

ALASKA LEGISLATURE COMMITTEE FILES

1987-1988

8672

5454

SRES

SB

53

- SB

55

1270

A POSITION SHOULD BE ESTABLISHED FOR A FISHERIES POSITION IN THE GOVERNOR'S OFFICE TO ASSIST THE GOVERNOR IN IMPLEMENTING AND COORDINATING THIS FISH POLICY.

XII. PORT AND HARBOR DEVELOPMENT

103

THERE IS A LACK OF OBJECTIVE, CONSTRUCTIVE CRITERIA FOR ALLOCATING STATE FUNDS TO PORTS AND HARBORS.

RECOMMENDATIONS

- D.O.T.P.F. SHOULD COMMUNICATE WITH LOCAL PEOPLE PRIOR TO DESIGN AND LOCATION OF HARBORS.
- THE STATE SHOULD ADOPT A POLICY THAT ENCOURAGES HARBOR DEVELOPMENT AND SITING THAT WILL SERVE DEVELOPING FISHERIES.
- THE STATE SHOULD CONDUCT A COST-BENEFIT ANALYSIS OF COMPETING HARBOR PROJECTS. EMPLOYMENT, INCOME TO ALASKANS, SAFETY AND SHORE-BASED DEVELOPMENT SHOULD BE SELECTION CRITERIA.
- THE STATE SHOULD IDENTIFY MAJOR PORT SITES FOR HARBORS, AND PROCESSING, DISTRIBUTION, AND SERVICE. SUCH PLANNING COULD DISPLACE SOME OF THE SEATTLE - BASED DISTRIBUTION SYSTEM.

XIII. WATER AND SEWER DEVELOPMENT

104

FISHERIES DEVELOPMENT PLANNING SHOULD INCLUDE IDENTIFYING WATER AND SEWER NEEDS.

XIV. NORTH PACIFIC FISHERIES MANAGEMENT COUNCIL

MAJOR PROBLEMS WITH THE NPFMC ARE

- 1) decisions of the council have not served to produce benefits to Alaskans in a manner consistent with State policy.
- 2) the council suffers from divided interests by members and others.

RECOMMENDATIONS

- ALASKA APPOINTEES SHOULD COMMUNICATE WITH STATE FISHERIES OFFICIALS, THE BOARD OF FISH AND THE GOVERNOR. ALASKA MEMBERS MUST UNDERSTAND ALASKA POSITION ON ISSUES.
- DOMESTIC PROCESSING AND HARVESTING INTERESTS SHOULD BE GIVEN CONSIDERATION FOR THE RESOURCE ALLOCATIONS BY THE COUNCIL.
- THE COUNCIL SHOULD IDENTIFY SPECIES FOR DOMESTIC HARVEST AND PROCESSING.

XV. BOARD OF FISH.

106

THE BOARD OF FISH MUST MAINTAIN ITS STATUS AS A LAYPERSON'S BOARD, AND IT MUST BE KEPT INFORMED OF THE STATE'S FISHERY POLICY.

RECOMMENDATIONS

- THE GOVERNOR'S OFFICE SHOULD CLARIFY THE RELATIONSHIP BETWEEN THE BOARD AND THE COMMISSIONER'S OFFICE AND THE GOVERNOR'S OFFICE.

- THE CHAIRMAN OF THE BOARD SHOULD REPORT DIRECTLY TO THE GOVERNOR AND THE COMMISSIONER.
- THE CHAIRMAN OF THE BOARD OF FISH, THE COMMISSIONER OF DCED, THE COMMISSIONER OF ADF&G, THE CHAIRMAN OF NPFMC, THE GOVERNOR'S FISHERIES ADVISOR, AND THE CHAIRMEN OF CFEC SHOULD MEET REGULARLY TO COORDINATE FISH POLICY.
- THE BOARD SHOULD GET FORMAL ECONOMIC INPUT FROM THE STATE TO BALANCE MANAGEMENT, BIOLOGICAL AND ECONOMIC FACTORS.
- THE GOVERNOR SHOULD DRAFT CRITERIA TO BE USED BY THE BOARD WHEN MAKING AN ALLOCATIVE DECISION.
- CFEC AND DCED SHOULD JOINTLY PREPARE ECONOMIC INFORMATION FOR THE BOARD.

XVI. FISHERIES MANAGEMENT

109

RECOMMENDATIONS

- EACH AGENCY SHOULD DISCARD EXISTING GOALS, AND DEFINE WHAT THEY EXPECT TO ACCOMPLISH WITH RESPECT TO FISHERIES DEVELOPMENT.
- MEASURES OF PERFORMANCE SHOULD BE EXPRESSED IN TERMS OF PROGRESS TOWARD GOALS. (i.e. IT IS MORE IMPORTANT TO MAKE 10 CONTACTS AND ARRESTS WITH MAJOR FOREIGN VESSELS THAN IT IS TO MAKE 10,000 CONTACTS WITH SPORT FISHERMEN ON THE KENAI RIVER.
- THE STATE SHOULD REVIEW THE PROFESSIONAL CAPABILITIES OF FISHERIES MANAGERS.
- AN EVALUATION OF FISHERIES MANAGEMENT PROGRAMS SHOULD BE CONDUCTED AT THE END OF EACH CYCLE.

XVII. ALLOCATION DECISIONS

111

THE BOARD OF FISH, THE NPFMC AND INPFC ALL MAKE ALLOCATION DECISIONS AS DO FISHERIES MANAGERS.

RECOMMENDATIONS

- ALLOCATION DECISIONS SHOULD MAXIMIZE BENEFITS TO ALASKANS. CRITERIA MIGHT INCLUDE, TRADITIONAL USAGE, RESIDENCY, ECONOMIC DEPENDENCY, HARVESTABLE VALUE, ECONOMIC BENEFIT OR HARM OF ALLOCATIVE DECISION.
- THE STATE SHOULD GET LEGAL COUNCIL ON ALLOCATION CRITERIA
- THE STATE SHOULD INITIATE A PROCESS FOR LONG TERM CHANGES IN RESOURCE ALLOCATION.

XVIII. GOVERNOR'S OFFICE IN D.C.

112

THE GOVERNOR'S OFFICE IN D.C. SHOULD INCLUDE A PERSON KNOWLEDGEABLE IN FISHERIES ISSUES.

XIX. ON-GOING STATE FISHERIES COUNCIL

113

A PERMANENT INDUSTRY BASED FISHERIES ADVISORY GROUP SHOULD BE ESTABLISHED. THE GROUP WOULD PARTICIPATE IN BUDGET PLANNING AND EVALUATION.

XX. ENFORCEMENT

ENFORCEMENT DIVISION LACKS DIRECTION, GOALS AND MEASURES OF PERFORMANCE. THEY SEEM TO CONCENTRATE ON QUANTITY RATHER THAN QUALITY OF THEIR ACTIVITIES.

RECOMMENDATIONS

- THE DIVISION SHOULD SET NEW GOALS AND RELATE THEM TO MAXIMIZING THE BENEFIT TO ALASKA'S FISHERIES
- THE DIVISION SHOULD PRIORITIZE ITS ENFORCEMENT ACTIVITIES ACCORDING TO LOSS TO THE STATE AND ITS CITIZENS.
- THERE SHOULD BE A COOPERATIVE EFFORT BY FEDERAL AND STATE LAW ENFORCEMENT PERSONNEL.
- THERE SHOULD BE 100 PERCENT OBSERVER COVERAGE OF FOREIGN FISHING VESSELS IN AMERICAN WATERS.

XXI REGULATORY POLICY

115

THE REGULATORY POLICY SHOULD BE GOVERNED BY THE GOALS AND OBJECTIVES OF THE STATE'S FISHERY POLICY. THE SOCIOECONOMIC IMPACT OF REGULATORY MEASURES SHOULD BE ASSESSED BEFORE THE MEASURES ARE IMPLEMENTED.

XXII POLICY TOWARD EXISTING FISHERIES

THE STATE SHOULD MAINTAIN AND ENHANCE THE WELL BEING OF ALASKA'S EXISTING WHEREVER POSSIBLE.

RECOMMENDATIONS

- THE STATE POLICY SHOULD SUPPORT THE MAINTENANCE AND ENHANCEMENT OF EXISTING FISHERIES AND RESOURCES.

XXIII. ORGANIZATIONAL RECOMMENDATIONS

116

- 1) APPOINT A GOVERNOR'S DOMESTIC AND INTERNATIONAL FISHERIES ADVISOR.
- 2) APPOINT A FISHERIES STAFF PERSON IN THE ALASKAN OFFICE IN D.C.
- 3) REPLACE THE OFFICE OF COMMERCIAL FISHERIES DEVELOPMENT WITH A DIVISION OF FISHERIES DEVELOPMENT. THE DIVISION WOULD HAVE EQUAL STATUS WITH THE DIVISION OF TOURISM AND WOULD COORDINATE THE FISHERIES WITHIN THE DEPARTMENT.
- 4) FISHERIES RELATED PROGRAMS SHOULD BE COORDINATED THROUGH THE GOVERNOR'S SPECIAL STAFF ASSISTANT FOR FISHERIES
- 5) THE GOVERNOR SHOULD SET UP A FISHERIES CABINET CONSISTING OF THE CHAIRMAN OF THE CFEC, THE CHAIRMAN OF THE BOARD OF FISH, THE COMMISSIONER OF ADF&G, AND COMMISSIONER OF DCED, AND THE GOVERNOR'S STAFF ASSISTANT.
- 6) FISHERIES POLICY COUNCIL SHOULD BE APPOINTED TO PARTICIPATE IN THE BUDGET PLANNING PROCESS, PERFORMANCE EVALUATION AND TO PROVIDE INPUT TO THE GOVERNOR AND PROGRAM MANAGERS.

7) DCED SHOULD REORIENT ITS FISHERIES AND ECONOMIC RESEARCH PROGRAMS TO TAKE AN ACTIVE ROLE IN FISHERIES ECONOMIC DEVELOPMENT.

8) STATE ECONOMIC PARTICIPATION IN FISHERIES SHOULD BE EXPANDED TO CONTRIBUTE TO THE SAME EXTENT AS ITS BIOLOGICAL COUNTERPARTS.

