to the protections of AS 16.20.240 -- AS 16.20.270.

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Without such protections, DNR could effectively dissolve legislatively created critical habitat areas.

The necessity for including protective covenants in conveyances in fee of state land does not apply to land held in private ownership at the time the critical habitat area was established, because private citizens are not subject to the separation of powers principle and their actions cannot be restricted based on this doctrine. Moreover, had the legislature intended to prohibit or restrict alienability of privately held lands in critical habitat areas, it would presumably have so stated in the legislation. Thus, a private landowner must give ADF&G notice of intent to convey land in fee under AS 16.20.250, but the restrictions of AS 16.20.260 do not apply, and there is no basis for requiring covenants in such private conveyances.

G. Summary and examples

Thus, we believe state land in refuges, as well as sanctuaries, 31/ cannot be conveyed in fee out of state ownership absent legislative authorization. Further, we believe that ADF&G and the boards in combination have permit authority over certain activities within refuges (consisting of state owned land) and critical habitat areas (consisting in almost all cases

31/ AS 16.20.140 and AS 16.20.170.

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of both private and state owned land). It is clear from both AS 16.20.060 and AS 16.20.250 that plans for any anticipated use are reviewable and that under the most supportable interpretation, they must be approved before the use can proceed if ADF&G determines that it would be likely to affect fish or wildlife or their habitat. This does not supplant DNR's separate authorities discussed in sections II B and C above, but it is, rather, in addition to them. 32/ Some examples may be helpful.

If an individual wished to lease a piece of refuge land and to construct on it a boat-launching facility, DNR could evaluate the conveyance under the relevant statutes and regulations, giving notice to ADF&G as required by AS 16.20.050, and determine whether or not under the relevant DNR provisions the lease is in the state's best interest and could be approved. In doing so, DNR could consider any input from ADF&G, but would not be bound by it. However, ADF&G would at the same time be reviewing the proposed plans and specifications for the boat-launching facility to evaluate possible impact on fish, game, or their habitat. If a permit were not issued by ADF&G, the individual could not

32/ We do not mean to suggest that DNR and ADF&G may not work together and make their decisions simultaneously. Indeed, such an approach would be consistent with the Administration's ongoing efforts at "permit reform" and, as discussed in section II E above, is provided for currently in the coastal zone consistency review process established in 6 AAC 50.

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construct the facility on the land, even if the lease were approved by DNR. If an individual wanted to commercially harvest trees on refuge land, ADF&G would be again notified under AS 16.20.050 and could require a permit under AS 16.20.060. Meanwhile, DNR would be reviewing the proposal under its own authority, such as AS 38.05.115. Approval from both agencies, each operating under its separate statutory standard, would be necessary. If the activity were to be located in or were to affect the coastal zone, the consistency review procedures in 6 AAC 50 would apply.

If an owner of private land in a critical habitat area wished to sell or lease his parcel to another individual, the owner would be required to notify ADF&G under AS 16.20.250, but ADF&G approval would not be required. (Similarly, DNR would notify ADF&G if it were considering a sale or lease of state land in critical habitat areas, but ADF&G approval would not be required.) If, however, the land owner wished to cut down all the trees on his parcel to achieve a better view of the nearby mountains, he would again notify ADF&G under AS 16.20.250, but in this instance, since something more than a change in paper status is involved, and if ADF&G determined that fish or wildlife or their habitat could be affected, ADF&G could require that he not proceed without a permit under AS 16.20.260.

If a tour guide wanted to set up expeditions into a

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sanctuary, he could be required by the boards to obtain a permit under AS 16.20.120 and AS 16.20.170, and DNR would not be involved. If a company, on the other hand, wanted to lease sanctuary land for oil exploration, the lease would be governed by DNR regulations under AS 16.20.140, and the exploration would be subject to state and federal laws and limitations jointly determined by DNR and ADF&G under AS 16.20.130. The boards could also impose requirements not inconsistent with those laws and limitations under AS 16.20.120 and AS 16.20.170.

V. SPECIFIC QUESTIONS FROM DNR AND ADF&G

Both DNR and ADF&G have posed specific questions about their complementary authorities in special areas. 33/ Although

33/ In addition, DNR has asked what authorities it holds in yet a fourth type of legislatively created area, state range areas. State range areas are set out in AS 16.20.300 through AS 16.20.360, and two are established. The Delta Junction Bison Range Area is described in AS 16.20.300, and the Matanuska Valley Moose Range is described in AS 16.20.360.

For the Delta Junction Bison Range Area, ADF&G is directed by AS 16.20.310 to develop a plan for bison which includes activities such as planting grains and other wild forage, altering existing plant cover, and tilling in order to produce forage. ADF&G is directed by the statute to "coordinate as closely as possible" with "the activities of the Agricultural Development Authority, Department of Natural Resources, relating to the Big Delta Agricultural Project." (No other reference to this "Authority" appears to be contained in the Alaska statutes.)

The Matanuska Valley Moose Range is established for several purposes, including improving and enhancing moose popu-
(Footnote continued)

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the answers are largely provided above, the questions (somewhat paraphrased) and specific answers are set out here.

