

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9270 HOUSE LABOR & COMMERCE

Responsiveness Summary

ADEC Responses to Public Written Comments

Comments: ADEC received letters favorable to reclassification from: Steven C. Borrell, Alaska Miners Association; Richard A. Hughes, Ryan Lode Mines, Inc.; James L. Cloud; Earl H. Beistline; Laurence A. Peterson, Agra Earth & Environmental; Howard J. Grey, Ambler Exploration Inc.; Becky L. Gay, Resource Development Council for Alaska, Inc.; Gerald J. Booth, Cook Inlet Region, Inc.; Dick Swainbank, Alaska Department of Commerce and Economic Development; and Paul S. Glavinovich.

ADEC Response: ADEC appreciates the commenters support for reclassification.

Comment: Becky Gay's letter recommended that waterbodies undergoing reclassification, such as Red Dog and Ikalukrok Creeks, should not be listed on the 303 (d) impaired water body list, while they are undergoing reclassification.

ADEC Response: Red Dog Creek was placed on the 303 (d) list because Cominco discharges total dissolved solids in concentrations which exceed natural background. It was not placed on the impaired waterbody list because of naturally occurring mineralization. The reclassification packet request deals with the natural creek metals toxicity, rather than with mine effluent discharges.

Comments: More than half of the letters in favor of reclassification commented that the reclassification process is time-consuming and costly.

ADEC Response: ADEC agrees that the reclassification process is time-consuming and costly. The reason for this is that ADEC is required to prepare a Use Attainability Analysis, which scientifically demonstrates that the use/s to be removed never existed, do not exist, and are not attainable. Public participation, including public hearings in the affected watershed, is also required.

The Red Dog project has been particularly complicated because other actions (whole effluent toxicity, site specific criteria, etc.) are taking place concurrently in order to reissue the wastewater discharge permit. Sorting out the many facets of this project involves a cooperative effort by the resource agencies and the company.

Comments: ADEC received one letter against reclassification, from Mr. Rodney Powell, who cited lack of scientific evidence for use removals. This letter also requested information on the effluent components, site specific studies, master plan, etc.

ADEC Response: ADEC believes that the final Use Attainability Analysis is scientifically defensible. Baseline data collected prior to and since mine development by several reputable companies and scientists, well documents the past, present and future potential protected water quality uses of Red Dog and Ikalukrok Creeks. Mr. Powell's questions were answered in Joyce Beelman's letter to him dated May 24, 1996. (Attached)

Sierra Club Legal Defense Fund (SCLDF) comments on behalf of the Alaska Clean Water Alliance (ACWA):

SCLDF Comment: The SCLDF expressed concern that ADEC's draft UAA recommendations for reclassification of stream segments of Red Dog and Ikalukrok Creeks will result in precluding possible future uses of these waters by unnecessarily removing designated uses, when removing a potential use is either not clearly called for by water quality limitations on those waters, or when there is no demonstrated detrimental effect on present uses. SCLDF clarifies this statement by asking that ADEC take a conservative approach to preserving as many potential uses of the Waters of the State as possible.

ADEC Response: In reclassifying a stream, ADEC not only determines if a protected use existed, presently exists, or is foreseeable in the future; but also determines if the use is attainable, even though it is unlikely to occur. If the potential for the use exists, even if improbable, ADEC is not removing the designated use. We have demonstrated in the final UAA the appropriateness of removing Water Supply, Recreation and Aquatic Life protected uses from some segments of Red Dog and Ikalukrok Creeks. Our determinations are based primarily on water quality limitations. Therefore, we believe we are taking the conservative approach to reclassification which the SCLDF recommends.

SCLDF Comment: The SCLDF points out that ADEC decision to remove the Agriculture and Aquaculture Water Supply uses on some segments of Red Dog and Ikalukrok Creeks is not based on EPA's definition of "attainable".

ADEC Response: The SCLDF rightly points out that Agriculture (and Aquaculture) use removals do not meet the strict definition of "attainable", as given in the USEPA definition; i.e., "...attainable using permit limits for point sources and best management practices for nonpoint sources." The UAA and at least one of the 6 factors are required to remove "fishable, swimmable" uses. These federal requirements do not apply to Water Supply uses: Drinking Water, Agriculture and Aquaculture. However, ADEC chose to address all potential uses removals in this format in order to justify its recommendations to retain or remove these uses in state regulation.

ADEC has prepared a new matrix (Table 4) in the final UAA which shows which of the 6 factor/s, 40 CFR 131.10 (g) (1-6), are invoked for each use removal, even though they are not the "swimmable, fishable" uses. ADEC used this format to demonstrate why water supply

protected uses are not appropriate, due to the high natural mineralization. These naturally metals-laden waters would be inappropriate for crop irrigation, irrespective of the future prospects of agriculture in the Far North.

SCLDF Comment: The SCLDF states that ADEC is choosing to ignore the potential water quality use of reindeer stock watering, which ADEC identifies in its draft UAA as a potential and attainable use.

ADEC Response: ADEC has not ignored reindeer herding as a possible future Agriculture, stock-watering activity. Rather, new information was obtained during the public process (see final UAA and Summary of Public Hearings/Meeting) which indicates that reindeer herding does not include stock-watering activities. Herders do not provide water to reindeer, which are corralled for less than 24 hours so that these animals do not undergo undue stress.

During the public process the areas of past reindeer herding were identified to be at the foothills of the DeLong Mountains near Bons and Dudd Creeks, not in the proposed reclassification area. ADEC would recommend that any future reindeer herding activities occur adjacent to non-mineralized drainages and avoid the stream segments of Red Dog Creek and Ikalukrok Creeks because of the high natural mineralization and potential for adverse human and wildlife health affects (see final UAA).

SCLDF Comment: The SCLDF indicates that aquatic life exists in Red Dog and Ikalukrok Creeks and that ADEC has not justified removal of the Water Supply, aquaculture protected use below the confluence of North Fork with Red Dog Creek; i.e., the Main Stem of Red Dog Creek and below.

ADEC Comment: The fact that aquatic life exists in metal-laden waters, even though stressed as the McConnell study indicates, does not mean that the Water Supply, Aquaculture protected use should remain in the Water Quality Standard regulations. Historical data indicate that fish passed through the highly mineralized Main Stem to reach less metal contaminated waters in North Fork Red Dog Creek. There are documented fish kills in Main Stem Red Dog Creek. The decision to construct a fish hatchery (aquaculture) on Red Dog or Ikalukrok Creeks would take this into consideration during a cost/benefit analysis, which would easily show that fish raised in mineral-laden water would not be healthy.

SCLDF Comment: The SCLDF states that ADEC has not provided adequate justification for removal of the Contact Recreation designation..

ADEC Response: During the public review process, ADEC held public hearings and meetings in Kivalina, Noatak and Kotzebue to determine past, present and future uses of Red Dog and Ikalukrok Creeks. Local people told ADEC that they never used, do not use, and do not intend to use Red Dog or Ikalukrok Creeks for any form of Contact Recreation, due to their remoteness from nearby villages, access difficulties and mining activities. Also open water recreational

activities, such as fishing, logically occur closer to home (See final UAA and Summary of Public Hearings/Meeting).

The physical conditions of Red Dog and Ikalukrok Creeks preclude all contact recreational activities, except wading. Because wading is included in the definition of Contact Recreation and is potential, though improbable protected use, ADEC is not removing this use from the proposed segments, except the Middle Fork. The disturbed creek bed of the Middle Fork above the Mine's effluent discharge, precludes all protected uses except industrial. Because there is no aquatic life and fishing would not occur, the Middle Fork below the Mine's effluent, only Contact Recreation, wading will be protected (See Figure 3 and Table 4).

SCLDF Comment: The SCLDF states that it understands the justification for removal of Secondary Recreation for the Middle Fork Red Dog Creek and above, but does not believe ADEC has provided adequate justification for downstream waters. Additionally, ADEC does not address potential secondary recreation uses after mining ceases.

ADEC Response: After meeting with the local people, ADEC determined that Secondary Recreation is an existing use in winter, and a potential, although improbable, use in the summer. Therefore, ADEC also finds it inappropriate to remove Secondary Recreation in Main Stem Red Dog Creek below the North Fork. However, because there is no aquatic life in Middle Fork Red Dog Creek, ADEC finds it appropriate to remove Secondary Recreation, fishing as a protected use in this stretch of the Middle Fork (See final UAA and Summary of Public Hearings/Meeting).

SCLDF Comment: The SCLDF agrees that data support the removal of the aquatic life designated use from Red Dog Creek above its confluence with North Fork Red Dog Creek, and that the aquatic life designation should be maintained below this confluence.

ADEC Response: ADEC appreciates the SCLDF comments. New information, collected during the 1996 field season, has refined ADEC's understanding of areas appropriate or inappropriate for this use removal (See final UAA).

EPA Review Comments

18 AAC 70.002 (a)(1)(A)(i) - Water Supplv. drinking, culinary and food processing.

EPA Comment: The EPA agrees that this is an appropriate use removal for Middle Fork Red Dog Creek and all its tributaries (Sulfur, Shelley, Rachael and Hilltop Creeks), Main Stem Red Dog Creek, and Ikalukrok Creek from its confluence with Red Dog Creek to its confluence with the Wulik River. This determination is based on data showing high natural mineralization. These data provide documentation which supports Factor 1 of the USEPA Water Quality Standards Regulations (40 CFR 131.10 (g)(1-6), which states: "Naturally occurring pollutant

concentrations prevent the attainment of the use.”

ADEC Response: ADEC appreciates EPA's concurrence.

18 AAC 70.20(a)(1)(A)(ii) - Water Supply, agriculture, including irrigation and stock watering.

EPA Comment: EPA agrees that the high natural mineralization of Middle Fork Red Dog Creek and its tributaries, Main Stem Red Dog Creek and Ikalukrok Creek from its confluence with Red Dog Creek to its confluence with the Wulik River, supports removal of the “irrigation” part of the agriculture definition; but asks for clarification of the “stock watering” part of the definition. First, EPA asks if wildlife populations which inhabit and migrate through the area, and are hunted by local subsistence hunters, are considered “livestock” or “stock”.