COMMITTEE ON MARKETING AND QUALITY ASSURANCE

132

STRIKES

IT IS RECOMMENDED THAT THE GOVERNMENT NOT GET INVOLVED IN ANY FISH PRICE DISPUTE. THE COMMISSIONER OR DEPUTY OF THE DEPARTMENT OF LABOR COULD SERVE AS AN INFORMAL NON-BINDING MEDIATOR

PRICES TO FISHERMEN

133

PRICE TO FISHERMEN SHOULD BE DETERMINED IN A FREE AND OPEN MARKET. THE STATE SHOULD CONTINUE TO SUPPORT EXISTING AUTHORITY FOR THE FORMATION OF COOPERATIVES AND MARKETING ASSOCIATIONS. THE DEPARTMENT SHOULD ATTEMPT TO ALLOW HARVESTING WHEN STOCKS ARE IN PRIME CONDITION.

QUALITY CONTROL.

ASMI SHOULD CONTINUE ITS VOLUNTARY PREMIUM LABEL CONCEPT, AND GUIDELINES FOR GUIDELINES FOR HANDLING FROM THE WATER TO THE TABLE ARE SUPPORTED.

MARKETING

134

MARKETING STUDIES HAVE NOT BEEN HELPFUL IN THE PAST IN NEGOTIATING PRICES. THE STATE SHOULD PROVIDE THE VEHICLE FOR THE VOLUNTARY REPORTING OF AVERAGE PRICES WHERE PARTIES REQUEST IT.

PROCESSOR PROFITS

PROCESSOR PROFITS OUGHT NOT TO BE A MATTER OF STATE REGULATION. THE STATE SHOULD REVIEW TAXING AND REGULATORY POLICIES WITH THE INTENT OF CREATING A BENEFICIAL REGULATORY AND TAXING CLIMATE FOR GROWTH OF THE PROCESSING INDUSTRY.

FOREIGN PHASE-OUT

THE GOVERNOR SHOULD SUPPORT THE PHASE-OUT OF FOREIGN FISHING AND PROCESSING WITHIN THE FCZ.

ASMI

ASMI'S BUDGET SHOULD BE SUPPORTED.

135

COMMITTEE ON FINANCE AND INVESTMENT

136

A. COMMERCIAL FISHING LOAN PROGRAM

136

THE PROGRAM PROVIDES ALASKANS THE FINANCING NECESSARY FOR THE PURCHASE OF COMMERCIAL FISHING ENTRY PERMITS AND VESSELS. IF ALASKA IS TO MAINTAIN AND PROMOTE THE DEVELOPMENT OF A STRONG AND VIABLE RESIDENT COMMERCIAL FISHING INDUSTRY, THEN THIS PROGRAM IS AN ABSOLUTE NECESSITY.

THE PROGRAM IS NOT INTENDED TO GENERATE A PROFIT. RATHER THE STATE IS COMPENSATED BY INDIRECT ECONOMIC BENEFITS PRODUCED BY A RESIDENT FISHING FLEET. THE FOCUS OF THE LEGISLATION IS FOR A PROGRAM OF SERVICE FOR A SOURCE OF FINANCING TAILORED TO THE NEEDS AND CIRCUMSTANCES OF THE INDUSTRY.

THE PERFORMANCE OF THE PROGRAM HAS REFLECTED THESE GOALS. LENDING PERSONNEL HAVE EXPRESSED ARROGANCE, INSENSITIVITY AND CONDESCENSION.

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RECOMMENDATIONS

1. THE PROGRAM SHOULD HAVE TWO GOALS. FIRST, THEY SHOULD MAKE LONG-TERM LOANS AVAILABLE TO ALASKANS FOR PERMITS AND COMMERCIAL VESSELS.

SECOND, THE INTERESTS OF THE STATE SHOULD BE PROTECTED BY COMPETENT PROFESSIONALS WHO ARE SKILLED LOAN ISSUES AND KNOWLEDGEABLE ABOUT THE FISHING INDUSTRY.

THE EXISTING PROGRAM SHOULD BE IMPROVED, OR DISSOLVED AND GIVEN OVER TO PRIVATE INSTITUTIONS.

2. IF THE PROGRAM IS RETAINED, THE FOLLOWING CHANGES ARE RECOMMENDED:

- A. THERE SHOULD BE A SYSTEM FOR PREQUALIFYING APPLICANTS.

- B. SPECIFIC CRITERIA FOR LOAN EXTENSION REQUESTS SHOULD BE ADOPTED. THE FOLLOWING PROBLEMS HAVE BEEN EXPERIENCED BY BORROWERS:

- 1) UNWILLINGNESS BY LOAN OFFICERS TO WORK WITH BORROWERS EXPERIENCING PROBLEM LOANS.

- 2) OVERLY STRINGENT REQUIREMENTS FOR EXTENSION REQUESTS.

- 3) ADVERSARIAL ATTITUDES BY LOAN OFFICERS TOWARDS BORROWERS.

- C. THE DIVISION OF BUSINESS LOANS SHOULD REQUEST PERMIT VALUATIONS FROM THE CFEC.

- D. SPECIFIC PERSONNEL SHOULD BE DELEGATED THE PRIMARY RESPONSIBILITY FOR FISHING LOANS SO THAT THOSE

INDIVIDUALS MAY DEVELOP A FUND OF KNOWLEDGE ABOUT FINANCES OF FISHING.

E. THERE SHOULD BE A METHOD OF ON-GOING PROGRAM EVALUATION.

F. THERE SHOULD BE AN APPLICATION INSTRUCTION MANUAL TO ASSIST APPLICANTS WHO ARE NOT SOPHISTICATED BORROWERS.

G. THERE SHOULD BE A CIRCUIT RIDER PROGRAM TO BRING THE PROGRAM TO THE FISHERMEN.

H. COLLATERAL REQUIREMENTS SHOULD BE REVIEWED.

B. COMMERCIAL FISHERIES ENTRY COMMISSION

143

THE PURPOSE OF CFEC IS THREE-FOLD.

- 1) ENHANCING THE ECONOMIC BENEFIT TO FISHERMEN
- 2 CONSERVING THE FISHERY
- 3) AVOIDING UNJUST DISCRIMINATION IN ALLOCATION OF PERMITS.

TO THESE ENDS, THE COMMISSION IS TO "...REGULATE ENTRY INTO THE COMMERCIAL FISHERIES FOR ALL FISHERY RESOURCES IN THE STATE;" AND "...TO REDUCE THE NUMBER OF OUTSTANDING ENTRY PERMITS TO THE OPTIMUM NUMBER OF ENTRY PERMITS." THROUGH THE ADMINISTRATION OF A BUY-BACK PROGRAM.

THE COMMISSION HAS ENGAGED IN ONLY THE FIRST ACTIVITY.

THE PURPOSES FOR WHICH CFEC WERE FORMED ARE STILL VALID. THE PROGRAM IS NOT PERFECT, BUT NECESSARY.

THE COMMISSION HAS A HIGH CALIBER STAFF. IT HAS DEVELOPED A GOOD INFORMATION SYSTEM THAT IS PRODUCING DATA FOR AN ECONOMIC UNDERSTANDING OF COMMERCIAL FISHERIES.

RECOMMENDATIONS

1. COLLATERAL VALUES OF PERMITS SHOULD REFLECT CURRENT MARKET CONDITIONS FOR PURPOSES OF THE LOAN PROGRAM.
2. THE CFEC OFFICE IN KODIAK SHOULD BE CONTINUED.
3. THE CFEC OFFICE IN ANCHORAGE SHOULD BE EXPANDED.
4. THE REPRESENTATIVES OF CFEC, THE BOARD OF FISH, AND DNR SHOULD MEET TO RESOLVE CONFLICTS IN PERMITS AND MANAGEMENT REGULATIONS.

PROBLEMS TO BE FURTHER ADDRESSED 1. THE BUY-BACK PROGRAM IS NOT A DESIRABLE METHOD FOR REDUCING THE NUMBER OF PERMITS. ALTERNATIVE METHODS SHOULD BE INVESTIGATED.

2. THE COST OF PERMITS IS AN OBSTACLE TO INCREASING ALASKAN PARTICIPATION IN SOME FISHERIES. THE DEPARTMENT OF LAW SHOULD INVESTIGATE POSSIBLE SOLUTIONS SUCH AS THE CONCEPT OF A QUOTA PERMIT SYSTEM.

3. THE NEED AND JUSTIFICATION FOR EXTENDING THE LIMITED ENTRY PROGRAM TO OTHER FISHERIES SHOULD BE INVESTIGATED.

SUBCOMMITTEE ON HABITAT

148

DNR PLANNING AND CLASSIFICATION REGULATIONS.

DNR'S PLANNING AND CLASSIFICATION PROPOSALS DO NOT ACKNOWLEDGE THE NEEDS OF RENEWABLE RESOURCES.

PROPOSED REGULATIONS ALLOW STATE -OWNED LANDS TO BE CLASSIFIED AS COAL, MINERAL, OIL OR GAS LANDS. ON THESE LANDS DEVELOPMENT OF NON-RENEWABLE RESOURCES DEVELOPMENT BECOMES THE PRIMARY USE. PROTECTION OF FISH SPAWNING AREAS WILL NOT BE REQUIRED.

THE PROPOSED PLANNING AND CLASSIFICATION REGULATIONS REQUIRE MORE THOROUGH REVIEW.

PERMIT REFORM

149

STREAMLINING THE RESOURCE AGENCIES' PERMIT PROCESS CAN IMPROVE EXISTING REGULATORY FUNCTIONS.

CONFLICTS IN RESOURCE DEVELOPMENT AMONG STATE AGENCIES SHOULD BE RESOLVED IN THE OFFICE OF MANAGEMENT AND BUDGET OR IN THE GOVERNOR'S OFFICE.

MARINE OIL POLLUTION

151

OFFSHORE OIL EXPLORATION, DEVELOPMENT AND PRODUCTION POSES A THREAT TO ALASKA'S FISHERIES AND WILDLIFE POPULATIONS.