Question A: Is the authority exercised by ADF&G under AS 16.20.050 and AS 16.20.060 on state game refuges exclusive of the authority of DNR under Title 38 on state lands? Does DNR retain its traditional role as lessor of interests in land and permitter of certain activities in special areas, while ADF&G holds a veto over the actual exercise of these activities within refuges, critical habitat areas and sanctuaries? Do ADF&G or the boards have the authority to give controlling approval, conditional approval, or denial to a use, lease, or disposal of real property otherwise allowed by DNR in state refuges, critical habitat areas, and game sanctuaries?

Answer: As discussed in section IV above, the statutory authorities of ADF&G and the boards in relation to the

(Footnote continued),
lations and habitat and perpetuating public multiple use of the area through fishing, grazing, forest management, hunting, trapping, and mineral and coal entry and development. AS 16.20.340. The management of fish and game resources in the range is the responsibility of ADF&G, under AS 16.20.350(a). Management of the surface and subsurface estate is the responsibility of DNR, which is directed to adopt a management plan for the range that reflects the concurrence of ADF&G. AS 16.20.350(b). DNR is authorized by AS 16.20.250(c) to adopt regulations governing the public use of the area and is specifically directed to consult with ADF&G before the adoption. Thus, the DNR plan for the area must be approved by ADF&G, but the regulations may be adopted after consultation with ADF&G, even (presumably) if agreement cannot be reached between the two departments.

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authorities of DNR are of several kinds. Some authorities must be exercised after consultation, some are joint authorities requiring concurrence, and some are separate and may be independently exercised (although public policy would often best be served by cooperative joint decision making).

ADF&G, in combination with the boards, does have permit authority to approve, condition, or deny activities which could affect fish or game on their habitat in those special areas, whether or not approved by DNR. Similarly, DNR has certain authorities within those areas, and even if a use were one which ADF&G would approve, if DNR also had jurisdiction and for some separate reason did not approve it, it could not be carried out. Thus, it is misleading to characterize ADF&G's authority as a "veto" over DNR's authority, just as it would be inaccurate to characterize DNR's authority as a "veto" over ADF&G's authority. Each is necessary and each is to be exercised independently, under the relevant statutory authorities and standards.

Question B: Do ADF&G or the boards have the authority to adopt regulations setting guidelines for the issuance of their permits in state refuges, critical habitat areas and sanctuaries? Do ADF&G or the boards have the authority to adopt plans for state refuges, critical habitat areas, and game sanctuaries for the purpose of guiding the agency in making permit decisions, species enhancement decisions, species harvest decisions,

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scientific investigations, and decisions designating specific geographic areas as appropriate locations for particular uses?

Answer: As discussed in section III above, this office has already concluded that ADF&G and the boards have implied authority to adopt regulations governing issuance of permits in refuges and critical habitat areas and more explicit authority in sanctuaries. 1982 Op. Att'y Gen. No.1 (Mar. 4). If guidelines are to be used in evaluating permit applications rather than a case-by-case assessment directly under the statute, the guidelines must be contained in regulations. In Kenai Peninsula Fisherman's Cooperative Association Inc. v. State, 628 P. 2d 897, 906 (Alaska 1981), the court discussed the broad definition of "regulation" contained in AS 44.62.640(a)(2), noting that it includes manuals, policies, instructions, guides to enforcement, interpretive bulletins, interpretations, and the like. Id. at 904-05.

One indicator of a regulation is that it "implements, interprets or makes specific the law enforced or administered by the state agency," and another is that it "affects the public or is used by the agency in dealing with the public." Id. at 905. General guidelines for issuing permits in special areas would indeed fit both those descriptions, and thus should be adopted by

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ADF&G as regulations. 34/

With respect to the authority to adopt plans for the purposes of guiding species enhancement decisions, species harvest decisions, scientific investigations, and decisions allocating lands and waters for particular uses, the same principles apply. 35/ If the plan would affect the public or be used in dealing with the public, then the plan must be adopted as a regulation. If the plan relates "only to internal management," then the definition of "regulation" in AS 44.60.640(a)(2) does not apply and it need not be adopted as a regulation. For example, an internal plan on where to use ADF&G's resources to enhance habitat or to conduct scientific investigations would not need to be adopted as a regulation.

34/ This conclusion can be contrasted to adoption by DNR of land use plans. Specific DNR statutes set out procedures (including detailed notice requirements) and criteria governing land use planning and classification, and those have been elaborated on in DNR regulations. AS 38.04.065, AS 38.05.945, 11 AAC 55.010 -- 11 AAC 55.280. This differs from ADF&G authority in special areas, for which no such detailed procedural mechanisms are established and which are subject to the Administrative Procedure Act, AS 44.62.

35/ For two refuges, Mendenhall Wetlands and Creamer's Field, the statutes specifically direct ADF&G to develop plans. AS 16.20.034(g) and 039(d). For the Anchor River/Fritz Creek critical habitat area, AS 16.20.230(d) specifically directs ADF&G in consultation with DNR to prepare a plan, concurred in by the Kenai Peninsula Borough for some portions of the area, by July 1, 1989, to be submitted to the legislature for approval.

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Decisions about harvest of fish and game by the public lie within the authorities of the boards, 36/ and a plan by ADF&G could not directly control that, even if it were adopted as a regulation. However, ADF&G could suggest a plan which the boards could choose to ignore or follow in exercising their own regulatory authorities over the taking of fish and game.