ADEC Comment: Wildlife populations are not considered “livestock” or “stock”. Webster's Dictionary defines “livestock” as “domestic animals kept for use on a farm or raised for sale or profit”. One definition of “stock”, is that it is the short form of “livestock”. These terms imply ownership by specific individuals or groups of individuals, of specific populations of animals. Local people do not own the animals they hunt in this sense. All wildlife populations are not domesticated animals and remain unconfined and move freely through the area. Therefore, wildlife cannot be considered “livestock” and are not protected under the Alaska Water Quality Standard criteria for Water Supply, agriculture.

EPA Comment: Since the draft UAA mentioned reindeer herding as a past activity in the area, EPA asks if this activity could be considered “stock watering”.

ADEC Comment: During the public hearings in Kivalina and Noatak, the Department received clarification from the villagers, at least one of whom had participated in this activity in the 1940's. Reindeer herding activities occurred along the foothills of the mountains near Bons and Dudd Creeks, not near Red Dog and Ikalukrok Creeks. (An abandoned cabin still exists on Dudd Creek which was used by the herders.) Unlike Red Dog and Ikalukrok Creeks, Bons and Dudd Creeks have very low natural mineralization. Reindeer herding no longer occurs in this area.

The Department discussed the “stock watering” concept with Mr. Larry Davis of the Alaska Reindeer Association in Nome, who is presently engaged in reindeer herding activities. No water is provided by herders when reindeer are corralled. These animals cannot be confined more than a day before they become stressed. When they roam free, reindeer have plenty of liquid water available in the summer and snow in winter.

EPA's Fact Sheet on Cadmium (one of the metals found in particularly high concentrations in Red Dog and Ikalukrok Creeks) states that laboratory animals subjected to short-term, high-dose exposures of various cadmium compounds exhibited damage to the nervous system, kidney, liver, bone, blood formation system, cardiovascular and reproductive systems. Therefore, should villagers near Red Dog and Ikalukrok Creeks consider reindeer herding as a future activity, it is recommended that they avoid the Red Dog and Ikalukrok Creek drainages, due to the high

natural metals in these creeks.

With these clarifications, we expect that EPA will agree with ADEC that Water Supply, agriculture including irrigation and stock watering, is neither a past, present or attainable use for Middle Fork Red Dog Creek and its tributaries, Main Stem Red Dog Creek and Ikalukrok Creek from its confluence with Red Dog Creek to its confluence with the Wulik River. Removal of this use is supported by water quality information for these drainages. Factor 1, which states that naturally occurring pollutant concentrations prevent the attainment of the use, is met.

18 AAC 70.020(a)(1)(A)(iii) - Water Supply, aquaculture

EPA Comment: EPA requests clarification regarding whether aquaculture could be considered a fishable/swimmable use (as in growth and propagation) or an "offstream use (as in water supply). ADEC considers aquaculture a water supply use (18 AAC 70.020 (a)(1)(A)(iii), not a fishable/swimmable use or growth and propagation use (18 AAC 70.020 (a)(1)(C).

ADEC interprets aquaculture as a Water Supply use, a fish or shellfish farming activity resulting in human consumption of the product. At Red Dog and Ikalukrok Creeks, a fresh water system, this would involve construction of a fish hatchery with "off stream" use of these creek waters. This criterion sets a certain standard of water quality for waters to be used in fish farming. Red Dog and Ikalukrok Creeks due to the high natural mineralization far exceed the standards required for aquaculture.

The Alaska Water Quality Standard criteria for protection of aquatic life, i.e., growth and propagation (18 AAC 70.020 (a)(1)(C), protects all naturally occurring aquatic life populations, not human-controlled populations such as fish raised in hatcheries. It is possible, as is the case at Red Dog and Ikalukrok Creeks, that aquatic life have acclimated to waters which exceed the aquatic life criteria for some parameters. Fish studies have shown that these fish, although present, exhibit the kind of stress shown by fish subjected to highly mineralized waters. Removal of the aquatic life criteria, where fish exist, is not an option.

However, should a fish hatchery be considered for Red Dog or Ikalukrok Creeks, a cost:benefit analysis would indicate that this system is inappropriate for this activity, due to the poor water quality of this system, which would result in the production of metals-stressed fish. ADF&G fisheries biologists involved in fish hatchery work agree that water quality is an important element in determining fish hatchery locations.

With this clarification, we expect that EPA agrees with ADEC that aquaculture is not an existing or attainable use, and is distinct from the aquatic life use which does exist and is expected to continue although the water quality does not naturally meet the high standards of the Alaska Water Quality growth and propagation criterion. Water quality data support Factor 1, which states that "naturally occurring pollutant concentrations prevent the attainment of the use" for removal of this use in Middle Fork Red Dog Creek and its tributaries, Main Stem Red Dog

Creek, and Ikalukrok Creeks from its confluence with Red Dog Creek to its confluence with the Wulik River.

18 AAC 70.020(a)(1)(B)(i) - Contact Recreation

EPA Comment: EPA requests clarification on how ADEC interprets existing Contact Recreation in a water body and presents two interpretations.

ADEC Response: ADEC agrees with EPA in its first interpretation of Contact Recreation at Red Dog and Ikalukrok Creeks; that "because the waterbody is not suitable for swimming, primary contact recreation is not an existing use."

Physical conditions preclude any Contact Recreation activities for 6-9 months of the year when these water bodies are frozen. During open water conditions, either flow is too rapid or too high for swimming; or, the water is too shallow except for wading. Although access is difficult though not impossible, areas where wading could occur during low water conditions, include Middle Fork Red Dog Creek and its tributaries, except Hilltop and Sulfur Creeks, Main Stem Red Dog Creek; and Ikalukrok Creek from its confluence with Red Dog Creek to its confluence with the Wulik River (See final UAA and Table 4).

During the public hearings, residents of Kivalina and Noatak told ADEC that there is no summer use of Red Dog and Ikalukrok Creeks because access is impossible due to the shallowness of entrance to Ikalukrok Creek. The Red Dog Mine, where all recreational activities are prohibited, is at the other end of the Red Dog/Ikalukrok drainage. According to the accounts of the local people, no contact recreation activities have ever occurred in this water system, and are unlikely to occur in the future.

EPA Comment: EPA requests a clarification of the link between the acute Aquatic Life Criteria for metals and Contact Recreation and how the "gulp" concept adversely affects human health. The draft UAA stated that "the primary concern regarding this protected use is whether human health might be adversely affected by ingestion of these waters during Contact Recreation activities".

ADEC Response: ADEC wants to clarify that swimming does not and cannot occur due to either flows or water levels (which may be very high and swift at spring breakup, or too low for any contact recreation activity except wading). Since swimming does not occur, water ingestion as suggested by the "gulp" concept would not occur.

EPA Comment: EPA requested clarification of the meaning of the State definition which includes "intimate contact with water directly related to shoreline activities", particularly asking about fishing activities.

ADEC Response: "Intimate contact with water directly related to shoreline activities" might

include fishing. This has been considered in the revised Table 4, which shows that Ikalukrok and Main Stem Red Dog Creek would continue to be protected for Contact Recreation. Since there are no fish in Middle Fork Red Dog Creek, below the Mine's effluent, and wading would be possible, this section would be protected for Contact Recreation, wading only. The section of Middle Fork Red Dog Creek above the Mine's effluent has no fish and cannot be waded because the creek bed has been disturbed and is now an artificial clean water conduit and contaminated water ditch system. Contact Recreation will be removed as a protected designation.

18 AAC 70.020(a)(a)(B)(ii) - Secondary Recreation

EPA Comment: EPA states that they believe this use is a potential one, after mining, even if not existing. EPA also states that fish toxicity information is not relevant to most of the incidental, accidental and sensory water uses included in Secondary Recreation.

ADEC Response: Based on the input received at the Public Hearings/Meeting, ADEC agrees with EPA that it is not possible to remove the Secondary Recreation protected use designation from Red Dog and Ikalukrok Creek, with the exceptions of the Middle Fork Red Dog Creek above the Mine's discharge, and Hilltop and Sulfur Creek.

The Middle Fork Red Dog Creek above the Mine's discharge as been completely reworked (disturbed) constructing the Mine Water Management System (clean water conduit and mineralized water ditch, sump and dam). Hilltop Creek is part of the ore body drainage, carries high metals concentrations and has no discernable depth due to its porous rock rubble substrate. Sulfur Creek is intermittent summer and winter, carrying water only at spring breakup and during rainy conditions (Figure 3 and Table 4).

Since there is no aquatic life in the Middle Fork Red Dog Creek below the Mine's discharge, ADEC finds it appropriate to remove Secondary Recreation, fishing as a designated protected use.

Access to these creeks during winter is very easy by dog team or snow machine, except for the area where the Red Dog Mine is located. At the Public Hearing, residents of Kivalina indicated that they do not use the Ikalukrok Creek for any winter activities, although they do ice fish in the Wulik upstream of its confluence with Ikalukrok Creek. Residents of Noatak indicated that there are many trails for trapping and hunting which cross Red Dog and Ikalukrok Creeks in a northwest direction from the village. Local people indicated that they did use this creek system prior to mining activity. Now, no local people hunt or engage in any secondary recreation activities in the mining area, due to the noise which scares away game, and the hazardous conditions, such as blasting. Residents of Noatak indicated that they would like to be assured that once the mining activity is over, they would be able to return to their traditional activities.

One could argue that Alaska Water Quality Standards were meant to protect open water conditions, and that these creeks are frozen at least 9 months each year. Even if that were a

successful argument, hiking, fishing, and hunting are possible in summer alongside these creeks, even though none of these activities ever existed or presently exist. Kivalina residents indicate that there is no need for them to travel far from their village to fish during the summer months, since these fish are plentiful at Kivalina.

The National Toxics Rule for acute metals toxicity limits applies to the protected Recreation uses in Alaska. This is inappropriate for the Secondary Recreation protected use at Red Dog and Ikalukrok Creeks. ADEC recommends that Cominco apply for a Site Specific Criterion determination to remove this requirement.