NECESSARY RESEARCH MUST BE CONDUCTED. THE STATE MUST BE COMMITTED TO THE TWIN TASKS OF ENSURING ADEQUATE RESEARCH AND ENERGY IMPACT PLANNING IF MARINE FISHERIES AND WILDLIFE RESOURCES ARE TO BE MAINTAINED.

INSTREAM FLOW LAW

152

THIS AMENDMENT TO THE ALASKA WATER USE ACT MAKES IT POSSIBLE TO RESERVE ENOUGH WATER IN A STREAM OR RIVER TO ALLOW: PROTECTION OF FISH AND WILDLIFE HABITAT, MIGRATION AND PROPAGATION; RECREATION; NAVIGATION AND WATER QUALITY MAINTENANCE.

ALTHOUGH THE AMENDMENT WAS PASSED IN 1980, THE DEPARTMENT STILL HAS NOT IMPLEMENTED IT. THE REGULATION SHOULD BE IMPLEMENTED AS SOON AS POSSIBLE.

BRISTOL BAY COOPERATIVE LAND USE PLAN

154

THE ALTERNATIVES FAVORABLE FOR PERPETUATION OF FISH AND WILDLIFE RESOURCES, THE MORE RESTRICTIVE OPTIONS SHOULD BE ADOPTED.

LAND USE PLANS SUCH AS THOSE DEVELOPED FOR BRISTOL BAY COULD BE OF USE IN THE REST OF THE STATE.

MINING

COAL AND OTHER SURFACE MINING CAN BE DETRIMENTAL TO THE LONG-TERM PRODUCTION OF FISHERY AND WILDLIFE RESOURCES.

THE STATE NEEDS TO DEVELOP DATA ON FISH AND WILDLIFE RESOURCES THAT MAY BE AFFECTED BY MINING ACTIVITIES. THE STATE SHOULD DEVELOP COST-EFFECTIVE RECOMMENDATIONS FOR MITIGATING IMPACTS TO FISH AND WILDLIFE HABITAT.

PLACER MINING

157

UNREGULATED PLACER MINING CAN DEGRADE AQUATIC HABITAT. DEC AND ADF&G'S HABITAT DIVISION MUST BE STAFFED AND COORDINATED TO ENSURE THAT REGULATIONS ARE MET. STREAM RECLASSIFICATION SHOULD BE DONE UNDER CLOSE SCRUTINY.

CORPS OF ENGINEERS WETLANDS PERMITS (SECTION 404)

THE CORPS IS PROPOSING TO CHANGE ITS 404 PERMIT PROGRAM FROM INDIVIDUAL, CASE BY CASE TO A NATIONWIDE, BLANKET PERMIT. THIS WILL REDUCE THE ABILITY TO PROTECT WETLANDS.

THE GOVERNOR AND THE CONGRESSIONAL DELEGATION SHOULD TAKE A STRONG STAND TO RETAIN THE 404 PERMIT PROGRAM IN ITS PRESENT FORM.

LOGGING AND FISHERY HABITAT

TIMBER HARVEST AND ASSOCIATED ROAD CONSTRUCTION RESULTS IN UNAVOIDABLE IMPACT ON SUSTAINABLE PRODUCTIVITY OF FISHERY HABITAT.

THE GOVERNOR SHOULD DIRECT ADF&G AND OTHER AGENCIES TO RESEARCH BIOLOGICAL AND ECONOMIC IMPACT OF LOGGING ACTIVITIES ON SPORT, SUBSISTENCE AND COMMERCIAL FISHERIES. THE STATE SHOULD ALSO PLACE INCREASED EMPHASIS ON ENFORCEMENT TO ENSURE THAT TIMBER HARVESTERS COMPLY WITH REGULATIONS.

Senator Johne Binkley

Alaska State Senate
P.O. Box V • Juneau, Alaska 99811 • (907) 465-4985



Finance Committee
Co-Chairman

M E M O R A N D U M

March 11, 1987

TO: SENATOR JACK COGHILL, CHAIRMAN
Senate Resources Committee

FROM: SENATOR JOHN BINKLEY *Johne*

SUBJ: Scheduling of SB 53, "An Act relating to the Board
of Fisheries"

Senate Bill 53 remedies a situation which threatens the livelihood of hundreds of commercial herring fishermen in western Alaska. I am most concerned that the local fishermen be afforded the opportunity to develop the necessary knowledge and skills and upgrade their vessels and gear so that they may eventually be able to compete in the western Alaska commercial herring fisheries. I believe this bill adequately and fairly addresses this problem.

This bill has been referred to the Senate Resources Subcommittee on Fisheries, which has reviewed the bill and recommends a committee substitute. I support the changes made in the CS in that the intent of the proposed legislation has been more clearly defined.

I would respectfully request that this bill be scheduled for a hearing in the Resources Committee at the earliest convenient time. Thank you for your consideration.

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: _____

Bill Version : CSSB 53 (Resources)
Publish Date : _____

Revision Date: _____
Title: "An Act relating to the
Board of Fisheries"

Agency Affected: Department of Law
BRU: Legal Services

Sponsor: Senate Resources Committee
Requestor: Senator Eliason

Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Prepared by: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: March 6, 1987
 Approved by Commissioner: Richard I. Pegues / FOR
Grace Berg Schaible, Atty. Gen Date: March 6, 1987
 Agency: Department of Law

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 53

CSSB 53

This bill amends AS 16.05 by clarifying the Board of Fisheries' authority to allocate fishery resources among and within user groups. This clarification will not have a fiscal impact on the Department of Law, and it should help to diminish recurring disputes over the board's authority.

Senator Johne Binkley

Alaska State Senate
P.O. Box V • Juneau, Alaska 99811 • (907) 465-4985



Finance Committee
Co-Chairman

M E M O R A N D U M

February 6, 1987

TO: SENATOR DICK ELIASON, CHAIRMAN
Senate Resources Subcommittee on Fisheries

FROM: SENATOR JOHNE BINKLEY *JB.*

Subj: Senate Bill 53: "An Act relating to the Board of Fisheries."

For several years local advisory committees and fishermen attempted to resolve the problem of how people in the Cape Romanzof, Norton Sound, Nelson Island, Nunivak Island, and Goodnews Bay areas could be given the opportunity to develop commercial herring fisheries as part of their economic base. The regulation which later became known as "superexclusive use area" 1/ was first adopted by the Board of Fisheries in 1982. It was intended to assist people in certain western Alaska areas who were recognized as being among the most economically disadvantaged in the state.

The regulation reflects a decision by the board to construct a mechanism which would allow those people in those communities to develop the knowledge, skills and financial base to insure that their participation in the commercial herring fisheries would continue, and would not be overwhelmed by the more efficient, larger vessels with more ample financial backing from other areas of the state and outside the state.

1/ A person who participates as a permit holder in a superexclusive use area may not during the same season participate either as a permit holder or a crewmember in either another superexclusive use area or any nonexclusive area. The regulation also provides that a person who participates as a crewmember in commercial herring fishing in a superexclusive use area may not during the same season participate as a permit holder in either another superexclusive use area or any nonexclusive area. Under the regulation, a person may participate--as a crewmember only--in commercial herring fishing in all the areas, superexclusive and nonexclusive.

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In conjunction with continuing and expanding the superexclusive use areas, the board entered written findings regarding superexclusive areas for the Arctic/Yukon/Kuskokwim (AYK) herring fisheries. The board noted in the findings that the superexclusive use area, though not appropriate for all fisheries, is a management tool that has enabled the "orderly conservation and development" of the AYK herring fisheries. The board has also found that the commercial herring fisheries are an important segment of the local economies of these communities, in which there are "few employment alternatives to commercial [herring] fishing."

The board found the herring fisheries were only recently developing, and that local people "in general do not have sophisticated equipment or skills," though they "do have the capability to fully harvest and utilize all available resources in their area." The board expressed the intent to allow local people the "opportunity to acquire the skills and equipment so that they may fairly compete" with the other, more efficient fishing fleets, and noted that superexclusive use areas would permit the local people the time to develop "those skills needed to be competitive," and income generated from the fisheries would enable them to upgrade their vessels and gear.

The board noted that because the fisheries in question are "so recently developed compared to other Alaska sac roe fisheries," there is less knowledge of the resource status than elsewhere in the state. The board concluded that regulations which "reduce the amount of effort and efficiency of the participants" or which reduce the growth rate of effort and efficiency are necessary. Further, a "slower paced fishery on stocks of unknown magnitude, distribution, and resiliency" is desirable. Finally, the significant degree of subsistence utilization of the herring resource in the region, compared to other regions in the state, "supports the board's desire for a cautious, conservative regulatory environment."

The intent of the board to assist the local communities in developing their fishing capabilities so that they may be competitive with the other more efficient components of the herring fishery throughout the state has been consistent from the outset. The data developed over the years for which the regulation was adopted indicates that this regulatory mechanism promotes the intended results.

The board has expressed concern that the lack of data on these particular herring resources, and the reliance of the area on herring for subsistence uses, a slow paced, less efficient fishery is appropriate. As the skills and technology of the local people increase, and as the knowledge

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of those herring resources grows, the board may determine it is appropriate at a later date to remove this regulatory mechanism.

On February 6, 1986, a criminal complaint was filed in the district court for the second judicial district at Nome, alleging that Mr. Hebert had violated 5 AAC 27.987(a) and (b) during June 1985, by delivering herring as a permit holder in a superexclusive use area (Norton Sound) and in nonexclusive areas (Bristol Bay and Security Cove) during the same season. On May 5, 1986, a motion to dismiss was filed on behalf of Mr. Hebert. On August 18, 1986, the court dismissed the case, holding that the regulation did not serve any conservation purpose, and that the allocation purpose intended by the board exceeded its authority. On September 19, 1986, the state filed a notice of appeal from the court's decision. On October 21, 1986, the Court of Appeals granted the state's motion for leave to have filed a late notice of appeal.

In essence, the District Court found that the board acted outside the scope of its statutory authority when it established the superexclusive use areas at Cape Romanzof and Norton Sound. Although the court recognized that improving and maintaining the economic health of those localities is a "legitimate and highly desirable goal for the state," the board has the authority to act only for the purposes of conserving or developing the fishery resources of the state. And although the board has authority under AS 16.05.251(e) to allocate among different fishery user groups (i.e., personal use, sport, and commercial), the board does not have authority to allocate among members of a single user group, the court said.