Whether or not ADF&G and the boards have authority to designate geographic areas as appropriate locations for particular uses hinges on whether that furthers the purposes of protecting and preserving the natural habitat and the fish and game of the special areas, or any of the more particular purposes of some of the individual refuges. If such designation facilitates the protection and preservation of the habitat or the fish or game, it should be a component of ADF&G or board regulations governing permitting uses in special areas. For example, if in a particular special area, ADF&G determined that on portion A it was possible to build boardwalks without adversely affecting fish or game or their habitat, but on portion B it was not, then that could be a component of the plan for the special area, which would then have to be adopted in regulation since it would guide permitting decisions involving the public use of the special

36/ Those authorities are found in AS 16.05.251, AS 16.05.255, AS 16.20.040, AS 16.20.120, and AS 16.20.240.

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area. In contrast, if ADF&G determined that portion A was a higher priority for a scientific investigation than portion B, ADF&G might develop a plan for investigation that would direct its personnel and resources to portion A first. That would not need to be adopted as a regulation, since it relates only to internal management.

Question C: We assume that the statutes contemplate cooperation in the planning, management and regulation of critical habitat areas, refuges and sanctuaries. Do the statutes imply specific procedures for cooperation in deciding the use of lands and waters in these areas?

Answer: Statutory obligations upon the two departments to consult and cooperate with one another or with other entities are mandatory and must be meaningfully fulfilled. Provisions which establish consulting mechanisms are undeniably important to achieving the most thorough compilation of information and understanding of the data and the potential consequences of various actions. See 1985 Inf. Op. Att'y Gen. (Sep. 11; 366-105-86). Thus, even when consultation is not required by statute, it is highly desirable when the subject matter of the possible action concerns both departments.

In some cases, outlined in section II C above, AS 16.20 specifies that cooperation and consultation is required between DNR and ADF&G. For example, in the Mendenhall Wetlands state

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game refuge, DNR is specifically designated to manage the surface and subsurface estate, but any actions by DNR which would affect the habitat are to conform with a plan adopted by ADF&G. AS 16.20.014(g). Another example is found in AS 16.20.130, which subjects oil and mineral exploration and development in the sanctuaries to, among other things, limitations jointly determined by DNR and ADF&G. A further example is the responsibility of DNR (and other governmental agencies) to notify ADF&G of any anticipated use, lease, or other disposal of land in refuges or critical habitat areas. AS 16.20.050 and AS 16.20.250. Obviously, unless ADF&G is notified, it would be difficult for it to review proposed actions.

Also, as discussed in section IV above, in some instances DNR is required by its own statutes and regulations to consult with ADF&G before taking action.

Additionally, as discussed in detail in section II E above, 6 AAC 50, establishes a procedure for consistency review under the ACHP for activities in or affecting the coastal zone, providing a mechanism for inter-departmental comment and cooperation in making permit decisions. Although not mandated by statutes, the departments could by agreement follow a similar process in exercising their authorities outside the coastal zone.

VI. CONCLUSION

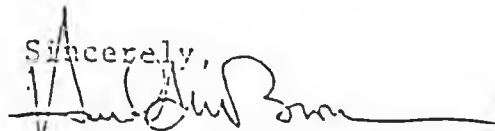
The attached chart summarizes the authorities of the

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two departments which are separate yet complementary. The Department of Natural Resources has many general authorities with regard to state-owned land, as well as specific authorities in state game refuges and sanctuaries. Some of those authorities must be exercised in conjunction with the Department of Fish and Game, some must be exercised after consulting with the Department of Fish and Game, and some may be independently exercised. The Department of Fish and Game and the Boards of Fisheries and Game have specific authorities in state game refuges, game sanctuaries, and critical habitat areas. Some of the authorities are to be exercised in conjunction with DNR, but for the three types of special areas, the Department of Fish and Game and the Boards of Fisheries and Game have separate permit authority which may be exercised independently of the Department of Natural Resources. In any event, any departmental actions which may affect the coastal zone must be consistent with the ACMF, and the consistency review process established in 6 AAC 50 is an example of inter-departmental coordination that might be useful statewide.

Sincerely,



Harold M. Brown
Attorney General

Attachment

SUMMARY OF DNR/ADF&G
 AUTHORITIES IN SPECIAL AREAS
 (AG # 366-045-84 and 366-122-84)

	Refuges	Critical habitat areas	Sanctuaries
Consists of state land only	X*		X
Consists of state and private land		X**	
State land cannot be transferred in fee without specific legislative authorization	X		X
Land can be leased only for oil and mineral exploration and development (by DNR)			X
Oil and mineral exploration and development governed by state and federal laws and regulations, and by limitations jointly determined by DNR & ADF&G			X
Boards may regulate all activities and uses not inconsistent with oil and mineral exploration and development			X
Leases and other paper changes of state land status executed by DNR, but ADF&G must be notified first.	X		
Sales, leases, and other paper changes of land status executed by private land owner or DNR, but ADF&G must be notified first		X***	
ADF&G and boards may regulate those activities which they determine may affect fish, game or their habitat	X	X	X

* Except for the units which have incorporated by reference from the national wildlife refuge system. AS 16.20.030(a).

** Except for the Anchor River/Fritz Creek critical habitat area, which consists of state land only.

*** Transfers of state land must be subject to covenants running with the land that make it subject to the protections of AS 16.20.240 -- AS 16.20.270

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Establishing Ernie Haugen
Public Use Area
Sponsor: Jones, et al
Requestor: Senate Finance Committee

Agency Affected: Dept. of Natural Resources
BRU: Land and Water Management
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

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

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Since there is no specified timeframe for completion of the management plan, the division shall undertake the project as its workload permits.