18 AAC 70.020(a)(1)(C) - Growth and Propagation of fish, shellfish, and other aquatic life and wildlife.

EPA Comment: EPA agreed with ADEC that Middle Fork Red Dog Creek does not support aquatic life due to the high mineralization of this section of Red Dog Creek. EPA recommended that additional field work be done in the tributaries to Middle Fork Red Dog Creek to determine whether they have self-sustaining or robust aquatic life communities.

ADEC Response: ADEC appreciates EPA's concurrence with its recommendation to remove the aquatic life criterion protective use from Middle Fork Red Dog Creek. The recommended additional aquatic life surveys were performed by ADF&G during the 1996 field season. Results of this work show that Hilltop, lower Rachael Creek and Sulfur Creeks do not meet the definition of "biotic integrity" (See final UAA), based either on the high natural metals concentrations found in these waters or the intermittent flow regimes. Connie Creek and Shelly Creeks, however, do meet the biotic integrity definition.

The additional field surveys have made it easier for the agencies and biologists to differentiate between Sulfur, Shelly, Connie, Hilltop and Rachael Creeks.

Cominco may want to consider sampling a stream in the vicinity of the Mine known to have very low to non-existent mineralization; e.g., Bons or Dudd Creek, to determine if non-mineralized streams have more taxa and numbers of organisms. Otherwise, a subjective decision may need to be made on what constitutes a self-sustaining, or robust community, worthy of aquatic life protection under 18 AAC 70.020 (a)(1)(C). For the present, ADEC is relying upon the "biotic integrity" definition provided by EPA.

Mike Frank Comment: Mr. Frank agrees with ADEC that Water Supply, drinking water is an appropriate use removal due to the naturally high mineralizations in waters near the Red Dog Mine.

ADEC Response: ADEC appreciates Mr. Frank's support.

Mr. Frank Comment: Mr. Frank states that the public notice and the associated agency

documentation were not sufficient to adequately inform the public or to justify reclassification, except for removal of drinking water.

ADEC Response: Regarding the public process, ADEC did more than just meet our statutory requirements for public noticing the proposed reclassifications. The announcements were sent to approximately 300 individuals, whose names are on the Alaska Water Quality Regulations interested parties address list. ADEC published in newspapers in Juneau, Kotzebue and Fairbanks, made personal telephone calls to native leaders in Kivalina, Noatak and Kotzebue to invite them to the public hearings and meeting, and conducted an informational meeting at a NANA Regional Corporation Board meeting. ADEC also met several times with the Sierra Club Legal Defense Fund. ADEC's efforts were intended to get the reclassification process before the affected and interested public and receive their comments, opinions and information.

Mr. Frank Comment: Mr. Frank states that the agency documentation is inadequate to justify reclassification, except to remove the drinking water protected use.

ADEC Response: Regarding justification of the reclassification, ADEC requests that Mr. Frank review the final Use Attainability Analysis alongside the draft one. The intent of putting a draft document through the public process is to allow the public to comment on the accuracy as well as the intent of the document. Corrections have been made and new information added into the final UAA, based on the intensive public process, so that the conclusions reached in Table 4 are well justified.

Mr. Frank Comment: Mr. Frank expresses concern about the impact of the reclassification on renewal of permits such as the NPDES and/or other state wastewater permits at the mine.

ADEC Response: It is the state's intention, as stated on page 1 of the UAA, to establish the correct baseline classification for these water bodies. For this reason, we reviewed historical pre-mining water quality data, or recent water quality information from areas undisturbed by mining. The results of reclassification will not result in degradation of these water bodies.

Future permit limits will only be altered insofar as standards for protected uses, which were never appropriate, are no longer legally required.

Mr. Frank Comment: Mr. Frank states that the draft UAA does not remark on the compliance history of the facility, nor chronicle the Mine's discharge history, or significant changes in the mine's predicted operational configuration since it began; nor does the draft UAA make any considered judgement as to whether such changes or permit violations may or may not have adversely affected "existing uses".

ADEC Comment: ADEC recognizes that "existing uses" are defined as occurring on or after November 28, 1975 and that there is a continuum from pre-mining to the present. Although the UAA relies on water quality data collected prior to mining, or from areas outside of mining

influences, data collected since mining do not show statistical changes in metals concentrations downstream.

The department has been tracking the effluent and receiving water quality, prior to and since 1989. Although there have been effluent violations, metals concentrations in the receiving waters have for the most part remained at or below historical background levels.

The UAA summarizes those major water quality problems which are pertinent to the reclassification discussion. For example, Mine Water Management System Section, page 6, describes the permafrost degradation when overburden was first removed at the ore body in 1989 as well as the subsequent solutions entered into by Cominco and the Alaska Department of Environmental Conservation through a Compliance Order By Consent.

Other compliance issues, outside the scope of this reclassification packet, are not included, but are documented in ADEC files and available to the public for their review. In each case, solutions were found to assure that these violations were not repeated.

ADEC does not believe that the UAA is the appropriate place to chronicle the mine's discharge history. However, this information is available from the USEPA, who completed a comprehensive review of all effluent compliance violations. There is a difference, however, between effluent limitations, which are very stringent, and the receiving water quality, which may have improved since mining started, allowing new species of fish to move into the lower Red Dog Creek.

Mr. Frank Comment: Mr. Frank comments that aquatic life uses that ADEC now believes did not exist, were in fact attainable before 1988; while aquatic life was sparse, perhaps the sparse aquatic life might nonetheless be an important load component in maintenance of downstream health. Mr. Franks suggests that aquatic life may have been more plentiful before mining disturbance, and that it would be improper to delete that use based on diminished post-mining aquatic life.

ADEC Response: ADEC certainly agrees with the premise that if the mine activities have impaired the aquatic community, that would not support deletion of the aquatic life use. However, ADEC and ADF&G have compared the baseline data, gathered before mining disturbance, with current aquatic life data. The current evidence of occasional organisms in the Main Stem of Red Dog Creek is comparable to what Dames & Moore reported in 1983. The question is whether such a simplified and sparse occurrence of aquatic invertebrates constitutes an "existing use" by an aquatic community. The State is working with the USEPA to determine what level of biotic integrity and species diversity is necessary to constitute aquatic life deserving of that use designation.

In summary, ADEC has the data collected prior to mining on water quality and on fish and other aquatic life. We have annual water quality and fishery data since mining activities began and

recently compared the non-fish aquatic life with baseline information. Our interpretation of these data, which is supported by the Alaska Department of Fish and Game, is that there has been no impairment of receiving water quality nor adverse affect on aquatic life, caused by the metals in the mine's effluent

Please refer to the state wastewater permits and recent Compliance Order By Consent for the rationale for these documents. You will note that discharge rates were allowed to exceed the NPDES limits, but that metals concentrations remained the same. Monitoring requirements continue to be intensive. The total dissolved solids studies required in the recent COBC will allow us to determine and assess any effects of this discharge on sensitive fish life stages and invertebrates. In the meantime, the fishery information we have received over the years, continue to suggest that fish are as healthy as can be expected in a naturally mineralized water body.

Mr. Frank Comment: Mr. Frank asks that ADEC explain why protected uses cannot be attained by implementing effluent limits required under section 301 (b) and 306 of the Clean Water Act and by implementing cost-effective and reasonable best management practices for nonpoint source control" 40 CFR 131.10(a).

ADEC Response: ADEC believes it is unreasonable to request that industry improve water quality that is naturally degraded. The intent of the regulation cited is to require industry to clean up pollution caused by industry, not pollution caused by nature. ADEC has never asked Cominco to improve water quality above its natural historical condition. ADEC does require, however, that Cominco not exceed the historical water quality of the receiving water.

RECEIVED

Rodney Powell

P.O. Box 111605

Anchorage, AK.

99511-1605

APR 24 1996

DEPT. OF ENVIRONMENTAL
CONSERVATION
NRO

4-19-96

Joyce Beelman
Alaska Dept. of Environmental Conservation
610 University Avenue
Fairbanks, AK 99709-3642
(fax #907-451-2187)

Subject: Red Dog Mine

I'm disappointed that your about to be taken by this National assault on Health and Safety Standards in the name of Regulatory reform.

Just because there are already natural toxins in the water that reduce numbers of fish naturally. And just because no one is using the water for drinking. There are not scientific reasons that should allow reclassification, this is especially not a common sense reason for reclassification.

Have they identified toxins they intend to dump? Why did they originally want other creeks reclassified? (future plans maybe). Are there site specific studies being done? Have surrounding areas been studied to see how they will be impacted?

Is there a Master Plan for the entire project or is this one part of a piece meal process?

It is imperative that we get the Science done right on these projects because of pending legislation on regulatory reform:

- * repeals provisions on adding cancer-causing substances to food;
- * undermines the public's right to know regarding the release of toxic substances into the environment;
- * gives businesses and industries with only a marginal interest in a regulation the right to appeal it;
- * permits government agencies to grant exemptions to health, safety, and environmental protections while preventing those exemptions from being appealed in the courts;
- * allows government agencies to give secret immunity to industries, thus permitting them carte blanche to pollute with absolutely no penalties to be incurred.

Sincerely,



RODNEY POWELL

PAUL S. GLAVINOVICH
MINERALS CONSULTANT

P.O. Box 112816
Anchorage, Alaska 99511

Telephone
(907) 345-3646

May 9, 1996

Ms. Joyce Beelman
Alaska Department of Environmental Conservation
610 University Avenue
Fairbanks, Alaska 99709

RECEIVED
MAY 13 1996
DEPT. OF ENVIRONMENTAL
CONSERVATION
MRO

Re: Reclassification Red Dog and Ikalukrok Creeks

Dear Ms. Beelman:

I am in writing in support of Cominco Alaska, Inc.'s petition to reclassify certain sections of Red Dog and Ikalukrok Creeks near the Red Dog Mine in northwestern Alaska. The streams in question have a documented pre-mining history of extremely high metal content and low pH but these characteristics were not recognized in the initial classification exercise and the streams were inappropriately classified for uses which were not then and are not now, naturally attainable.