Senate Bill 53 would remedy both of the problems pointed out by the court. Section 1 expands the authority of the board by allowing it to enhance and protect people's ability to take and use fishery resources. This would include protecting fishermen in given areas of the state by setting up superexclusive use areas. Granting the board such authority is consistent not only with the Hebert case, but also with Art. VIII, sec. 15, of the Alaska Constitution. That section allows the state to limit entry into any fishery to prevent economic distress among fishermen and those dependent upon them for a livelihood. This is an exception to the prohibition in that same section against the establishment of an exclusive right or special privilege of fishery.

Section 2 of the bill amends AS 16.05.251(e) to make clear that the board may distinguish among users in a single use group, as well as among different groups. This language

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is needed in conjunction with section 1 to clearly authorize the board to create the superexclusive use areas.

There are mechanisms in place which would prevent arbitrary abuse by the board in making allocation determinations as a result of this bill. For instance, Article VIII, section 17 of the state constitution states that "Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." Article VIII, section 2, requires the legislature to "provide for the utilization, development, and conservation of all natural resources . . . for the maximum benefit of its people." And AS 16.05.251(e) requires the board to establish criteria for allocations. These provisions should be adequate to protect against arbitrary abuse of the board's discretion.

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: _____

Bill Version : HB63

Publish Date : _____

Revision Date: _____

Agency Affected: Department of Law

Title: "An Act relating to the Board
of Fisheries."

BRU: Legal Services

Sponsor: Repr. Hoffman

Components: Legal Services Operations

Requestor: Repr. Hoffman

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Prepared by: Richard I. Pegues, Director

Phone: 465-3672

Division: Administrative Services

Date: Jan. 28, 1987

Ronald W. Lorensen,

Approved by Commissioner: Acting Attorney General

Date: Jan. 28, 1987

Agency: Department of Law

Distribution (by preparer):

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB63

This bill amends AS 16.05.221(a) by clarifying the Board of Fisheries' authority to allocate fishery resources within user groups, as well as among the various user groups. This clarification will not have a fiscal impact on the Department of Law, and it should help to diminish recurring disputes over the board's authority.

Alaska State Legislature

Senate Resources Committee



Sen. John B. (Jack) Coghill, Chairman
Sen. Paul Fischer, Vice-Chairman
Sen. Lloyd Jones
Sen. Arliss Stunqlewski
Sen. Jim Duncan
Sen. Fred Zhatoff
Sen. Dick Eliason

Box V
Juneau, Alaska 99811
(907) 465-4007

TO: SENATE RESOURCES COMMITTEE
FROM: COMMITTEE STAFF
DATE: MARCH 30, 1987
RE: CS SB 53 "An Act relating to the Board of Fisheries

CONTENTS

1. Sponsor's Bill Analysis
2. Fish and Game Bill Analysis
3. Fish and Game Fiscal Note
4. Department of Law Fiscal Note
5. Memo of support from Senate Resources Fisheries Subcommittee
6. Letter, Department of Law
7. Letter, Department of Law
8. Letter, Department of Law

Senator Johne Binkley

Alaska State Senate

P.O. Box V • Juneau, Alaska 99811 • (907) 465-4985

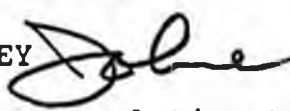


Finance Committee
Co-Chairman

M E M O R A N D U M

March 11, 1987

TO: SENATOR JACK COGHILL, CHAIRMAN
Senate Resources Committee

FROM: SENATOR JOHNE BINKLEY 

Subj: Senate Bill 53: "An Act relating to the Board of Fisheries."

For several years local advisory committees and fishermen attempted to resolve the problem of how people in the Cape Romanzof, Norton Sound, Nelson Island, Nunivak Island, and Goodnews Bay areas could be given the opportunity to develop commercial herring fisheries as part of their economic base. The regulation which later became known as "superexclusive use area" ^{1/} was first adopted by the Board of Fisheries in 1982. It was intended to assist people in certain western Alaska areas who were recognized as being among the most economically disadvantaged in the state.

The regulation reflects a decision by the board to construct a mechanism which would allow those people in those communities to develop the knowledge, skills and financial base to insure that their participation in the commercial herring fisheries would continue, and would not be overwhelmed by the more efficient, larger vessels with more ample financial backing from other areas of the state and outside the state.

^{1/} A person who participates as a permit holder in a superexclusive use area may not during the same season participate either as a permit holder or a crewmember in either another superexclusive use area or any nonexclusive area. The regulation also provides that a person who participates as a crewmember in commercial herring fishing in a superexclusive use area may not during the same season participate as a permit holder in either another superexclusive use area or any nonexclusive area. Under the regulation, a person may participate--as a crewmember only--in commercial herring fishing in all the areas, superexclusive and nonexclusive.

Senator Jack Coghill

March 11, 1987

Page 2

In conjunction with continuing and expanding the superexclusive use areas, the board entered written findings regarding superexclusive areas for the Arctic/Yukon/Kuskokwim (AYK) herring fisheries. The board noted in the findings that the superexclusive use area, though not appropriate for all fisheries, is a management tool that has enabled the "orderly conservation and development" of the AYK herring fisheries. The board has also found that the commercial herring fisheries are an important segment of the local economies of these communities, in which there are "few employment alternatives to commercial [herring] fishing."

The board found the herring fisheries were only recently developing, and that local people "in general do not have sophisticated equipment or skills," though they "do have the capability to fully harvest and utilize all available resources in their area." The board expressed the intent to allow local people the "opportunity to acquire the skills and equipment so that they may fairly compete" with the other, more efficient fishing fleets, and noted that superexclusive use areas would permit the local people the time to develop "those skills needed to be competitive," and income generated from the fisheries would enable them to upgrade their vessels and gear.

The board noted that because the fisheries in question are "so recently developed compared to other Alaska sac roe fisheries," there is less knowledge of the resource status than elsewhere in the state. The board concluded that regulations which "reduce the amount of effort and efficiency of the participants" or which reduce the growth rate of effort and efficiency are necessary. Further, a "slower paced fishery on stocks of unknown magnitude, distribution, and resiliency" is desirable. Finally, the significant degree of subsistence utilization of the herring resource in the region, compared to other regions in the state, "supports the board's desire for a cautious, conservative regulatory environment."

The intent of the board to assist the local communities in developing their fishing capabilities so that they may be competitive with the other more efficient components of the herring fishery throughout the state has been consistent from the outset. The data developed over the years for which the regulation was adopted indicates that this regulatory mechanism promotes the intended results.

The board has expressed concern that the lack of data on these particular herring resources, and the reliance of the area on herring for subsistence uses, a slow paced, less efficient fishery is appropriate. As the skills and technology of the local people increase, and as the knowledge

Senator Jack Coghill
March 11, 1987
Page 3

of those herring resources grows, the board may determine it is appropriate at a later date to remove this regulatory mechanism.

On February 6, 1986, a criminal complaint was filed in the district court for the second judicial district at Nome, alleging that Mr. Hebert had violated 5 AAC 27.987(a) and (b) during June 1985, by delivering herring as a permit holder in a superexclusive use area (Norton Sound) and in nonexclusive areas (Bristol Bay and Security Cove) during the same season. On May 5, 1986, a motion to dismiss was filed on behalf of Mr. Hebert. On August 18, 1986, the court dismissed the case, holding that the regulation did not serve any conservation purpose, and that the allocation purpose intended by the board exceeded its authority. On September 19, 1986, the state filed a notice of appeal from the court's decision. On October 21, 1986, the Court of Appeals granted the state's motion for leave to have filed a late notice of appeal.

In essence, the District Court found that the board acted outside the scope of its statutory authority when it established the superexclusive use areas at Cape Romanzof and Norton Sound. Although the court recognized that improving and maintaining the economic health of those localities is a "legitimate and highly desirable goal for the state," the board has the authority to act only for the purposes of conserving or developing the fishery resources of the state. And although the board has authority under AS 16.05.251(e) to allocate among different fishery user groups (i.e., personal use, sport, and commercial), the board does not have authority to allocate among members of a single user group, the court said.

Senate Bill 53 would remedy both of the problems pointed out by the court. Section 1 expands the authority of the board by allowing it to enhance and protect people's ability to take and use fishery resources. This would include protecting fishermen in given areas of the state by setting up superexclusive use areas. Granting the board such authority is consistent not only with the Hebert case, but also with Art. VIII, sec. 15, of the Alaska Constitution. That section allows the state to limit entry into any fishery to prevent economic distress among fishermen and those dependent upon them for a livelihood. This is an exception to the prohibition in that same section against the establishment of an exclusive right or special privilege of fishery.

Section 2 of the bill amends AS 16.05.251(e) to make clear that the board may distinguish among users in a single use group, as well as among different groups. This language

Senator Dick Eliason
February 6, 1987
Page 4

is needed in conjunction with section 1 to clearly authorize the board to create the superexclusive use areas.

There are mechanisms in place which would prevent arbitrary abuse by the board in making allocation determinations as a result of this bill. For instance, Article VIII, section 17 of the state constitution states that "Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." Article VIII, section 2, requires the legislature to "provide for the utilization, development, and conservation of all natural resources . . . for the maximum benefit of its people." And AS 16.05.251(e) requires the board to establish criteria for allocations. These provisions should be adequate to protect against arbitrary abuse of the board's discretion.



STATE OF ALASKA
OFFICE OF THE GOVERNOR

BILL ANALYSIS

DEPARTMENT Fish and Game	DIVISION Boards	BILL NUMBER SB 53	SPONSOR Senator John Binkley
-----------------------------	--------------------	----------------------	---------------------------------

DEPARTMENT POSITION
The department's position on this bill must be neutral. Allocation of fish resources is a public policy issue reserved to the Legislature and Board of Fisheries

PREPARED BY Beth Stewart	DATE 2/26/87	COMMISSIONER'S SIGNATURE <i>[Signature]</i>	DATE 3-2-87
-----------------------------	-----------------	--	----------------

SUMMARY

AGENCIES AFFECTED BY BILL None known	CONSTITUENT GROUP(S) AFFECTED BY BILL This bill affects sub-categories of fishermen within specific sport, commercial, and personal use fisheries.
ORGANIZATIONAL SUPPORT FOR BILL Groups who wish to insure that the board has the authority to create super-exclusive registration areas for herring.	ORGANIZATIONAL OPPOSITION TO BILL No organized opposition is known at this time.