Prepared by: *Rick Halford*
Division: Senator Rick Halford, Co-chairman
Senate Finance Committee

Phone: 465-4958
Date: 3/23/88

Approved by Commissioner: _____
Agency: _____

Date: _____

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 468
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Establishing Ernie Haugan Public Use Area
Sponsor: Jones, Kelly, Halford, et.al
Requestor: Senate C&RA

Agency Affected: Natural Resources
BRU: Land and Water Management
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		30.0	15.0	5.0	5.0	5.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		30.0	15.0	5.0	5.0	5.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		30.0	15.0	5.0	5.0	5.0
FEDERAL FUNDS						
OTHER						
TOTAL		30.0	15.0	5.0	5.0	5.0

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Janet Bureson Phone: 465-3400
Division: Land and Water Management Date: 2/23/88
Approved by Commissioner: Tom Hawkins for Date: 2.23.88
Agency: Natural Resources

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

	<u>89</u>	<u>90</u>	Beyond
<u>300 Contractual</u>	30.0	15.0	5.0
Contract for Plan	Design & Implement	Implement	Operate & Maintain

ALASKA STATE LEGISLATURE


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907-465-3743

Senator Lloyd Jones

MEMORANDUM

TO: Representative Sam Cotten Co-Chairman
Representative Adelheid Herrmann Co-chairman
Members, House Resources Committee

FROM: Senator Lloyd Jones 

DATE: April 5, 1988

SUBJECT: Resources Committee Substitute for SB 468,
establishing the Ernie Haugen Public Use Area

This legislation has a two fold purpose; to honor a great public servant of Alaska and to ensure a traditional public recreation area continues to serve the residents of Petersburg and Wrangell as well as other Alaskans. The proposed Ernie Haugen public use area can be reached by driving south twenty-seven miles from Petersburg on the Mitkof Highway. (See attached map.)

The resources committee substitute, with which I concur, substantially reduces the acreage from the original measure.

The intent for the public use area is to ensure historic and traditional activities are not impeded, and to remove any discretionary authority from DNR to sell, transfer, or reclassify the land lying within its boundaries. It is also intended the area be managed under the existing funds within DNR's budget.

I can think of no greater honor to bestow upon Ernie Haugen. Ernie served Petersburg and Wrangell in the legislature for a period of eighteen years. He is an individual who has been unwavering in his support for the development of Alaska's natural resources, and as such, it is appropriate that we honor his service.

Page 2,
Ernie Haugen
April 5, 1988

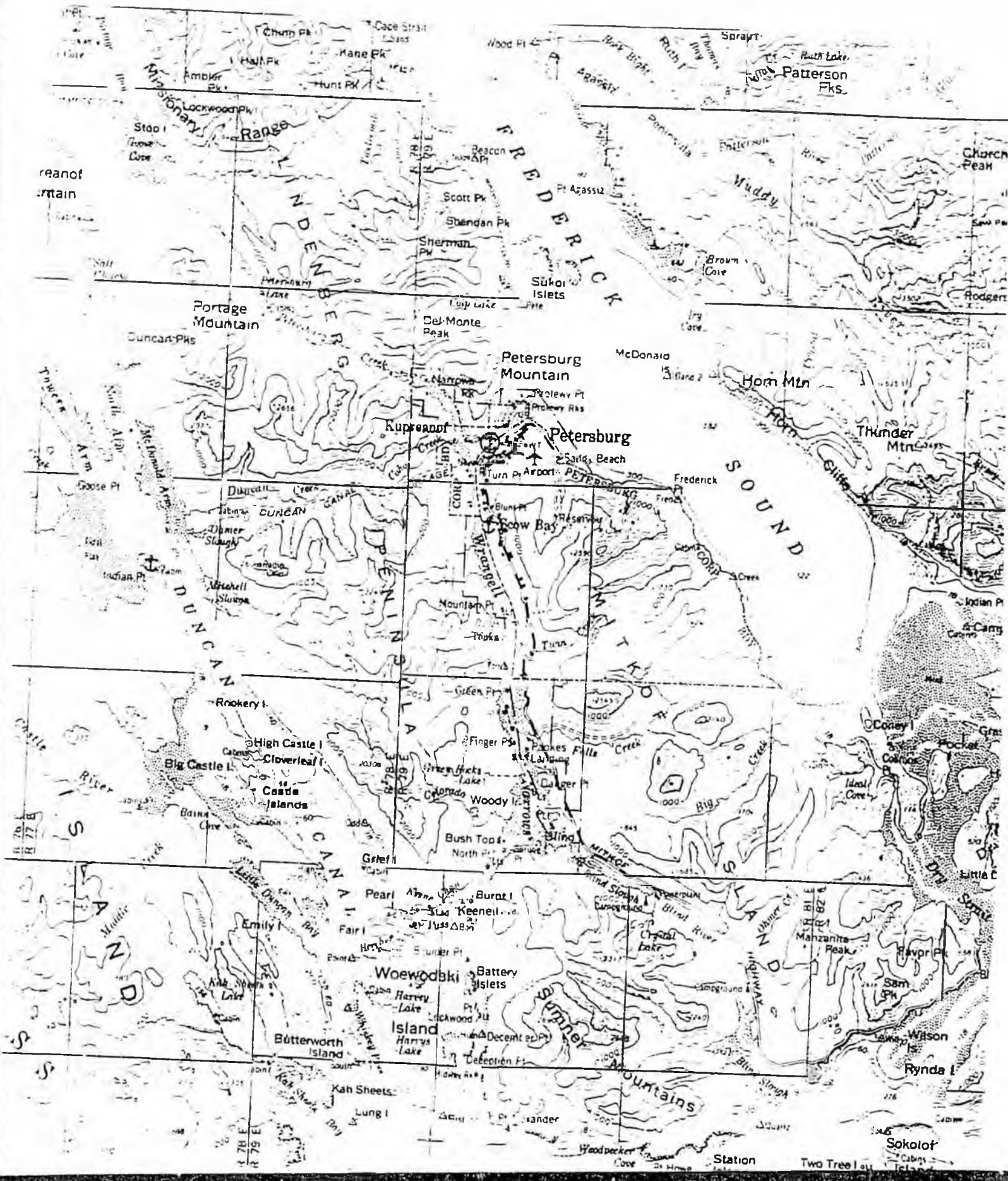
The lands included in the proposed public use area have been used by the people of Petersburg and Wrangell for the past two decades as a picnicking, camping, and woodcutting area. It has also served as a staging area for loading and unloading boats and barges for pleasure and commercial uses. The Ernie Haugen Public Use Area would encompass those areas which have been traditionally used for the pleasure of the two communities.