Cominco's petition to reclassify the subject streams is appropriate and such reclassification to reflect pre-mining conditions is provided for under Alaska statutes and the Administrative Code.

I am particularly concerned that this reclassification effort has become so protracted and that the costs to Cominco of pursuing this option are now in the hundreds of thousands of dollars. There is little question that the State erred thirty-plus years ago when it essentially grouped all of its waters under one blanket classification. Red Dog and Ikalukrok Creeks are prime examples of such oversight. Reclassification provides a vehicle to correct that; however, the process must offer some reasonable assurance of success and in a timely manner or else it becomes just another obstacle that could preclude all but the largest of resource projects.

Sincerely,



cc: Commissioner M. Brown

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION
DIVISION OF AIR AND WATER QUALITY
MAJOR FACILITIES AND WATER PERMITS SECTION
610 University Avenue
Fairbanks, AK 99709-3643

Telephone: (907) 451-2360
Fax: (907) 451-2187

File: 475.45.007

May 24, 1996

Mr. Rodney Powell
Alaska Road Boring
P. O. Box 11605
Anchorage, Alaska 99511-1605

Dear Mr. Powell:

Thank you for your comments and questions regarding the Red Dog Mine. We are responding to your questions underlined below. We would be happy to talk further with you and provide you with additional information in the future.

Have they identified toxins they intend to dump? All point source discharges of wastewater to waterbodies are required to be permitted. The permit process begins with the submittal of a permit application by the owner or operator of a facility proposing to discharge wastewater. As part of the application process, the facility is required to characterize the wastewater that will be discharged. The facility is required to identify all toxic pollutants and hazardous substances expected to be present in the discharge.

Cominco Alaska Inc. (Cominco) applied for a discharge permit and identified all chemicals, including toxins, which are used in the milling process and which may, or are discharged. The federal National Discharge Elimination System (NPDES) permit process is authorized by Section 402 of the Clean Water Act. NPDES permit and state Water Quality Certification for this project were issued in 1985 and are presently under reconsideration by the resource agencies. When the new amended draft permit documents are ready, there will be a public process so that people like yourself can review these documents and makes formal comments. We expect that these draft documents will be ready for public review during the winter of 1996-97.

Why did they originally want other creeks reclassified? (future plans maybe). Although we cannot speak for Cominco Alaska Inc., we know that the area surrounding the mine is also mineralized and that mining exploration is going on along other drainages, particularly the upper Ikalukrok Creek. The draft Use Attainability Analysis separates the reclassification process into two phases. Phase One covers only those parts of the company's original request for which the resource agencies have adequate data to determine if protected water quality uses existed in the past, presently exist, or have the potential to exist. Phase Two includes those areas, such as North Fork Red Dog Creek and Ikalukrok Creek above its confluence with Red Dog Creek, where additional baseline water quality and aquatic life information is necessary before the state can consider reclassification.



Are there site specific studies being done? Cominco's request for a site specific criterion for Total Dissolved Solids (TDS) was also placed in Phase Two because studies are needed to determine if a site specific criterion would result in any adverse affect on aquatic life. The studies are currently being developed by the company and the resource agencies, so that there is a definitive answer regarding adverse affects. We anticipate that these studies will be completed by late fall 1996.

Have surrounding areas been studied to see how they will be impacted? The Environmental Baseline Studies in the early 1980's looked at water quality, aquatic and other wildlife, which might be affected by mining activities. A follow up document, entitled "Environmental Information Document, Red Dog Mine Project NPDES Permit Renewal" was issued in 1991.

A new Environmental Assessment is required before the amended federal NPDES permit and Water Quality Certification can be completed. These documents look primarily at the impacts of mining activities on air, land and water quality. They do not pertain to surrounding areas unless there is the potential of mining impact.

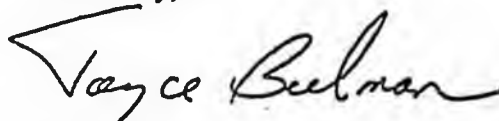
Is there a master plan for the entire project or is this one part of a piecemeal process? The resource agencies attempt to look at the whole picture and anticipate what impacts mining activity will have. It is ADEC's responsibility to protect air, land and water quality so that development and other human activities do not adversely affect human health or the environment. Our goal is to assure industrial development, while at the same time, protecting human health and the environment. Through permitting, monitoring and inspections, we feel we are doing a good job in meeting these responsibilities at the Red Dog Mine.

Please review our responses to your questions and draw your own conclusions. We would welcome any further discussion with you about this project. Our files are open to the public and we can send you any further information you request. Please call me collect at (907) 451-2141, or if I am not available, you may speak with Mr. Pete McGee, (907) 451-2101.

We recommend that you write the U.S. Environmental Protection Agency; 1200 Sixth Avenue, Seattle, WA 98101, or call Kathleen Collins, (206) 553-2108, to have your name placed on the mailing list for the Red Dog Mining Project. You are now on the ADEC mailing list.

We will respond formally to the second part of your letter in which you comment on the science these projects in our Responsiveness Summary for the Reclassification process.

Sincerely,



Joyce Beelman
Major Facilities & Water Permits

JB/rg (K:\EQ\AIRWATER\RDPOWELL.LET)

cc: Pete McGee, ADEC/Fairbanks
Cameron Leonard, Attorney/Fairbanks
Kathleen Collins, EPA/Seattle

Phyllis Weber Scannell, ADF&G/Fairbanks
Charlotte MacCay, Cominco/Anchor
Mike Conway, ADEC/Juneau

STATE OF ALASKA

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

DIVISION OF TRADE AND DEVELOPMENT

File: 96reddog

Joyce Beelman,
Alaska Department of Environmental Conservation,
610, University Avenue,
Fairbanks,
Alaska 99709-3642

May 15th, 1996

Thank you for the opportunity to comment on the Red Dog Creek Draft Use
Attainability Analysis and Proposed Regulation Changes.

The Department of Environmental Conservation is to be commended for proposing to reclassify various creeks in the vicinity of the Red Dog Mine. This will rectify a mistake made by the State two decades ago when, in our opinion, these waterbodies were initially misclassified.

We believe that the proposal is based on sound science, and that it good public policy to recognize that there are areas where the natural state of rivers is not as pristine as many people wish or imagine.

Strict water quality standards were in effect in Alaska since territorial days, but there was some flexibility in the application of the standards.

In 1977 the State was required by the U.S. Environmental Protection Agency (EPA) under the authority of the Federal Water Pollution Control Act (FWPCA), also known as the Clean Water Act (CWA) to classify all waterbodies. At that time there was virtually no base-line data available for the thousands of creeks and rivers in the state, and so with a short time line for compliance the State was obliged to do a blanket classification, and adopt the strictest standard for almost all of them, despite public comment that warned of misclassification, and the possibility that the standards might be inflexible.

The EPA assured the State that if a creek was classified as "Drinking Water", with the attendant strict water quality standard, it would be a simple matter to change the classification to the less strict "Industrial Use" allowed by the CWA at a later time on a case-by-case basis. With that assurance the State adopted the "Drinking Water" standard for most waterbodies. Many states mistrusted the assurances and adopted the less strict standards, choosing to increase the standards at a later time on a case-by-case basis.

TONY KNOWLES, GOVERNOR

- P.O. BOX 110804
JUNEAU, AK 99811-0804
PHONE: (907) 465-2017
FAX: (907) 465-3767
TTY: (907) 465-2137
- 3601 C STREET, SUITE 798
ANCHORAGE, AK 99503
PHONE: (907) 561-5585
FAX: (907) 562-3048
- 751 OLD RICHARDSON HWY., #205
FAIRBANKS, AK 99701
PHONE: (907) 452-7464
FAX: (907) 456-8173

RECEIVED
MAY 16 1996
DEPT. OF ENVIRONMENTAL
CONSERVATION
N:O

*Joyce to Keith
McKenney
7.2.96*

96reddog page 2.

These assurances by the EPA proved to be erroneous, as is clearly shown by the sheer bulk of evidence in this proposed reclassification. The documentation alone represents many years of work and probably hundreds of thousands of dollars, in addition to the numerous samples collected needlessly over the years because of the original misclassification.

It was evident to even the most casual observers as early as 1970 that the Red Dog Creek was carrying a lot of iron and probably other metals (Tourtelot, H.A.; Tailleur I.L.; 1971. "The Shublik Formation and adjacent strata in northwest Alaska" U.S. Geological Survey Open File Report 71-0284). This naturally-occurring acid drainage had existed since the end of the ice age, and probably for many millions of years prior to that.

Red Dog Creek and surrounding drainages ought to have been reclassified automatically when base-line studies confirmed the self-evident natural metal contamination but, as stated in the introduction to this proposed regulation change, the DEC and the State were again misled in 1983 by the federal government into the belief that reclassification was to be made easier.

Most of the affected waterbodies are simply too cold to afford contact recreational values, and there are numerous side tributaries to the Ikalukrok and the Wulik Rivers which afford better quality drinking water than the main rivers in the natural state.

This Proposed Regulation change has taken about 5 years and hundreds of thousands of dollars to get to this point. Such expenditures affect the profitability of a project, and thereby directly impact the revenue stream to the State.

We support an early resolution to the misclassification of these waterbodies through this Attainability Analysis and Proposed Regulation Changes, and urge the DEC to work with the EPA to effect such changes in a much more expeditious manner in future.

Sincerely

Dick Swainbank
Dick Swainbank,

Development Specialist, (Mining & Minerals).

RECEIVED

MAY 22 1996

DEPT. OF ENVIRONMENTAL
CONSERVATION
DRO

COOK INLET REGION, INC.

May 20, 1996

Ms. Joyce Beelman
Alaska Department of Environmental Conservation
610 University Avenue
Fairbanks, Alaska 99709-3642

Via Faxcom to 1 (907) 451-2187

Dear Ms. Beelman:

I am writing in support of Cominco Alaska's request to reclassify certain sections of Red Dog and Ikalukrok Creeks.