FISCAL IMPACT NONE FISCAL NOTE ATTACHED

BACKGROUND LEGISLATIVE INTENT
The bill appears to allow the Board of Fisheries, within guidelines outlined in AS 16.05.251 to allocate fish between categories of fishermen within a single user group. For instance, the board would have the authority to allocate fish between different kinds of drift gillnet in Bristol Bay, or different kinds of sport fishermen on the Kenai River.

ANALYSIS OF BILL/PROGRAM EFFECTS

RECOMMENDATIONS PROPOSED

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: _____
 Revision Date: _____
 Title: An Act relating to the
Board of Fisheries
 Sponsor: Joffman
 Requestor: _____

Bill Version: HB 63
 Publish Date: 1/22/87

Agency Affected: Fish and Game
 BRU: _____
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0					
TRAVEL	0					
CONTRACTUAL	0					
SUPPLIES	0					
EQUIPMENT	0					
LAND & STRUCTURES	0					
GRANTS, CLAIMS	0					
MISCELLANEOUS	0					
TOTAL OPERATING	0					
CAPITAL	0					
REVENUE	0					

FUNDING: (Thousands of Dollars)

GENERAL FUND	0					
FEDERAL FUNDS						
OTHER						
TOTAL	0					

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Roland Shanks Phone: 465-4100
 Division: Commissioner's Office Date: 3/2/87

Approved by Commissioner: [Signature] Date: 3/2/87
 Agency: Fish and Game

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

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

MAR 10 1987

Bill Version: CSSB 53 (Resources)
Publish Date: _____

REQUEST: _____

Revision Date: _____
Title: "An Act relating to the
Board of Fisheries"

Agency Affected: Department of Law
BRU: Legal Services

Sponsor: Senate Resources Committee
Requestor: Senator Eliason

Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services

Phone: 465-3672
Date: MARCH 6, 1987

Approved by Commissioner: Richard I. Pegues / FOR 1
Grace Berg Schaible, Atty. Gen
Agency: Department of Law

Date: MARCH 6, 1987

Distribution (by preparer):

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 53

CSSB 53

This bill amends AS 16.05 by clarifying the Board of Fisheries' authority to allocate fishery resources among and within user groups. This clarification will not have a fiscal impact on the Department of Law, and it should help to diminish recurring disputes over the board's authority.

ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

RULES COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, VICE CHAIRMAN
LEGISLATIVE COUNCIL
RESOURCES COMMITTEE
FISHERIES SUBCOMMITTEE, CHAIRMAN



P.O. BOX 143
SITKA, ALASKA 99835

P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4916

M E M O R A N D U M

TO: Senator Jack Coghill, Chair
Senate Resources Committee

FROM: Senate Resources Fisheries Subcommittee

DATE: March 5, 1987

RE: S.B. 53 - An Act relating to the Board of Fisheries


The fisheries subcommittee has reviewed the above mentioned legislation and recommends that the attached committee substitute be considered by the Senate Resources Committee.



Senator Dick Eliason, Chair



Senator Jim Duncan, Member



Senator Fred Zharoff, Member

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

February 27, 1987

Honorable Dick Eliason
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: SB 53/HB 63 on the Board
of Fisheries

Dear Senator Eliason:

Your staff has asked us to comment briefly on SB 53 which would amend two provisions in AS 16.05, subsec. 221(a), concerning the purpose of the Board of Fisheries, and subsec. 251(e), concerning the board's mandate to establish criteria for the allocation of fishery resources.

We have previously provided copies to your staff of two letters from this department to Representative Hoffman, sponsor in the House of an identical bill -- HB 63. Those letters discuss the State v. Hebert case in which we have appealed dismissal by the district court in Nome of the criminal prosecution of a fisherman for violating the Norton Sound superexclusive herring area regulation, 5 AAC 27.987. Additional copies of those two letters are attached to this one for your convenience.

Our primary comment on SB 53 and HB 63, which are apparently responses to the district court decision in Hebert, is that such legislation is not now necessary to preserve the super-exclusive use area regulatory mechanism. Some sort of similar legislation may become necessary after a final appellate resolution of the Hebert case. However, at this point any responsive legislation seems premature. If such legislation is ultimately necessary or appropriate, it can be better fashioned after we have the benefit of the appellate court analysis and a final resolution of the issues involved. Although briefing has recently been completed before the Court of Appeals, oral argument has not yet been scheduled and we do not anticipate a Court of Appeals decision before this fall. The case could then go to the Alaska Supreme Court.

If these bills are to be pursued now, it is important that great care be taken to ensure that the language of the bills is neither unnecessarily broad in its effect nor violative of constitutional equal protection, commerce clause, and exclusive right of fishery principles. We have discussed our concerns with the legislative counsel who drafted the bill and have agreed in

Hon. Dick Eliason
Alaska State Legislature

February 27, 1987
Page 2

concept on language to narrow the effect of sec. 2 of the bill. That section currently amends the first sentence of AS 16.05.-251(e) as follows:

(e) The Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing users and groups of user.....

We believe that a better, more narrow approach to more directly address the possible effects of an eventual adverse decision in the Hebert case would be similar to the following:

(e) The Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing and among groups of commercial fishermen within a fishery.....

Please let us know if we can provide additional assistance if these bills are pursued further. Thank you for the opportunity to comment.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: 
Peter B. Froehlich
Assistant Attorney General

PBF:md

Enclosures

cc w/o enc.: Hon. John Binkley
Alaska State Senate

Hon. Lyman Hoffman
Alaska State House of Representatives

Hon. Don Collinsworth, Commissioner
Dept. of Fish and Game

Steven Pennoyer, Deputy Commissioner
Dept. of Fish and Game

Hon. Dick Eliason
Alaska State Legislature

February 27, 1987
Page 3

Roland Shanks, Special Assistant
Dept. of Fish and Game

Larri I. Spengler
Assistant Attorney General
Juneau

Sarah E. McCracken
Assistant Attorney General
Anchorage

B.J. Jordan
Legal Text Editor
Juneau

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 17, 1987

Representative Lyman Hoffman
House of Representatives
P.O. Box V
Juneau, Ak 99811

Dear Representative Hoffman:

Re: State v. Hebert
(herring use areas)

Lee Goodman of your staff has requested our office to expand upon Larri Spengler's February 10, 1987, analysis of State v. Hebert, to explain the wider ramifications that the district court's decision may have for fisheries board allocation regulations, if the decision is affirmed on appeal.

As explained in Larri Spengler's letter, the trial court in Hebert held that as of the date the board of fisheries adopted the Norton Sound superexclusive herring area regulation, 5 AAC 27.987, the board's statutory authority to conserve and develop the state's fisheries (AS 16.05.251) did not allow the board to make allocations within one user group (i.e., among commercial users) in order to provide an economic advantage to one segment of the user group. The court, in dicta, also opined that the 1986 amendment to the board's authority, AS 16.05.251(e) (Ch. 52, SLA 1986), which expressly allows "allocation of fishery resources among personal use, sport, and commercial fishing ..." also does not allow the board to make allocations within one use group. The Hebert court also found that there was insufficient evidence to support a finding that the superexclusive herring area regulation was intended in part as a conservation measure, to require less efficient harvesting means.

The Hebert decision is presently on appeal before the Alaska Court of Appeals. If the Court of Appeals (and any higher appellate court) simply affirms the trial court decision without modification, this decision might provide a basis for challenges to other fisheries board regulations that, to a greater or lesser extent, provide an economic advantage to, or otherwise allocate a certain portion of the harvest to a particular segment of a commercial, sports or personal use fishery. Each case would have to be analyzed on its own facts, but it is possible that the Hebert decision, if affirmed could be a basis for challenging such fisheries allocation regulations as the Cook Inlet management plan

~~BY THE ATTORNEY GENERAL~~
Steve Cowper, 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

P.O. BOX K-STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

Representative Lyman Hoffman
House of Representatives

February 17, 1987
Page 2

(which allocates among various segments of a commercial fishery) the False Pass fishery (which allocates to an existing local fishery), the Stepovak fishery plan (which also allocates among commercial uses), and several other regulatory provisions that make similar allocations. You may wish to consult the Department of Fish and Game for additional examples.

It would be difficult to predict the outcome of a challenge to fish board allocation regulations that might be brought under the Hebert rationale, because any decision would turn upon the particular board record and facts in each situation. If the Hebert decision were to be affirmed, however, it would place new constraints upon the fisheries board regarding its ability to make harvest allocations within a particular use group.

As mentioned in Larri Spengler's letter, the Hebert case turns upon statutory construction; the legislature has the authority to modify the statutes to reflect a different intent, so long as it is consistent with relevant constitutional principles.

If we can be of further assistance to you, please let us know.

Yours sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: *Sarah E. McCracken*
Sarah E. McCracken
Assistant Attorney General

SEM/jmo

cc: Don W. Collinsworth, Comm'r ADF&G
Steven Pennoyer, Deputy Comm'r ADF&G
Roland Shanks, ADF&G
Larri I. Spengler, AGO Jnu
—Pete Froelich, AGO Jnu
B. J. Jordan, AGO Jnu

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

February 10, 1987

The Honorable Lyman Hoffman
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Re: Herring area legislation

Dear Representative Hoffman:

You have asked for a description of the herring superexclusive use area litigation, and of its possible ramifications. As I understand it, you are inquiring about this case because it relates to HB 63, which you introduced. (That bill is virtually identical to SB 53, introduced by Senator Binkley.)