The description of the area is as follows; from the west, the area known as Green's Camp along the south side of the Mitkof Highway, including Crescent Beach/Banana Point along the highway to Wilson Cove. The total acreage would be 420, with approximately 330 in uplands and 90 in tidelands more or less.

Also in the measure is language which provides for power and transportation easements should they become necessary. The purpose of this language is to allow for a potential ferry terminal and necessary roads as well as for compatible utility development should it become advisable.

I have included for your information letters that were addressed to the Department of Natural Resources by area residents expressing the desire for a protective classification for the area. The underlined portions of the letters express the residents concerns. Given past and existing use, I think the public use classification best fits the area being considered.

Attached are maps showing the location of the proposed public use area.



ST. MANNER STRAIT



May 5, 1987

Department of Natural Resources
400 Willoughby Avenue, #400
Juneau, Alaska 99801

Attn: Judith Brady

Dear Ms. Brady:

Today I was shown a petition which requests that the land you propose to sell to the University of Alaska, 2,649 acres on the south end of Mitkof Island, be withdrawn from the list of lands made available for selection by the University of Alaska.

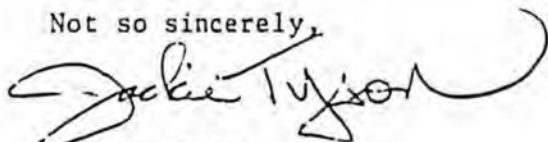
How can you so blatantly allow the sale of the best recreational area the citizens of this town have? In the summer, whenever we're fortunate enough to have a sunny day, those who have cars, make the long drive to Banana Point, Crescent Beach or Green's Camp to roast hot dogs and marshmallows, to beachcomb, and to swim and water-ski. You are giving away one of the few places for public sale an area which we all use and love.

Why in the world when you set out these land sales don't you take things into better consideration? If you want to sell land out there, at least you should reserve the land the public uses and save it for the good of all. If it's yours to dispose of... What is the sales price anyway? Why do you have to sell it all? If you must make a sale there, why not limit the land sold to only that on the upland side of the road?

You selected this for a recreational area around 4 years ago. What has happened???? I'm furious and so are a lot of people down here.

I would like you to respond to these questions and let me know just how it was determined to sell this prime piece of property. What are the trade-offs? This is absolute bull.

Not so sincerely,



Jackie Tyson
Box 587
Petersburg, Ak 99833

P.S. Petitions are being circulated throughout the town.

May 11, 1987

Judith Brady, Commissioner
Department of Natural Resources
Pouch M
Juneau, AK 99811

Dear Commissioner:

The citizens of Petersburg are very concerned over the inclusion of 2,649 acres on the south end of Mitkof Island in the list of lands available for selection by the University. We would like to see this area withdrawn and preserved for public use. There are only five places available to this community, and tourists, for recreational purposes. Three of the five recreation areas we enjoy are included in that 2,649 acres. It seems rather ironic that these parcels which were originally selected from the Tongass National Forest for inclusion in the State park system would then be turned around and sold for private use. Somehow it just doesn't add up.

The south end of this island is highly used by sport fishermen, commercial fishermen, hunters, boy scouts, girl scouts, families, different organizations have picnics at the recreation areas, and some people collect logs for firewood that have drifted up on the beaches. The impacts would be tremendous on the people of this community as well as on the land itself and the beaches when landowners try to get their various fill and construction permits. Of course, we can't forget the deer population which is now coming alive again. There have been numerous deer spotted along the roadside out there. There was also a moose spotted, which unfortunately was hit by a car. I understand Fish and Game anticipates reopening deer hunting on this island after being closed for almost 20 years. Disposing of the upper portions of this area will mean permanent closure to hunting for Petersburg residents which would have been open for hunting purposes.