During the late 1970's and early 1980's I had the opportunity to explore the area around Red Dog and Ikalukrok Creeks. It was apparent both from fly-over observations and extensive on-site experience that these creeks were highly affected by the mineralization in this area, especially around the Red Dog Deposit. Orange-red precipitates that contained very high values of cadmium, lead, zinc and iron were present within Red Dog Creek and the Middle Fork causing waters to be devoid of aquatic life including vegetation. In times of low water, fish kills occurred within the lower portion of Red Dog Creek. Exploration for other mineral deposits around Red Dog revealed additional mineralized tributaries contributing metals that added to the high metal content of upper Ikalukrok Creek. The water quality in many of these streams, especially Red Dog Creek, exhibited low pH, a decrease in dissolved oxygen levels, increased sulfates, and some of the highest zinc in water and steam silts of any place I have seen in Alaska as a result of our years of mineral exploration.

It is obvious to me that these creeks are not suitable for many of the uses they are presently classified to protect. The reclassification process is clearly the appropriate means to correct this error.

The reclassification process was meant to be a routine process in which stream classifications could be corrected to reflect the natural site-specific conditions. Public comments on water quality regulations were based on the assumption that streams would be reclassified as necessary so that these regulations would be applied to protect actual uses. In actuality, it has been difficult to initiate a stream reclassification and many persons within the mining industry do not consider it an available option. Although Cominco Alaska has been able to have its reclassification petition considered, the process that they have experienced would be too lengthy and cost prohibitive for all but the largest companies.

Sincerely,

COOK INLET REGION, INC.


Gerald G. Booth
Vice President, Resources

Joyce Beelman/Alaska DEC
Reclassification of Red Dog and Ikalukrok Creeks
May 20, 1996

Page 2

cc: Carl H. Marrs
John Ellsworth

COOK INLET REGION, INC.

May 20, 1996

Ms. Joyce Beelman
Alaska Department of Environmental Conservation
610 University Avenue
Fairbanks, Alaska 99709-3642

Via Faxcom to 1 (907) 451-2187

Dear Ms. Beelman:

I am writing in support of Cominco Alaska's request to reclassify certain sections of Red Dog and Ikalukrok Creeks.

During the late 1970's and early 1980's I had the opportunity to explore the area around Red Dog and Ikalukrok Creeks. It was apparent both from fly-over observations and extensive on-site experience that these creeks were highly affected by the mineralization in this area, especially around the Red Dog Deposit. Orange-red precipitates that contained very high values of cadmium, lead, zinc and iron were present within Red Dog Creek and the Middle Fork causing waters to be devoid of aquatic life including vegetation. In times of low water, fish kills occurred within the lower portion of Red Dog Creek. Exploration for other mineral deposits around Red Dog revealed additional mineralized tributaries contributing metals that added to the high metal content of upper Ikalukrok Creek. The water quality in many of these streams, especially Red Dog Creek, exhibited low pH, a decrease in dissolved oxygen levels, increased sulfates, and some of the highest zinc in water and steam silts of any place I have seen in Alaska as a result of our years of mineral exploration.

It is obvious to me that these creeks are not suitable for many of the uses they are presently classified to protect. The reclassification process is clearly the appropriate means to correct this error.

The reclassification process was meant to be a routine process in which stream classifications could be corrected to reflect the natural site-specific conditions. Public comments on water quality regulations were based on the assumption that streams would be reclassified as necessary so that these regulations would be applied to protect actual uses. In actuality, it has been difficult to initiate a stream reclassification and many persons within the mining industry do not consider it an available option. Although Cominco Alaska has been able to have its reclassification petition considered, the process that they have experienced would be too lengthy and cost prohibitive for all but the largest companies.

Sincerely,

COOK INLET REGION, INC.


Gerald G. Booth
Vice President, Resources

CIRI BUILDING 2525 "C" STREET P.O. BOX 93330 ANCHORAGE, ALASKA 99509-3330
(907) 274-8610 FAX (907) 279-8836

Joyce Beelman/Alaska DEC
Reclassification of Red Dog and Ikalukrok Creeks
May 20, 1996

Page 2

cc: Carl H. Marrs
John Ellsworth



Resource Development Council for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
Phone 907/276-0700 Fax 276-3887

Founded 1975

EXECUTIVE DIRECTOR
Becky L. Gay

1995-96 EXECUTIVE COMMITTEE

- Elizabeth Rensch, President
- Scott L. Thorson, Sr. Vice President
- John Sturgeon, Vice President
- Gerald G. Booth, Secretary
- Allen Bingham, Treasurer
- Jacob Adams
- Cynthia Bailey
- Charlie Boddy
- Frank Brown
- Dennis W. Egan
- Roy S. Ewan
- Mano Frey
- Paul S. Glavinovich
- Uwa L. Gross
- Robert W. Loescher
- John K. Norman
- David J. Panich
- William E. Pierce
- Jerome M. Selby
- R.B. Stiles
- Michael E. Stone
- Curt A. Taro

DIRECTORS

- Will Abbott
- Irene A. Anderson
- Ernesta Ballard
- Richard F. Barnes
- Rex I. Bishopp
- Kelby M. Campbell
- James E. Carmichael
- James L. Cloud
- Edward E. Crane
- Marilyn Crockett
- Lamy Daniels
- Curt Davis
- James V. Drew
- Paula P. Easley
- Bill Elander
- Donald S. Follows
- Lennie Gorsuch
- Elary Gromoff, Jr.
- Arvid Hall
- John L. Harris
- Robert S. Hatfield, Jr.
- Joseph R. Henri
- Roger C. Herrera
- Karen J. Hofstad
- David W. Hughes
- Jim Jansen
- Dan H. Keck
- John T. Kelsey
- John A. Landrum
- Pete Leathard
- Wayne Lewis
- Date R. Lindsey
- Frank E. McCusker
- H. Raymond Measles
- Clarence "Rocky" Miller
- Wesley P. Nason
- Wilbur O'Brien
- Kenneth E. Peavyhouse
- Kenneth R. Potts
- Troy Reinhart
- John A.L. Rense
- Ronald L. Rickens
- Dan Rowley
- Walt Schlotfeldt
- George R. Schmidt
- Thyes J. Schaub
- William A. Thomas, Jr.
- Scott B. Thompson
- Barry D. Thomson
- Lyle Von Bergen
- Leo A. Walsh
- Douglas M. Webb
- J.C. Vargfield
- George P. Wuerch

HONORARY DIRECTORS

- Phil R. Holdsworth
- William R. Wood

EX-OFFICIO MEMBERS

- Senator Ted Stevens
- Senator Frank Murkowski
- Congressman Don Young
- Governor Tony Knowles

Post-it® Fax Note 7671		Date <u>May 20</u>	# of pages <u>3</u>
To <u>JOYCE BEELMAN</u>	From <u>BECKY GAY</u>	RDC, AK	
cc: <u>Michele Brown</u>			
Phone # <u>907-451-2187</u>	Phone # <u>276 0700</u>		
Fax # <u>465-5070</u>	Fax # <u>276-3887</u>		

May 20, 1996

Ms. Joyce Beelman ..
Alaska Department of Environmental Conservation
610 University Ave.
Fairbanks, AK 99709-3642

RE: Re-classification of Red Dog and Ikalukrok Creeks

Dear Ms. Beelman:

The Resource Development Council (RDC) thanks you for including these comments in the formal record.

RDC commends DEC for work done to reflect water quality reality in Alaska and to finally forward the reclassification petition for Red Dog and Ikalukrok Creeks to the public for comment.

As you well know, reclassification is provided for under statute. This is important for the public and regulators to understand since the original and inappropriate classification of Alaska waters has led to all sorts of costly regulatory "make-work" efforts, the cost borne directly by both the regulating agencies and the regulated public.

Nowhere is this more evident than in the water body reclassification process, the final decision of which rests with the Environmental Protection Agency (EPA).

RDC supports DEC strongly pursuing the effort to reclassify Red Dog and Ikalukrok Creeks, particularly since pre-mining and present inaccessibility to the entire remote area precludes most uses from ever being attainable.



Re-classification of Red Dog and Ikalukrok Creeks/RDC page 2 May 20, 1996

RDC has long urged DEC to become more pro-active on appropriately and scientifically classifying state waters. Appropriate classification of State waters is basic and essential to the meaningful implementation of state water quality standards, discharge permitting and the evaluation of water bodies for the so-called impaired water bodies (303(d)) list.

Following is an excerpt from RDC's comments on DEC's draft 1996 305(b) Water Quality Assessment Report to the Environmental Protection Agency and Alaska's Candidate 1996 Section 303(d) List of Waters (March 1, 1966) which pertains to the two water bodies under consideration in the reclassification petition.

3. RDC recommends expanding and simplifying the Alaska criteria for de-listing.

It is not clear from the draft report whether de-listing criteria are set or limited by EPA, but if at all possible, Alaska de-listing criteria should be expanded and simplified greatly. Some waterbodies are known to *naturally not meet water quality*. In other cases, *designated uses are known not to be present*. Waters such as these should not be on the list to begin with, much less require a waterbody recovery plan to get de-listed. At present, there are only three ways to get de-listed, or off the list:

Number One criteria for de-listing includes waterbody assessments which call for total maximum daily load analyses (TMDLs). Additionally, an EPA-approved waterbody recovery plan must be implemented and underway.

Number Two criteria allows only certified sewage lagoons off the list.

Number Three says it takes "credible documentation that State Water Quality Standards have been met." The weight of evidence called for will be costly without stricter guidelines and controls for both listing and de-listing. This is an area one can imagine causing litigation.

In a state as enormous as Alaska, getting a waterbody de-listed promises to be a regulatory "make-work" program for consultants and lawyers, costing the regulated communities and industries dearly. This is especially wasteful if it really is a non-problem.