The Alaska Board of Fisheries has adopted superexclusive use areas in managing the herring commercial fisheries in the state. The regulations require that participants in the commercial herring fisheries either fish in one of several small areas, or anywhere else in the state. See, for example, 5 AAC 27.987. This mandate was violated by a Mr. Hebert, who, in a criminal prosecution before a state district court, moved to dismiss the charge, alleging that the regulation exceeded the authority of the Board of Fisheries. State v. Hebert, No. 2NO-S86-069 Cr. (Alaska Dist. Ct., Feb. 6, 1986). The Board of Fisheries in general has the authority to adopt regulations for the "conservation and development" of fishery resources. AS 16.05.221(a).

The judge in that case ruled that he could find no evidence supporting a conservation rationale. He found that the regulation had been adopted in order to benefit the less efficient, less well-financed fishermen from particularly cash poor areas of Alaska, and that while the socioeconomic goals were laudable, they did not fall within the board's current authorities.

That case is currently on appeal to the Alaska Court of Appeals. State v. Hebert, Court of Appeals No. A-1743. Briefing is completed, and eventually a decision will be issued. In the meanwhile, the regulations are technically enforceable; a district court decision dismissing a criminal prosecution is not equivalent to a superior court decision in a civil case enjoining the enforcement of a regulation. The decision is not binding on

The Honorable Lyman Hoffman
Alaska State Legislature

February 10, 1987
Page 2

other courts; the result of the judge's order is simply that that particular criminal prosecution is dismissed.

The superexclusive use area regulatory mechanism as applied to vessels has been common for years in the state's salmon fisheries, and has also been employed in other fisheries, such as king crab and tanner crab. 5 AAC 39.120; 5 AAC 34.020; 5 AAC 35.020. Assuming for the moment that the district court was correct in determining in the Hebert case that the Board of Fisheries may not regulate for only socioeconomic reasons within a particular commercial fishery under the current statutes, the other instances in which superexclusive use area had been employed are not necessarily invalid. The analysis in each situation would depend upon what the board record discloses about the conservation basis for the regulation. Clearly, even under the Hebert case, a conservation related justification which was supported by the facts would provide adequate legal support for superexclusive use areas.

The district court decision in the Hebert case hinges solely upon statutory construction, and any decision from the court of appeals will be similarly limited in scope, since those are the only issues presented in the appeal. Thus, whatever the court determines the statutes to currently mean, the legislature has the authority to modify the statutes to reflect some other intention, consistent, of course, with relevant constitutional principles.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL


By: Larri Irene Spengler
Assistant Attorney General

LIS:cck

cc: Senator Binkley
Alaska State Legislature

Don Collinsworth, Commissioner
Steve Pennoyer
Norman Cohen
Roland Shanks
ADFG

The Honorable Lyman Hoffman
Alaska State Legislature

February 10, 1987
Page 3

Ed Hine
LAA/Legal Services Office

Liza McCracken
Deborah Vogt
Pete Froehlich
B.J. Jordan
DOL

HB63 file
SB53 file

S B

5 5

SENATE COMMITTEE REPORT

FURTHER:

FINANCE

3/11/87

DATE TURNED INTO OFFICE _____

Mr. President:

RESOURCES _____ Committee considered _____ SB 55

establishing the Minto Flats State Game Refuge; efd.

and recommended:

replace with CS FOR SASS(res)) same title
 or adopt _____ CS FOR _____) new title

attached amendment(s) and

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

letter of intent adopted _____

Committee attached or adopted fiscal note(s)

new updated or previous
 zero fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

[Signature]
[Signature]
[Signature]

[Signature]
Chairman signature and recommendation

Committee Backup Attached

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 2/5/87 5-DAY NOTICE
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER RESOURCES
FINANCE

**FISCAL NOTE(S) ATTACHED yes **
IN ACCORDANCE WITH AS 24.08.035
(see below)

1/19/87
Mr. President:

DATE TURNED INTO OFFICE 3/11/87

COMMUNITY & REGIONAL AFFAIRS Committee considered SR 55

establishing the Minto Flats State Game Refuge; efd,

and recommended:

replace with CS SB 55 (C+RA) same title
 attached amendment(s) and new title

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

letter of intent adopted and attached

** Committee attached or adopted fiscal note(s)
 zero fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Mike Spasund - outstanding legislation
[Signature]

Rick Helford NO REC.

Artis Sturgulovich
Chairman signature and recommendation

Committee Backup Attached

Do Pass

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

Bill Version: CS (Resources) SB55
Publish Date: 4/10/87

REQUEST: _____

Revision Date: _____
Title: Hinto Flats State Game Refuge

Agency Affected: Fish and Game
BRU: Habitat

Sponsor: Senator Binkley
Requestor: _____

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		0				
TRAVEL		0				
CONTRACTUAL		0				
SUPPLIES		0				
EQUIPMENT		0				
LAND & STRUCTURES		0				
GRANTS, CLAIMS		0				
MISCELLANEOUS		0				
TOTAL OPERATING		0				
CAPITAL		0				
REVENUE		0				

FUNDING: (Thousands of Dollars)

GENERAL FUND		0				
FEDERAL FUNDS						
OTHER						
TOTAL		0				

POSITIONS:

FULL-TIME		0				
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Bruce H. Baker
Division: Habitat

Phone: 465-4100
Date: 4/10/87

Approved by Commissioner: Omni Belenewich
Agency: Fish and Game

Date: 4-10-87

Distribution (by preparer):

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

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____

Bill Version: CSSB 55 (CRA)
Publish Date: _____

Revision Date: Senate Resources
Title: Minto Flats Refuge

Agency Affected: Natural Resources
BRU: Land & Water Management

Sponsor: Binkley & Kerttula
Requestor: Senate Resources Committee

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

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

REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The Department of Natural Resources currently manages this land. Changing its status is not expected to significantly increase management costs. Personnel already in the system will be used. The Department expects to manage this land in accordance with provisions of the current Tanana Basin Management Plan.

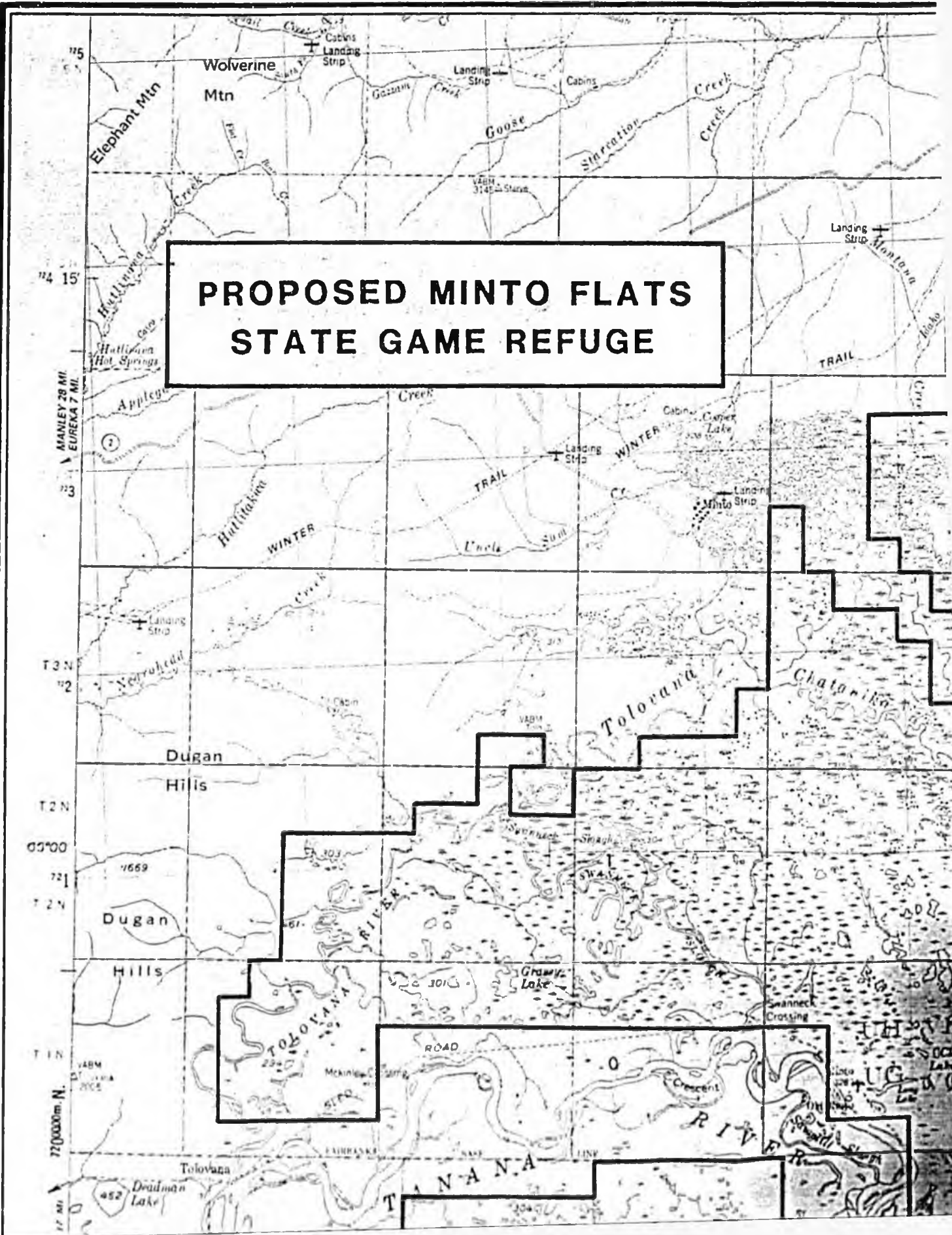
Prepared by: Andrew W. Bekovich Phone: 465-3400
Division: Land & Water Management Date: 04/13/87

Approved by Commissioner: Carol Williams for TMB Date: 04/13/87
Agency: Department of Natural Resources

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

THE FOLLOWING DOCUMENT HAS
NOT BEEN FILMED BUT IS
AVAILABLE IN THE ORIGINAL
FILE

PROPOSED MINTO FLATS STATE GAME REFUGE



5-0273L
Hein
4/9/87

Original sponsors: Binkley and Kerttula

1 IN THE SENATE

BY THE RESOURCES COMMITTEE

2 CS FOR SENATE BILL NO. 55 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act establishing the Minto Flats State Game
7 Refuge; and providing for an effective date."