I think it is a real shame that people were so uninformed about all this. There was not enough publicity to make people aware of what is being proposed. The vague description of the areas selected was very poor. There were no maps sent to show people the impact of the selection. After the informal hearing that was held here in town (which was poorly publicized) we decided to start a petition to inform people about what is going on and to let you know we oppose the selection of South Mitkof Island for the land settlement. After getting the enclosed petition typed up, and starting to spread the word, I was amazed how many people had no idea what it was even about. They were outraged that with something this major, which would impact

the whole community, was not made more public, besides the idea of taking away our recreation areas. People were also upset at the idea of decisions being made by the University to sell our recreation area for private use to generate revenue which will in turn not benefit the majority of our community. We will be the ones deprived of recreational areas on a small island which does not have an over abundance of them. The land selected in the Anchorage area doesn't even amount to a drop in the bucket compared to the over 4,600 acres to be taken from the Petersburg area. We were not even involved in the original transfer of the land between the University and the Municipality valued at approximately \$25,000,000. It seems rather unfair that the Anchorage area has approximately 1 acre and the Wasilla area approximately 2 acres compared to the 4,670 acres the Petersburg area is supposed to give up. Somehow I think the deck was loaded when this hand was dealt out.

We live on a small island and there are only two beaches that you can drive to on our highway system. One is just about 2 miles or so from town called Sandy Beach. It's a small beach but pretty nice if you don't mind not having much sun and getting the cold wind off the glacier when you are there trying to picnic. The only other beach you can drive to is Crescent Beach which has the unfortunate location of being in the middle of the proposed land settlement pool. It is the nicest beach to picnic at as it is on the southern end of the island which gets more sunshine and which the temperatures are always warmer than in town. It is also small and farther away from town, but is well worth the drive.

The enclosed petition was started the afternoon of Thursday, May 7th and collected Monday morning, May 11th. In that short amount of time we collected 391 signatures. Petersburg has a population of about 3,000 people and at least 1,500 adults. In just 3 days we collected signatures from over one-fourth of the adults in our community. If given more time for the petition we could have easily gathered signatures from practically every adult in town. Of all the many many people I showed the petition to, not one of them said they would not sign. I am sending a copy of the petition to you to show you that we are very much against the inclusion of this land in the proposed land selection.

I am also enclosing copies of three public opinion messages and a letter from a 9 year old girl written in regards to this land selection. You should also have received a letter from a concerned citizen of our community. The boy scouts in our community were also going to send a telegram(s) to

Judith Brady, Commissioner

Page 3

voice their concern in this matter. Please take time to read these letters and messages as this is something we want you to know that we do not take lightly.

Sincerely yours,

Teresa Stolpe

Teresa Stolpe
Concerned Petersburg Citizen

cc: Governor Cowper
Senator Jones
Representatives: Sund
Taylor
D. Daigger, DNR
C. Nash, University of Anchorage

ALASKA STATE LEGISLATURE

Home Address
3813 Denali Street
Ketchikan, AK 99901
907-225-9082



While in Juneau
P.O. Box V
Juneau, AK 99811
907-465-3743

Senator Lloyd Jones

June 24, 1987

Judy Brady, Commissioner
Department of Natural Resources
Box
Juneau, Alaska 99811

Dear Commissioner Brady:

I am writing regarding the proposed state land transfers to the the University of Alaska near Petersburg. I want to know the department's response to the legislative intent for Thomas Bay which I and Senator Duncan was placed into your budget. I am also concerned about the sale of parcels on south Mitkof Island near Petersburg. You are now probably aware of the strong public sentiment in Petersburg to the proposed land transfers.

The areas on south Mitkof Island proposed for transfer to the University of Alaska have been historically used as recreation areas by the residents of Petersburg and to some degree the residents of Wrangell. In fact this is often a meeting area for the relatives and friends of the communities of Petersburg and Wrangell.

As a former Petersburg resident who has utilized that area with my friends and family I am concerned that the Department is making a bad public policy decision. I understand that the Department needs land to settle with the University of Alaska. However, I am concerned that the Department is proceeding without considering other options.

To my knowledge the Department did not determine if there was a possible legislative solution. It seems that this land trade is being rushed. It also appears that southeast Alaska is being asked to pay for some bad decisions made in southcentral Alaska. It appears that some hasty and uninformed decisions are being made which unfairly affect my constituents.

I encourage the Department to consider other options such as making future state land grants from the federal government in all parts of Alaska available to the University.

Page 2,
DNR-Petersburg

June 24, 1987

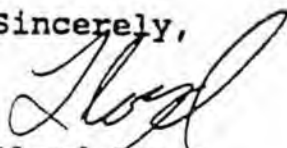
To take away state land which has been historically used as prime recreation land by generations of Alaskans seems unwise. Has DNR considered that these areas have had this historic recreational use? I wonder if DNR would take similar action against popular and prime state recreation near the major population areas of the state, or would some form of compromise be worked out?

The Senate and the House placed two separate intent language statements in the DNR budget which makes clear that the Thomas Bay lands were not to be considered in land exchange between the University and DNR. Had there been sufficient information and the opportunity there would be similar intent for south Mitkof Island.

I urge you to reconsider the Departments proposed actions on state land near Petersburg. I would also suggest that the Department consider other options such as future land selections that may be forthcoming from the federal government. I will be happy to assist DNR in finding a possible solution to this problem.

I look forward to hearing a response from the department regarding this letter.