 **AGRA**
Earth & Environmental

AGRA Earth &
Environmental, Inc.
3504 Industrial Avenue
Suite 5
Fairbanks, Alaska
U.S.A. 99701
Tel (907) 479-7586
Fax (907) 479-0193

May 7, 1996

Alaska Department of Environmental Conservation
610 University Avenue
Fairbanks, Alaska 99709-3642

Attention: Joyce Beelman

RE: RED DOG CREEK RECLASSIFICATION

Dear Joyce:

As you know, I developed the original water quality and hydrology information for the Red Dog Project by spending three years collecting data. I have made field trips to the area every month except January and February. There is no doubt that the Middle Fork Red Dog Creek, Sulfur Creek, and groundwater near these creeks were significantly impacted by natural metal concentrations. Tributaries other than the North Fork also exhibit varying degrees of impact.

Based on my observations, I support the reclassification of the Middle Fork and all its tributaries above the North Fork to an industrial use classification. I also support removing the drinking water supply, agricultural supply, aquacultural supply, and contact recreation from protected use in Ikalukrok Creek from Red Dog to the Wulik.

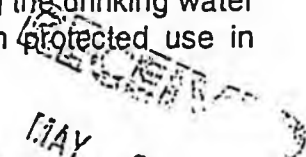
Sincerely,

AGRA Earth & Environmental, Inc.



Laurence A. Peterson
Fairbanks Office Manager

cc: Charlotte L. McCay, Cominco Alaska, Inc.


MAY 8 1996
DEPT. OF ENVIRONMENTAL
CONSERVATION
NBC





Earl H. Beistline

Mine Consultant

P. O. Box 80148
Fairbanks, Alaska 99708

Telephone: (907) 479-6240
FAX: (907) 479-0176

May 7, 1996

Joyce Beelman
AK Department of Environmental Conservation
610 University Avenue
Fairbanks, AK 99709-3642

Dear Ms. Beelman:

Recently I have had the opportunity to review current literature pertaining to COMINCO Alaska's request to reclassify Red Dog and Ikkalukrok Creeks located in northwestern Alaska where COMINCO operates an efficient, world class zinc mine in arctic Alaska.

The history of the discovery of mineralization in the area in 1968 by Bob Baker noticing the reddish orange staining on "rocks" in the creeks caused by weathering of the natural occurring minerals is well known and documented. Also, past sampling has provided the knowledge of the relatively natural occurring concentration of mineral in the water and its affect on fish in the streams caused by natural erosion and not by man's activities.

Considering the great amount of background information provided by COMINCO, the apparent non-harm to people in the area, the great economic importance of the mine to NANA and Alaska, their people and the value of the metals produced for mankind, I enthusiastically support a realistic reclassification of the creeks proposed by COMINCO.

I base my thoughts on being a lifelong resident of Alaska, a resource state, and having had a full professional mining engineering career in Alaska.

If you have any questions on the foregoing, I will be pleased to explain my thoughts in more detail. Thank you for the opportunity to comment on this matter.

Sincerely


Earl H. Beistline

James L. Cloud
PO Box 201014
Anchorage, AK 99520
(907) 345-9730

RECEIVED

MAY 1 1996

DEPT. OF ENVIRONMENTAL
CONSERVATION
NEQ

April 27, 1996

Joyce Beelman
Alaska Department of Environmental Conservation
610 University Avenue
Fairbanks, AK 99709-3642

RE: Reclassification of Red Dog and Ikalukrok Creeks

Dear Ms. Beelman:

Please accept this comments as supportive to the process of reclassifying Red Dog and Ikalukrok Creeks in Northwestern Alaska. As you are aware, these creeks are in the region of the Red Dog mine being owned by Nana Corporation and operated by Cominco Alaska.

It is important the state recognize water bodies throughout the state have not been properly reclassified to recognize the uses of those water bodies or their state of impairment whether they are impaired by industry use or natural occurrences of heavy metals. As you are undoubtedly aware Red Dog creek claims little if any aquatic life from pre-mining periods due to the leaching of zinc and lead from the naturally occurring deposits. It is unreasonable to continue to carry these water bodies under its current classifications which fail to recognize the naturally occurring toxicity in the region. The burden this erroneous classification puts on the mine and its investors and employees is unreasonable.

The only solution is to reclassify these water bodies to reflect the operation of the mine as well as the pre-existing condition of the waters.

Sincerely,


James L. Cloud



April 17, 1996

Ms. Joyce Beelman
Alaska Department of Environmental Conservation
610 University Ave.
Fairbanks, AK 99709-3642

Dear Ms. Beelman:

This is to provide comment relative to the proposed reclassification of certain portions of Red Dog Creek and Ikalukrok Creek near the Red Dog Mine in the DeLong Mountains in Northwest Alaska. I understand that the reclassification would remove some of the protected water quality uses identified in regulations, such as water supply and aquatic life. It is apparent that some of these uses do not now exist and are not attainable due to factors such as naturally high metals concentrations and remoteness of these waters. I see absolutely no reason why the reclassification should not be granted; I support that reclassification.

I appreciate the opportunity to comment.

Yours truly,

Richard A. Hughes
Project Manager

RECEIVED
APR 18 1996
DEPT. OF ENVIRONMENTAL
CONSERVATION
N.E.O.



ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, Alaska 99503 FAX: (907) 278-7997 Telephone: (907) 276-0310

May 20, 1996

Ms. Joyce Beelman
Department of Environmental Conservation
610 University Avenue
Fairbanks, AK 99709-3642

MAY 22 1996
DEPT. OF ENVIRONMENTAL
CONSERVATION
FBO

RE: Reclassification of Red Dog and Ikalukrok Creeks

Dear Ms. Beelman,

We are writing to encourage the reclassification of the Red Dog and Ikalukrok Creeks. These reclassifications are needed to insure the reasonable long term permitting and operation of the Red Dog Mine.

The State of Alaska in 1975 made an extremely poor decision when it classified all of its waters as suitable for all uses. This was the easy way out at the time but has become a tremendous burden for all parties involved in the issue. This error has cost the State and its industries untold dollars and headaches since that time.

The subject streams are some of the most egregious examples of the poor decision of the past. The natural contamination and associated fish kills, etc. for these streams has been well documented. Similarly, the lack of other uses that would be adversely impacted by reclassification have also been well documented.

The very serious need is now for the State to begin reclassifying streams in an orderly and cost-effective manner. The State must guard against spending an inordinate amount of time and money on this effort. The justification for such reclassification is obvious in the case of the subject streams. The reclassification for these streams has already taken an excessive amount of time and already cost an excessive amount money. This is setting an extremely poor precedent for the future.

It is clear that there now exists sufficient study and data to reclassify Red Dog and Ikalukrok Creeks. We urge you to proceed with this reclassification immediately.

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Commissioner Brown



ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, Alaska 99503 FAX: (907) 278-7997 Telephone: (907) 278-0347

May 20, 1996

Ms. Joyce Beelman
Department of Environmental Conservation
610 University Avenue
Fairbanks, AK 99709-3642

RE: Reclassification of Red Dog and Ikalukrok Creeks

Dear Ms. Beelman,

We are writing to encourage the reclassification of the Red Dog and Ikalukrok Creeks. These reclassifications are needed to insure the reasonable long term permitting and operation of the Red Dog Mine.

The State of Alaska in 1975 made an extremely poor decision when it classified all of its waters as suitable for all uses. This was the easy way out at the time but has become a tremendous burden for all parties involved in the issue. This error has cost the State and its industries untold dollars and headaches since that time.

The subject streams are some of the most egregious examples of the poor decision of the past. The natural contamination and associated fish kills, etc. for these streams has been well documented. Similarly, the lack of other uses that would be adversely impacted by reclassification have also been well documented.

The very serious need is now for the State to begin reclassifying streams in an orderly and cost-effective manner. The State must guard against spending an inordinate amount of time and money on this effort. The justification for such reclassification is obvious in the case of the subject streams. The reclassification for these streams has already taken an excessive amount of time and already cost an excessive amount money. This is setting an extremely poor precedent for the future.

It is clear that there now exists sufficient study and data to reclassify Red Dog and Ikalukrok Creeks. We urge you to proceed with this reclassification immediately.

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Commissioner Brown



Sunrise, Mt. McKinley

Ansel Adams

SIERRA CLUB LEGAL DEFENSE FUND, INC.

The Law Firm for the Environmental Movement

325 4th Street Juneau, Alaska 99801

(907) 586-2751 FAX (907) 463-5891

May 17, 1996

Joyce Beelman
Alaska Department of Environmental Conservation
610 University Avenue
Fairbanks, Alaska 99709-3642
Ph: 907-451-2141
Fax: 907-451-2187

RECEIVED

MAY 22 1996

DEPT. OF ENVIRONMENTAL
CONSERVATION

Re: Comments on the Proposed Stream Reclassification for Red Dog and Ikalukrok Creeks

On behalf of the Alaska Clean Water Alliance, Sierra Club Legal Defense Fund submits the following comments on the proposed stream reclassification.

General Comments

Our primary concern with ADEC's recommendations to reclassify some of the stream segments in the Red Dog Mine area is that it is precluding possible future uses of these waters by unnecessarily removing designated uses. There is potential benefit to users of Waters of the State in retaining as many potential beneficial uses of waters as possible. This goal is not accomplished by removing uses such as Agriculture and Aquaculture, and Contact and Secondary Recreation, when removing a potential use is either not clearly called for by water quality limitations on those waters, or when there is no demonstrated detrimental effect on present uses.

In its justification for the removal of a number of the present use designations ADEC as cited a number of factors which it predicts are not foreseeable in the future. However, many of these factors are not appropriate criteria under EPA regulations for reclassifying streams. More broadly, if the policy of the state with regard to reclassification of waters was to remove uses that were not foreseeable in the near future, or that caused the potential for future conflict with present uses, many - if not most - of Alaska's streams would not carry the industrial classification because this use would not be reasonably foreseeable. It would be most prudent for ADEC not to sanction the removal of a use, including industrial uses, unless clear demonstration has been made that the stream could either never support that use from a water quality standpoint, or that a present use permanently precludes another designated use.

ADEC should attempt to minimize the number of streams, or stream segments, recommend for reclassification. Instead of taking a conservative approach to preserving as many of the potential uses of the Waters of the State as possible, ADEC appears to be taking the position that only clearly identifiable uses will be designated and that long term potential uses will be precluded if they are not foreseeable on the present planning horizon. This approach is not in the best long term interest of the state.