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

9 * Section 1. AS 16.20 is amended by adding a new section to read:

10 Sec. 16.20.037. MINTO FLATS STATE GAME REFUGE. (a) The follow-
11 ing state-owned land and water is established as the Minto Flats State
12 Game Refuge:

- 13 (1) Township 1 North, Range 6 West, Fairbanks Meridian
14 Sections 2 - 11
15 Sections 14 - 23
16 Sections 26 - 34
- 17 (2) Township 1 North, Range 7 West, Fairbanks Meridian
18 Sections 1 - 36
- 19 (3) Township 1 North, Range 8 West, Fairbanks Meridian
20 Sections 1 - 16
21 Sections 21 - 28
22 Section 35: E1/2
23 Section 36
- 24 (4) Township 1 North, Range 9 West, Fairbanks Meridian
25 Sections 1 - 12
- 26 (5) Township 1 North, Range 10 West, Fairbanks Meridian
27 Sections 1 - 12
- 28 (6) Township 1 North, Range 11 West, Fairbanks Meridian
29 Sections 1 - 4

1 Sections 8 - 17

2 Sections 20 - 29

3 (7) Township 2 North, Range 6 West, Fairbanks Meridian

4 Sections 1 - 36

5 (8) Township 2 North, Range 7 West, Fairbanks Meridian

6 Sections 1 - 36

7 (9) Township 2 North, Range 8 West, Fairbanks Meridian

8 Sections 1 - 36

9 (10) Township 2 North, Range 9 West, Fairbanks Meridian

10 Sections 1 - 36

11 (11) Township 2 North, Range 10 West, Fairbanks Meridian

12 Section 3

13 Sections 8 - 10

14 Section 11: S1/2N1/2, S1/2

15 Section 12: S1/2N1/2, S1/2

16 Sections 13 - 36

17 (12) Township 2 North, Range 11 West, Fairbanks Meridian

18 Sections 13 - 15

19 Sections 22 - 27

20 Sections 34 - 36

21 (13) Township 3 North, Range 6 West, Fairbanks Meridian

22 Sections 13 - 36

23 (14) Township 3 North, Range 7 West, Fairbanks Meridian

24 Sections 6 - 8

25 Section 9: S1/2S1/2

26 Sections 13 - 36

27 (15) Township 3 North, Range 8 West, Fairbanks Meridian

28 Section 1

29 Sections 5 - 10

- 1 Sections 14 - 23
2 Sections 25 - 36
3 (16) Township 3 North, Range 9 West, Fairbanks Meridian
4 Section 24: S1/2
5 Section 25
6 Sections 33 - 36
7 (17) Township 3 North, Range 10 West, Fairbanks Meridian
8 Sections 34 - 35
9 (18) Township 4 North, Range 6 West, Fairbanks Meridian
10 Sections 2 - 9
11 Sections 16 - 21
12 (19) Township 4 North, Range 7 West, Fairbanks Meridian
13 Sections 1 - 4
14 Section 5: S1/2
15 Section 6: S1/2
16 Sections 7 - 24
17 Sections 30 - 31
18 (20) Township 4 North, Range 8 West, Fairbanks Meridian
19 Sections 10 - 15
20 Sections 22 - 27
21 Sections 30 - 31
22 Sections 35 - 36
23 (21) Township 5 North, Range 5 West, Fairbanks Meridian
24 Section 6: W1/2
25 Section 7: W1/2
26 Section 18: W1/2
27 (22) Township 5 North, Range 6 West, Fairbanks Meridian
28 Sections 1 - 3
29 Section 4: SE1/4

- 1 Section 9: E1/2
2 Sections 10 - 15
3 Section 16: E1/2, SW1/4
4 Section 20: S1/2
5 Sections 21 - 29
6 Sections 31 - 36
7 (23) Township 5 North, Range 7 West, Fairbanks Meridian
8 Section 35: SE1/4
9 Section 36: S1/2
10 (24) Township 1 South, Range 6 West, Fairbanks Meridian
11 Sections 5 - 8
12 Sections 17 - 20
13 Sections 29 - 31
14 (25) Township 1 South, Range 7 West, Fairbanks Meridian
15 Sections 1 - 36
16 (26) Township 1 South, Range 8 West, Fairbanks Meridian
17 Sections 1 - 2
18 Sections 11 - 14
19 Sections 23 - 26
20 Sections 35 - 36
21 (27) Township 1 South, Range 9 West, Fairbanks Meridian
22 Sections 1 - 36
23 (28) Township 1 South, Range 10 West, Fairbanks Meridian
24 Sections 7 - 36
25 (29) Township 1 South, Range 11 West, Fairbanks Meridian
26 Sections 25 - 26
27 Sections 35 - 36
28 (30) Township 2 South, Range 6 West, Fairbanks Meridian
29 Section 6: S1/2NW1/4, S1/2

- 1 Section 7: all North and West of the Alaska Railroad
2 right-of-way
- 3 Section 18: all North and West of the Alaska Railroad
4 right-of-way
- 5 Section 19: all North and West of the Alaska Railroad
6 right-of-way
- 7 (31) Township 2 South, Range 7 West, Fairbanks Meridian
8 Sections 1 - 12
- 9 Section 13: NE1/4, E1/2NW1/4, NE1/4SW1/4, S1/2SW1/4,
10 SE1/4
- 11 Section 14: W1/2
12 Sections 15 - 22
- 13 Section 23: W1/2
14 Section 24: all North and West of the Alaska Railroad
15 right-of-way
- 16 Section 27: NW1/4
17 Sections 28 - 32
- 18 Section 33: NE1/4NE1/4, W1/2NE1/4, W1/2, W1/2SE1/4
19 (32) Township 2 South, Range 8 West, Fairbanks Meridian
20 Section 1
21 Sections 12 - 13
22 Sections 24 - 25
23 Section 36
- 24 (33) Township 2 South, Range 9 West, Fairbanks Meridian
25 Sections 1 - 12
26 Section 17: W1/2NW1/4, NW1/4SW1/4
27 Section 18
28 Section 19: N1/2, N1/2S1/2
- 29 (34) Township 2 South, Range 10 West, Fairbanks Meridian

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Sections 1 - 20

Section 21: NE1/4, W1/2

Section 22: NW1/4

Section 24: N1/2, N1/2S1/2

Sections 29 - 31

(35) Township 2 South, Range 11 West, Fairbanks Meridian

Sections 1 - 5

Sections 7 - 36

(36) Township 2 South, Range 12 West, Fairbanks Meridian

Sections 25 - 26

Sections 35 - 36

(37) Township 3 South, Range 7 West, Fairbanks Meridian

Section 5: N1/2NE1/4, W1/2

Sections 6 - 7

Section 18: NE1/4, W1/2, N1/2SE1/4, SW1/4SE1/4

(38) Township 3 South, Range 8 West, Fairbanks Meridian

Section 1

Section 12

Section 13

Section 22: NE1/4 (that portion above the ordinary
high water mark right bank Tanana River)

Section 23: N1/2, SE1/4

Section 24: N1/2, SW1/4

Section 25: NW1/4

(39) Township 3 South, Range 11 West, Fairbanks Meridian

Sections 2 - 10

Section 11: N1/2

Section 14: SW1/4NE1/4, S1/2NW1/4, SW1/4, W1/2SE1/4

Sections 15 - 21

Section 22: NE1/4, W1/2, W1/2SE1/4

Section 23: NW1/4

Section 27: W1/2NE1/4, NW1/4, W1/2SW1/4

Sections 28 - 31

Section 32: NE1/4, NW1/4, SE1/4

Section 33: W1/2

(40) Township 3 South, Range 12 West, Fairbanks Meridian

Sections 1 - 2

Sections 11 - 14

Sections 23 - 26

Sections 35 - 36

(b) The Minto Flats State Game Refuge is established to

(1) ensure the protection and enhancement of habitat;

(2) ensure the conservation of fish and wildlife; and

(3) guarantee the continuation of hunting, fishing, trapping and other uses by the public in a manner compatible with the protection and enhancement of habitat and the conservation of fish and wildlife.

(c) The state may not acquire by eminent domain privately owned land within the Minto Flats State Game Refuge, but may acquire privately owned land by purchase, exchange, or otherwise for inclusion in the Minto Flats State Game Refuge.

(d) The commissioner of natural resources and the commissioner of fish and game may not adopt regulations, impose conditions, or take other actions that restrict the use of land, water, or other natural resources upstream from or adjacent to the Minto Flats State Game Refuge in order to achieve the purposes set out in (b) of this section.

(e) Public access to the Minto Flats State Game Refuge by means

Added

1 of horse, boat, aircraft, dog team, snowmachine, or other means con-
2 sistent with (b) of this section may not be prohibited.

3 (f) Access to and from private property within the Minto Flats
4 State Game Refuge shall be guaranteed through access corridors estab-
5 lished through agreement between the Department of Natural Resources,
6 the Department of Fish and Game, and the private property owners
7 involved.

8 (g) The Department of Fish and Game and the Department of
9 Natural Resources shall exercise their respective authorities over the
10 Minto Flats State Game Refuge consistent with a management plan pre-
11 pared by the Department of Fish and Game in consultation with the
12 Department of Natural Resources.

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20 * Sec. 2. This Act takes effect immediately under AS 01.10.070(c).
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500-9348

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF FISH AND GAME

P.O. BOX 3-2000
JUNEAU, ALASKA 99802
PHONE: (907) 465-4100

OFFICE OF THE COMMISSIONER

RAPIFAX TRANSMITTAL SHEET

To: Bruce Garrity
Sen. Cookhill's Office
Cap. Bldg - Rm 30

Date: 4.9.87

No. Pages 6

(following this page)

From: Kerry Howard
Habitat HQ

Message:

10/85

WHAT IS A STATE GAME REFUGE?

State game refuges are multiple use areas established by the legislature for the protection of productive fish and wildlife habitats and for the public's use and enjoyment.

Alaska Statute 16.20.020 states, "The purpose (of establishing state game refuges) is to protect and preserve the natural habitat and game population in certain designated areas of the state."