Sincerely,



Lloyd Jones

ALASKA STATE LEGISLATURE



Home Address
2813 Denali Street
Ketchikan, AK 99901
907-225-9082

While in Juneau
P.O. Box V
Juneau, AK 99811
907-465-3743

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Page 2,
DNR-Petersburg

June 24, 1987

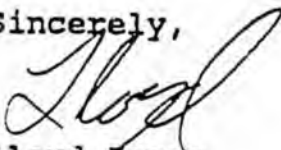
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I look forward to hearing a response from the department regarding this letter.

Sincerely,



Lloyd Jones

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Establishing Ernie Haugen
Public Use Area
Sponsor: Jones, et al
Requestor: Senate Finance Committee

Agency Affected: Dept. of Natural Resources
BRU: Land and Water Management
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Since there is no specified timeframe for completion of the management plan, the division shall undertake the project as its workload permits.

Prepared by: *Rick Halford*
Division: Senator Rick Halford, Co-chairman
Senate Finance Committee

Phone: 465-4958
Date: 3/23/88

Approved by Commissioner: _____
Agency: _____

Date: _____

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

July 7, 1987

Richard LeFebvre
Department of Natural Resources
Division of WLM
P.O. Box 107005
Anchorage, Alaska 99510-7005

Dear Mr. LeFebvre:

Enclosed you will find the copy of the petition that was circulated in Petersburg and sent to your Juneau office via DHL to Judy Brady, Commissioner and signed for by Lori Notestine, and also sent to your Anchorage office via Alaska Airlines Goldstreak to Denny Dalgger on May 12. I'm really glad that I called to inquire about the statement made in your letter to me saying that you'd received a petition with 51 signatures as it seemed you hadn't received our petition which had 391 signatures. Now as it has turned out, no one in your offices has any record of this petition at all. It just makes me wonder that if you lost a document of this nature, what else has been misplaced.

In my letter when it was stated that the Commissioner would not accept our petition, we were told that sending it to Juneau wouldn't meet the deadline requirements and that it had to go to Anchorage. Since we'd only heard about South Mitkof Island the week before the deadline, we were operating under a lot of pressure to have this in before it was too late. We had already sent one DHL to Juneau. This means we had to send the packet to Ketchikan via Wrangell Air Service which cost \$10 and then it went from Ketchikan to Juneau via DHL which cost another \$14. Then we had to turn around and make another copy and goldstreak that one to Anchorage which cost \$15. It doesn't make things easy having the jet go through to the north once a day and to the south once a day. I never realized how far away Anchorage and Juneau were till we went through this operation. You can imagine how shocked we are to find that neither of your offices has a copy of this document.

As I mentioned in a phone conversation with you day before yesterday, a map of S.E. Alaska, and the rest of the State, with the areas affected in a highlighted color with instructions to contact a specific local office written somewhere on the map would be a simple way that people would know what areas of the State were being considered in this land transfer. This is the sort of thing that would stand out at the post office or at the city office window or a place of like nature. The maps sent to me are pathetic to say the least. A sample is enclosed. At least with a broader, more general map, a person would be able to target the areas of concern and investigate more deeply using your maps as a second step going on from there to something like a topographic map.

The 'emergency' hearing in Petersburg was called to address the concerns of the moose hunters. The Mitkof Island lands were barely mentioned. The subject of that meeting was Thomas Bay basically, and hardly anyone was aware of the proposed transfer at the end of Mitkof Island. The emergency meeting, being called on short order, was not well advertised, and wasn't

on your agenda at all until the moose hunters raised such a stink that someone had to come down.

I have been informed that written statements by individuals holds more weight than a petition, and that is quite understandable. I just want you to know that I personally pounded the streets of this town and got 100 signatures on my own, and I'd be more than happy to go through the list of names and give you their comments. I had considered taking a tape recorder around to get some of the comments. Of course there were some that weren't fit for many people to hear. I'm sure everyone would be glad to say it again. The kids' comments were quite special.

Andy Pekovich asked me whether there were any areas we'd be willing to give up out there. His suggestion that the State keep from Banana Pt. to Wilson Creek Recreation Area is such a ridiculously small concession. The Sumner Strait Recreation Area known as Green's Camp is used all the time and is on the other end of the proposed land transfer from Banana Point. I didn't have the map in front of me at the time, so I just want to let you know that from the Banana Point Boat Launching Ramp to the Sumner Strait Recreation Area is the land we all use and dearly enjoy. We are adamantly against any of it being sold into private ownership. If people are allowed to build there, the result would be the destruction of the natural beauty of the area. We already have enough poaching in this area, and we don't want to see the bears, deer, eagles, and other creatures killed or frightened away. It is one of the pleasures to drive there and see bears and marton and other critters running along the road. We don't want to see it littered with abandoned vehicles and tacky residences. We want it to stay like it is.