Bozeman, Montana Denver, Colorado Honolulu, Hawaii New Orleans, Louisiana San Francisco, California
Seattle, Washington Tallahassee, Florida Washington, D.C.



a member of Earth Share.

Water Supply - Agriculture

ADEC has proposed removing Agriculture (and Aquaculture) as a use from all the stream segments under consideration, and has done so in spite of the fact that the justification offered does not meet the legal standard for removing that designated use.

The determination that agricultural uses should be removed from these streams is not based on uses that might be "... attainable using permit limits for point sources and best management practices for nonpoint sources" at some future time.¹ It appears to be based on ADEC's analysis of the near term foreseeable uses of the lands surrounding the Creeks. ADEC has not demonstrated that this use cannot be attained.

ADEC cites the fact that, "Ikalukrok Creek is identified as an Intensive Resource Use area and includes moose overwintering, caribou migration, grizzly fall habitat, fish overwintering, spawning and rearing."² In addition, ADEC determined that "Reindeer herding would be a possible stock-watering activity..."³ ADEC is choosing to ignore this identified potential agricultural use despite its own determination that it is a potential and attainable use.

ADEC should remove only those waters from the agriculture and aquaculture designation as are clearly incapable of supporting such uses. In this case, the redesignation should be limited to those waters above station 20 where the aquatic life use is being removed. Removal of the agriculture designation in the Main Stem of Red Dog Creek and below is not supported by ADEC's findings.

Water Supply - Aquaculture

ADEC has stated "The natural metals toxicity of Red Dog and Ikalukrok Creeks would preclude aquaculture at this water bodies."⁴ However, data from ADFG's Use Attainability Study describes the uses of the Main Stem of Red Dog Creek as "migration" and "rearing."⁵ These same stream segments, the Main Stem of Red Dog Creek and below, are proposed by ADEC to retain their aquatic use classification based on data and recommendations from this same report. ADEC's finding that aquaculture is not an attainable use for these stream segments is contradicted by the information in the ADFG report.

ADEC has not justified the need for removal of this use for stream segments below the confluence of the North Fork with Red Dog Creek, i.e. the Main Stem of Red Dog Creek and below.

¹ Draft Use Attainability Analysis, Joyce Beelman, ADEC, March 1996, p. 3.

² Id., p. 13.

³ Id., p. 14.

⁴ Id.

⁵ Red Dog Use Attainability Analysis Aquatic Life Component, Technical Report No. 96-1, Phyllis Weber Scannell, Alaska Department of Fish and Game, Habitat and Restoration Division, February 1996, p. 43 (Table 25).

Secondary Recreation

While we understand the justification for removal of Secondary Recreation as a designated use for the Middle Fork of Red Dog Creek and above, we do not believe ADEC has presented appropriate justification for removing Secondary Recreation as a use for the Main Stem of Red Dog Creek.

ADEC cites the facts that, "Cominco ... has posted Main Stem and Middle Fork Red Dog Creek to alert visitors that it is a hazardous mining area" and "Recent histological analysis show fish may be stressed due to high metals concentrations in the Main Stem Red Dog Creek."⁶

These factors do not provide appropriate justification for the removal of the Secondary Recreation designation. In addition, the factors mentioned by ADEC do not address the potential Secondary Recreation uses of hunting and hiking, and camping associated with these activities. Hunting is almost certainly to be a use of this area when mining ceases.

Contact Recreation

ADEC has proposed removing Contact Recreation as a use from all the stream segments under consideration. While ADEC has proposed that Contact Recreation is not an attainable use for any stream under consideration, it has also acknowledged that one of the potential uses is wading associated with fishing activities.⁷ ADEC then rationalizes that fishing is not likely to be a use because of the distance from local villages, and that Contact Recreation is not an attainable use because of Factors 1 and 2 of 40 CFR 131.10 (g).⁸ Factor 1 refers to naturally occurring pollutant concentrations preventing attainment of the use. However, the presence of fish has been documented by the Use Attainability Analysis in the Main Stem of Red Dog Creek, and below, as discussed in previous sections. Factor 2 generally refers to low-flow conditions preventing the use, but again ADEC has documented the presence of fish in the stream.

ADEC has not justified its recommendation that Contact Recreation is not an attainable use in the Main Fork of Red Dog Creek, and in the stream segments below, and must retain this as a use.

Growth and Propagation of Fish, Shellfish, other Aquatic Life, and Wildlife

ADEC has recommended that aquatic life be removed as a use from the Middle Fork of Red Dog Creek and its tributaries (with the exception of Connie Creek), and this recommendation is appropriately supported and documented by the data presented in the

⁶ Draft Use Attainability Analysis, p.16.

⁷ Id., p. 15.

⁸ Id.

ADFG report. We also agree with the ADEC recommendation that aquatic life should continue as a use in the Main Stem of Red Dog Creek, and below, and in Connie Creek, because it is a present use.

Summary

We believe the stream reclassifications proposed by ADEC are appropriate, with the following exceptions:

	<u>Main Stem Red Dog Creek</u>	<u>Ikalukrok Creek</u>
Agricultural Water Use	Retain	Retain
Aquaculture Water Use	Retain	Retain
Contact Recreation	Retain	Retain
Secondary Recreation	Retain	Retain (as proposed by ADEC)

The EPA regulations are highly specific about the circumstances under which ADEC may permissibly make a finding that attaining a designated use is not feasible.⁹ In numerous places, the Draft Use Attainability Analysis proposes to remove designated uses based on considerations that are not appropriate and not authorized by EPA regulations. For each use ADEC proposes to remove on each stream segment, ADEC should specify exactly which criterion from the EPA regulations justifies the removal.

We recognize the difficulties faced by the Red Dog Mine in permitting discharges that will maintain the tailings pond at safe levels. However, it is not appropriate to remove attainable uses to accommodate this interest. In many cases, there may be other ways to address the Red Dog's problems without eliminating beneficial uses of the streams. Site-specific criteria may be appropriate in some cases. For example, while natural conditions may permanently preclude crop farming, they do allow stock watering, and the criteria could potentially be eased with respect to the former use without compromising the latter. Similarly, while swimming is not likely an attainable use of these waters for contact recreation, wading is an attainable if not a present use. Site-specific criteria, or preferably temporary site-specific criteria, could be tailored appropriately.

⁹ 40 CFR § 131.10(g)(1)-(6).

May 17, 1996

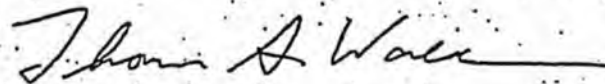
Page 5

Thank you for the opportunity to comment. If you have questions about our comments, please feel free to call.

Sincerely;

A handwritten signature in cursive script, appearing to read "David M. Chambers".

David M. Chambers, Ph.D.
Mining Analyst

A handwritten signature in cursive script, appearing to read "Thomas A. Waldo".

Thomas Waldo :
Staff Attorney



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

1200 Sixth Avenue
Seattle, Washington 98101

June 21, 1996

REPLY TO
ATTN OF: OW-134

Ms. Joyce Beelman
Department of Environmental Conservation
Northern Region
610 University Avenue
Fairbanks, AK 99709-3643

Dear Ms. Beelman:

The Environmental Protection Agency (EPA) has reviewed the Red Dog Creek Draft Use Attainability Analysis (UAA) and Proposed Regulation Change prepared by the Alaska Department of Environmental Conservation (ADEC) as well as the Red Dog Use Attainability Analysis: Aquatic Life Component Report, prepared by the Alaska Department of Fish and Game. This UAA was prepared in response to a request by Cominco Alaska, Inc. to remove specific protected water quality uses from segments of Red Dog and Ikalukrok Creeks in the vicinity of Red Dog mine.

Alaska has assigned criteria to protect general use classifications and the Alaska water quality standards (WQS) have established criteria that are sufficiently protective to safeguard the full range of waters in the State (i.e., criteria are based on the most sensitive uses). While this approach will result in full protection of all State waters, it can lead to site-specific challenges where the level of protection required by the general use classification is demonstrated to be over-protective for the more specific uses that exist or are attainable in a particular segment. This appears to be the situation for some of the streams and stream segments in the vicinity of the Red Dog Mine.

EPA is committed to maintaining water quality at levels that will protect fish, aquatic life, water supply, and allow for recreation wherever these are achievable uses of a stream. Under Federal regulations Red Dog and Ikalukrok Creeks cannot be reclassified if the uses to be removed (aquatic life, recreation, water supply - drinking, agriculture, and aquaculture) are existing uses or would be achieved after implementation of pollution control measures. Any reclassification of these two creeks cannot result in violation of WQS or loss of uses downstream in the Wulik River.

It is in the public interest to thoroughly evaluate whether there is a future need for the use before it is removed. Although the existing use provisions most directly address past or present conditions, decisions about existing uses generally should not be made in isolation.

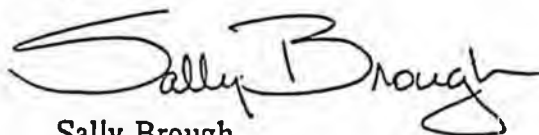
The WQS regulation links existing and designated uses, and it may be useful to view these provisions as a continuum in examining the broader question of use protection. Designated uses focus on potential while existing uses tend to focus on the past or present condition.

Our comments on each of the proposed use removals are discussed in the attached review comments. ~~EPA concurs with the removal of the drinking water use and the aquatic life use removal, with the exception of Shelly and Sulfur Creeks. We have asked for clarification about what is included in the agriculture and aquaculture uses. We have indicated that we could support removal of these uses depending on the clarification that is provided. The justification for removing the recreation uses is confusing and we have asked questions to help us understand the basis for removing them. Based on the information in the UAA, EPA does not support removal of secondary recreation.~~

We look forward to working with ADEC staff in the near future to help resolve any concerns we have raised. Before EPA can complete the approval/disapproval action on this formal WQS change, we must complete an Endangered Species Act consultation. We have initiated the process by requesting a species list from the Fish and Wildlife Service and the National Marine Fisheries Service. We will be working on our analysis of the potential impacts to any listed threatened or endangered species during the next few weeks.