State game refuges have a history that is old as the State of Alaska itself. In 1960 the first two state game refuges, Izembek and Chagvan Bay (Cape Newenham), were set aside for waterfowl and shorebirds. Over the years, as one or another outstanding area came to the attention of Alaskans and their legislators, other state game refuge's were established.

Protection of fish and wildlife and their habitats and maintenance of public use is the primary focus of the Department of Fish and Game's game refuge management program. Activities which are encouraged and do not require a refuge permit include hunting, fishing, trapping, public access, recreational activities (hiking, skiing, horseback riding, dog team travel, camping, mountain climbing, etc.), boating, berry picking, firewood gathering (dead and down timber) and many others. Other land use activities are

allowed in a manner compatible with these primary values. These other activities which may impact primary uses are authorized through a special area permit system administered by the Habitat Division, Alaska Department of Fish and Game.

Multiple uses which pre-date creation of the refuge and multiple uses which fulfill important public needs for which there is no feasible alternative site are permitted on the refuge. But they must be conducted in a manner compatible with the fish and wildlife values and public use for which the area was established.

Why is it important to establish this area as a state game refuge? Each year the status of state lands changes dramatically. Some lands are sold; some lands are leased for development. Creating a state game refuge guarantees that the land will remain in public ownership and will be managed to maintain fish and wildlife populations.

Behind each one of our state game refuges are citizens who enjoy using the area and who helped to get the area designated a state game refuge. As the years go by many things will change, but through the foresight of Alaskans and their Legislatures, state game refuges will always remain for the wildlife, for the fish, and for the people to enjoy.

<u>REFUGE</u>	<u>ACTIVITY</u>	<u>DECISION</u>
Palmer Hay Flats	Personal Use Cabins (8)	Approved
Palmer Hay Flats	Pipeline Survey	Approved
Palmer Hay Flats	Natural Gas Pipeline	Approved
Palmer Hay Flats	Grazing Lease	Denied
Palmer Hay Flats	Gravel Fill and Bridge	Approved
Trading Bay	Personal Use Cabins (19)	Approved
Trading Bay	Negotiated Lease (Set Net Cabin)	Approved
Susitna Flats	Personal Use Cabin (111)	Approved
Susitna Flats	Gravel Mining	Approved
Susitna Flats	Negotiated Lease (3 Commercial Cabins)	Approved
Susitna Flats	Negotiated Lease (Set Net Cabin)	Approved

<u>REFUGE</u>	<u>ACTIVITY</u>	<u>DECISION</u>
Susitna Flats	Insect poisoning removal	Approved
Susitna Flats	Seismic Exploration	Approved
Susitna Flats	Negotiated Lease (Set Net Cabin)	Approved
Susitna Flats	Negotiated Lease (6 Commercial Cabins)	Approved
Susitna Flats	Gravel Mining	Approved
Susitna Flats	Transmission Line Upgrade	Approved
Susitna Flats	Bridge Repair/Log Jam Removal	Approved
Susitna Flats	Fisheries Research Station	Approved
Susitna Flats	Gas Wells/Pipeline	Approved
Susitna Flats	Gravel Extraction	Approved
Susitna Flats	Gravel Extraction	Denied

<u>RELIC</u>	<u>ACTIVITY</u>	<u>DECISION</u>
Susitna Flats	Pipeline Survey	Approved
Susitna Flats	Road Upgrade	Approved
Susitna Flats	Natural Gas Pipeline	Approved
Susitna Flats	Motorized Vehicle Use	Approved
Susitna Flats	Barge Landing	Approved
Susitna Flats	Storage Yard	Approved
Susitna Flats	Hydrological Research	Approved
Susitna Flats	Winter/Ice Road	Approved
Susitna Flats	Survey/Brush Clearing	Approved
Susitna Flats	Material Extraction	Denied
Susitna Flats	Transmission Line	Approved
Goose Bay	Leach Field Construction	Approved
Goose Bay	Seismic Exploration	Approved

<u>REFUGE</u>	<u>ACTIVITY</u>	<u>DECISION</u>
Goose Bay	Road and Utility Corridor Construction	Approved
Potter Point	Erosion Control Outfall/ Stilling Basin	Approved
Potter Point	Roadway/Parking Area	Approved
Izembek	Gravity Survey	Approved
Mendenhall Wetlands	Buried Sewer Outfall Line	Approved
Mendenhall Wetlands	Airport Maintenance	Approved
Mendenhall Wetlands	Salmon Rearing Pens	Approved
Mendenhall Wetlands	Stream Channel Alternation	Denied
Mendenhall Wetlands	Log Transfer and Storage	Approved

DRAFT AMENDMENTS TO SB 55 MINTO FLATS STATE GAME REFUGE

(B) THE MINTO FLATS STATE GAME REFUGE IS ESTABLISHED TO ENSURE

(1) THE PROTECTION AND ENHANCEMENT OF HABITAT;
(2) THE CONSERVATION OF FISH AND WILDLIFE; AND
(3) TO GUARANTEE THE CONTINUED USE AND ENJOYMENT BY THE PUBLIC OF HUNTING, FISHING, TRAPPING, AND OTHER USES CONDUCTED IN A MANNER COMPATIBLE WITH THE THE PROTECTION OF HABITAT AND THE CONSERVATION OF FISH AND WILDLIFE; ACCORDING TO THE CONSTITUTION OF THE STATE OF ALASKA.

(C) THE STATE MAY NOT ACQUIRE BY EMINENT DOMAIN PRIVATELY OWNED LAND WITHIN THE MINTO FLATS STATE GAME REFUGE, BUT MAY ACQUIRE PRIVATELY OWNED LAND BY PURCHASE, EXCHANGE, OR OTHERWISE FOR INCLUSION IN THE MINTO FLATS STATE GAME REFUGE.

NEW SECTION

(D) THE STATE WHEN ESTABLISHING A MANAGEMENT PLAN FOR THE REFUGE MAY NOT, OR FOR LACK OF A MANAGEMENT PLAN FOR THE REFUGE MAY NOT, ADOPT OR RECOMMEND, REGULATIONS, STIPULATIONS, PERMITS, OR OTHER RESTRICTIONS ON THE USE OF LAND, WATER, OR LAND AND WATER PESOURCES OUTSIDE, UPSTREAM, OR ADJACENT TO, THE REFUGE IN ORDER TO FULFILL (B) OF THIS SECTION.

(E) PUBLIC ACCESS TO THE MINTO FLATS STATE GAME REFUGE BY MEANS OF HORSE, BOAT, AIRCRAFT, DOG TEAM, SNOWMACHINE, OR OTHER MEANS CONSISTENT WITH (B) (3) OF THIS SECTION, MAY NOT BE PROHIBITED.

(F) ACCESS TO AND FROM [REASONABLE INGRESS TO AND EGRESS FROM] PRIVATE PROPERTY WITHIN THE MINTO FLATS STATE GAME REFUGE SHALL BE GUARANTEED THROUGH ACCESS CORRIDORS ESTABLISHED THROUGH AGPEEMENT BETWEEN THE DEPARTMENT OF NATURAL RESOURCES, THE DEPARTMENT OF FISH AND GAME, AND THE PRIVATE PROPERTY OWNER(S) INVOLVED.

(G) [SAME WORDING AS IN (F) OF CS.]

(H) THE MINTO FLATS STATE GAME REFUGE MANAGEMENT PLAN [THE COMMISSIONER OF FISH AND GAME] SHALL RECOGNIZE THE EXISTENCE OF HISTORIC TRAILS AND SHALL PROVIDE ACCESS ACROSS THE REFUGE TO THE EXTENT CONSISTENT WITH (B) OF THIS SECTION.

NEW SECTION

(I) THE AUTHORITIES OF AS 41.17.230 SECTION (E) SHALL BE RETAINED BY THE COMMISSIONER OF NATURAL RESOURCES, CONSISTENT WITH SECTION (B) OF AS 16.20.037.

Grammar

problem

OK

Minto Flats

*superfluous
in what
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OK

OK

*OLD H
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OK

DO NOT SEND TO RECORDS CENTER

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 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

To	HABITAT	INIT	DATE
1	DIRECTOR	MS	
2	AD III	MS	
	AD IV		
	AD V		
	AD VI		
	AD VII		
	AD VIII		
	AD IX		
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	AD XI		
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	AD XIII		
	AD XIV		
	AD XV		
	AD XVI		
	AD XVII		
	AD XVIII		
	AD XIX		
	AD XX		

Handwritten notes: "R. Supp done 11/15", "TIL 1.0"

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

A.	Consultation requirements	page 28
B.	Nature of separate, complementary authorities	page 30
C.	Separate, complementary authorities in sanctuaries	page 31
D.	Separate, complementary authorities in refuges and critical habitat areas	page 32
E.	Water appropriation and use	page 37
F.	Prohibition on transfer of state land out of refuges	page 39
G.	Summary and examples	page 42
V.	Specific questions from DNR and ADF&G	page 45
VI.	Conclusion	page 52
	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

CORRECTION

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

Hon. Esther Wunnicke
Commissioner, DNR
Hon. Don W. Collinsworth
Commissioner, ADF&G
File 366-045-84 & 366-122-84

November 8, 1985
Page 2

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:

I.	Introduction	page 1
II.	The statutory framework	page 3
	A. Special areas	page 3
	B. DNR general authorities	page 6
	C. DNR authorities specific to special areas	page 13
	D. ADF&G authorities in special areas	page 15
	E. Coastal zone consistency review	page 21
III.	Prior attorney general opinions	page 24
IV.	Interaction between DNR and ADF&G authorities	page 27

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."

A.	Consultation requirements	page 28
B.	Nature of separate, complementary authorities	page 30
C.	Separate, complementary authorities in sanctuaries	page 31
D.	Separate, complementary authorities in refuges and critical habitat areas	page 32
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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

Hon. Esther Wunnicke
Commissioner, DNR
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November 8, 1985
Page 4

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.

Hon. Esther Wunnicke
Commissioner, DNR
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Commissioner, ADF&G
File 366-045-84 & 366-122-84

November 8, 1985
Page 5

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, SLA 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)

Hon. Esther Wunnicke
Commissioner, DNR
Hon. Don W. Collinsworth
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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 the 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
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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 38.05.285 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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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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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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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(e) 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 Potter 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.