Sincerely,

Jackie Tyson

Jackie Tyson

cc: Governor Cowper
Rep. John Sund
Rep. Robin Taylor

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Establishing Ernie Haugan Put-
Use Area
Sponsor: Jones, Kelly, Halford et.al
Requestor: Senate C&RA

Agency Affected: Natural Resources
BRJ: Land and Water Management
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		30.0	15.0	5.0	5.0	5.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		30.0	15.0	5.0	5.0	5.0

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND		30.0	15.0	5.0	5.0	5.0
FEDERAL FUNDS						
OTHER						
TOTAL		30.0	15.0	5.0	5.0	5.0

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Janet Burleson

Phone: 465-3200

Division: Land and Water Management

Date: 2/27/88

Approved by Commissioner: Tom Hawkins for

Date: 2.23.88

Agency: Natural Resources

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

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4 7 2

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

SB 472

STEVE COWPER, GOVERNOR

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400

April 29, 1988

The Honorable Sam Cotten
Chairman, House Resource Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Cotten:

Subject: The Committee Substitute for Senate Bill 472 (Resources), which would require the Commissioner of Natural Resources to lease the Matanuska Maid Creamery to a dairy producers' cooperative by July 1, 1989. The bill would also require the Commissioner to transfer the creamery to the cooperative, at the cooperative's request, any time between June 30, 1999 and June 30, 2004.

Position: The Department of Natural Resources supports the concept of returning the creamery to the private sector. We wish to point out, however, that if we are required to sell, lease, or transfer the facility to a particular group we cannot ensure the continued success of the operation. Absent direction to the contrary, the department will proceed with its current plan to enter a one year agreement with Alaska Dairy, Inc. (draft enclosed) for management oversight of the creamery. The agreement will allow Alaska Dairy, Inc. the opportunity to experience and learn creamery management and give dairy farmers a stronger voice in creamery operations. With creamery management experience to draw upon, Alaska Dairy, Inc. may decide to purchase the creamery from the state.

When qualified buyers are interested in purchasing the creamery, it will be offered for sale through the competitive bidding process.

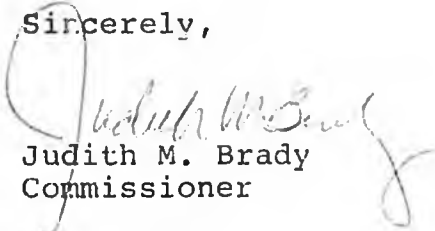
Because of its confidential nature, information about creamery finances will be provided to you separately. I hope to have additional information about the creamery available for the committee before its next meeting on this bill.

Representative Cotten

-2-

April 29, 1988

Sincerely,


Judith M. Brady
Commissioner

Enclosures

cc: Committee Members
Senator Josephson
Bob Evans
Ron Clarke
Mark Weaver

FISCAL NOTE

REQUEST:

Revision Date: 3/31/88
Title: Transfer Matanuska Maid Assets
Sponsor: Sen. Resources Committee
Requestor: Senate Finance Committee

Agency Affected: Natural Resources
BRU: Agricultural Management

Components: ARLF

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	(3222.2)	(222.2)	(222.2)	(222.2)	(222.2)
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

This fiscal note adjusts the revenue loss to the state related to transfer of the creamery to a dairy cooperative because the cash, accounts receivable, inventory and prepaid expenses will not be included in the transfer. (See attached explanation).

Prepared by: Hal Ward
Division: Division of Agriculture

Phone: 745-7200
Date: 3/31/88

Approved by Commissioner: *L. Gorman*
Agency: Natural Resources

Date: 3/31/88

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Explanation for Revised Fiscal Note

CSSB 472 (Resources)

<u>FY 89</u>		<u>FY 90-93</u>
155.0	Lease Income	156.0 Lease Income
(148.2)	Loss of Opportunity for Sale	(148.2) Loss of Opportunity
(230.0)	Depreciation	(230.0) Depreciation
(3000.0)	Loss of Capital Improvements	
<hr/>		
(3222.2)	Loss for FY 89	(222.2) Loss per year FY 90-93

Lease payment income is projected to be \$156,000 per year (\$13,000 per month). The loss in income from immediate sale of the land and buildings in Anchorage over 20 years at 8% for the current tax value (March, 1988) is \$1,475,500 (\$148,200 per year). The loan fund would receive no repayment for the contribution of over \$3,000,000 in operating capital and plant improvements during the last three years.

The recently incorporated cooperative that is seeking to lease/purchase the creamery has no assets and no financial capacity to provide operating capital or plant maintenance. The exposure to the State of Alaska as owner of the facility would include working capital of 3,000,000 and replacement of equipment based on depreciation of \$230,000 per year for 15 years to offset obsolescence and provide for future expansion.

Draft

AGREEMENT

This Agreement is made among Alaska Dairy, Inc. (hereafter "ADI"), the State of Alaska, Department of Natural Resources, Agricultural Revolving Loan Fund (hereafter "ARLF"), and the Alaska Quality Dairy Cooperative, Inc. to provide management oversight for the creamery located in Anchorage, Alaska, and the feedmill and store located in Palmer, Alaska, both formerly owned by Matanuska Maid, Inc. (hereafter "the creamery"), and other rights and duties.

RECITALS

1. ARLF commenced its operation of the creamery on November 16, 1984.
2. ARLF completed its acquisition of the creamery assets in December, 1985.
3. The Department of Natural Resources and ARLF have concluded that the creamery should receive management oversight from a corporation which has representation from the dairy farming community, the State of Alaska, and the Alaska business community.

TERMS

1. ARLF, with the consent of the Commissioner of the Department Natural Resources, ADI, and the Alaska Quality Dairy Cooperative, Inc. enter into this Agreement for ADI to provide management oversight for the creamery for the period January 1, 1988 to December 31, 1988, and other rights and duties. ARLF may extend this Agreement for one year.