We appreciate the opportunity to review and comment on this UAA. If you have any questions about our comments, contact Sally Brough, Water Quality Standards Coordinator for Alaska at (206) 553-1295.

Sincerely,



Sally Brough
Water Quality Standards Coordinator

EPA REVIEW COMMENTS
RED DOG UAA

18 AAC 70.0020(a)(1)(A)(i) - Water Supply, drinking, culinary and food processing.

The information in the UAA provides adequate documentation to support the ADEC recommendation to remove this use from Middle Fork Red Dog Creek and its tributaries (Sulfur, Shelly, Connie, Rachael and Hilltop Creeks), Main Stem Red Dog Creek, and Ikalukrok Creek from the confluence with Red Dog Creek to its confluence with the Wulik River. EPA concurs with the statement that this use "is neither an existing, probable, nor an attainable use".

18 AAC 70.020(a)(1)(A)(ii) - Water Supply, agriculture, including irrigation and stock watering

The Alaska WQS do not contain a definition for "agriculture". The EPA WQS Handbook states that "the agricultural use classification defines waters that are suitable for irrigation of crops, consumption by livestock, support of vegetation for range grazing, and other uses in support of farming and ranching and protects livestock and crops from injury due to irrigation and other exposure" (p. 2-3). The Alaska WQS use the phrase "stock watering". Based on Alaska WQS regulations and the Federal definition for the agriculture use, this use appears to have two parts: a farming component which includes water that is used for growing crops and a ranching component which includes water that is used for livestock purposes.

We agree that using highly mineralized water for growing crops "is neither an existing, probable nor attainable use in the tundra/permafrost terrain in the vicinity of Red Dog and Ikalukrok Creeks. However, the livestock/stock watering component of this use warrants further discussion.

The UAA states that "Ikalukrok Creek is identified as an Intensive Resource Use area and includes moose overwintering; caribou migration; grizzly fall habitat; fish overwintering, spawning, and rearing". It is not clear whether wildlife populations (moose, caribou, grizzly bear) that are hunted by local subsistence hunters are considered "livestock" or "stock". (The Alaska WQS regulations do not define either of these terms.) EPA suggests that ADEC needs to clarify what this use category includes before making this particular use reclassification decision.

The UAA mentions that reindeer herding has been conducted in Alaska in the past. This activity could be included in "stock watering". The UAA needs to clarify whether reindeer herding is included in stock watering and whether this is an activity that is likely to be pursued in the future in the vicinity of the Red Dog/Ikalukrok Creeks.

If wildlife populations are included in the definition of "agriculture", then EPA would recommend that this use should not be removed for Ikalukrok Creek. ~~If wildlife is not included in the Alaska agriculture use category then EPA would concur with this use removal for Middle Fork Red Dog Creek and its tributaries (Sulfur, Shelly, Connie, Rachael and Hilltop Creeks), Main stem Red Dog Creek, and Ikalukrok Creek from the confluence with Red Dog Creek to its confluence with the Wulik River.~~

18 AAC 70.020(a)(1)(A)(iii) - Water Supply, aquaculture

The Clean Water Act (CWA) in §101(a)(2) establishes an interim goal of water quality which provides for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water (fishable/swimmable). CWA §303(c)(2)(A) requires that State WQS be established for waterbodies taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, agricultural, industrial, and navigational uses. §303(c) includes several offstream uses (e.g., public water supply, agricultural and industrial uses) which do not appear in the §101(a) goals.

We have questions about whether the aquaculture use is a fishable/swimmable use (as in growth and propagation) [§101(a)(2) use] or an "offstream use (as in water supply) [§303(c)(2)(A) use]. The UAA needs to clarify how this use (aquaculture) differs from 18 AAC 70.020(a)(1)(C) - Growth and propagation of fish, shellfish, other aquatic life, and wildlife. The Alaska WQS regulations include a definition for aquaculture: "the cultivation of aquatic plants or animals for human use or consumption". The cultivation of aquatic life in this definition could be interpreted to be included in the "growth and propagation" use. The "cultivation" of aquatic life could also be interpreted to include raising fish and other aquatic life for subsistence or business purposes (e.g., fish hatchery). The UAA should clarify which interpretation is correct.

Since the aquaculture use and the growth and propagation use both deal with the survival of aquatic life, the UAA needs to explain why the aquatic life use for Main Stem Red Dog and Ikalukrok Creeks will be retained but the aquaculture use is recommended for removal on these two streams. We do note that the UAA provides information that indicates that Main Stem Red Dog Creek has existing aquatic life use but the fish found in this creek are showing physiological signs of stress from exposure to metals.

If aquaculture is an offstream use that applies to fish hatchery type of situations, then EPA concurs with the ADEC recommendation to remove this use from the Middle Fork Red Dog Creek and its tributaries (Sulfur, Shelly, Connie, Rachael and Hilltop Creeks), Main stem Red Dog Creek, and Ikalukrok Creek from the confluence with Red Dog Creek to its confluence with the Wulik River. Since there are exceedences of the aquatic life criteria for cadmium and zinc all the way to the confluence with the Wulik River it does not seem likely that Main Stem Red Dog and Ikalukrok water would be suitable for use in a fish hatchery.

18 AAC 70.020(a)(1)(B) - Recreation

Two questions need to be answered in order to remove a use. First, is the use, in this case recreation, an existing use? The existing use question refers to whether people are actually using the waterbody for contact or secondary recreation. The second question is whether there are any limiting factors such as a water quality problems that would prevent the use from ever being attained or any physical features that would limit its use for the activities included in the recreation categories. The UAA has discussed the first question - are contact and secondary recreation existing uses. The UAA has not fully explained the water quality problem that precludes recreational use.

The pollutant of concern for recreation in and on the water is usually bacteria. However, in the National Toxics Rule, Alaska specified that freshwater acute aquatic life metals criteria apply to

both contact and secondary recreation uses. Therefore, in Alaska, it appears that metals concentrations are also of concern for recreational uses.

18 AAC 70.020(a)(1)(B)(i) - Contact Recreation

A somewhat common existing use question applies to contact recreation - if a few people on a few occasions swim in a waterbody that does not have the quality to support swimming, is this an existing use? The straightforward answer to this question is that "swimming" is not an existing use because the present (or past) condition does not support that use. This conclusion is based on the very limited actual use and, more importantly, the lack of suitable water quality to support the use (as determined by the water quality requirements in the State classification system for contact recreation).

Various interpretations of EPA guidance, however, have led to two possible answers to the existing use question in this example. First, because the waterbody is not suitable for swimming, primary contact recreation is not an existing use. Alternatively, primary contact recreation could be an existing use because the waterbody was actually used for swimming, even though the use was occasional and water quality was not acceptable to support such a use. EPA Region 10 believes the first alternative is the appropriate interpretation of Agency guidance in this case, because the use is not established and the water quality is not suitable.

The UAA needs to explain how acute aquatic life metals criteria are a factor in wading, swimming, diving and shoreline activities. The UAA states that "the primary concern regarding this protected use is whether human health might be adversely affected by ingestion of these waters during contact recreation activities." How does the "gulp" concept adversely affect human health?

The UAA also needs to explain what activities are included in "intimate contact with water directly related to shoreline activities". The shoreline activities phrase could be interpreted to include fishing and camping. If this interpretation is correct, then the UAA should explain whether contact recreation is directly linked to fish being present. If fish are found in the Main Stem Red Dog Creek and Ikalukrok Creek then it is difficult to separate the retention of aquatic life uses from the contact recreation uses. If shoreline activities do not include fishing then this should be clarified so UAA reviewers do not link the presence of fish with contact recreation.

Finally, the UAA should clarify which stream segments would not support swimming due to shallowness of the water. For example, water that is only ankle deep would preclude swimming, diving, and water skiing but not wading.

It is difficult to concur with the ADEC recommendation to remove contact recreation until the questions about shoreline activities are explained. Similarly, the link between acute aquatic life criteria for metals and contact recreation needs to be clarified.

18 AAC 70.020(a)(1)(B)(ii) - Secondary Recreation

EPA does not believe that secondary recreation should be removed because incidental/occasional secondary recreation will likely occur in the future. The definition of secondary recreation includes incidental, accidental and sensory water uses. The UAA mentions the toxic

mineralized water on fish that live in the Main Stem Red Dog Creek. The fish toxicity information is not relevant to the majority of activities included in the secondary recreation definition. Only fishing will be affected by the high metals concentrations. How do metals criteria preclude the attainment of "boating, camping, hunting, hiking, or vacationing". The depth of the water would not be a limiting factor for secondary recreation except for boating.

While the mine is in operation the Main Stem and Middle Fork Red Dog Creeks are posted as a "hazardous mining area". Additionally, the noise and disturbance from mining activities scares away any wildlife that could attract subsistence hunters. Our major concern with the removal of this use is what happens after mining ceases. Once the mine has shut down will the area continue to be posted and will there be any means (e.g., fencing) to prevent future access to these creeks. Additionally, once the mine is closed the noise and disturbance from the mining activities will no longer be a factor to keep wildlife away. Subsistence hunters would be able to use the area in the future.

EPA believes that the potential for secondary recreation use should be retained. The access road from the port facility will likely make it easier for the local population to reach the area.

18 AAC 70.020(a)(1)(C) - Growth and propagation of fish, shellfish, and other aquatic life, and wildlife

As explained in EPA's *Questions and Answers on Antidegradation* (USEPA, 1985, p. 3), the Agency considers the protection afforded by standards to focus on an appropriately representative aquatic community whether or not that community includes sport or commercial fish.

EPA concurs with the ADEC recommendation to remove the aquatic life use for Middle Fork Red Dog Creek, and its tributaries Hilltop and Rachael Creeks. EPA does not consider the aquatic life found at station 20 on Middle Fork Red Dog Creek, just upstream of the confluence of Middle Fork Red Dog Creek with North Fork Red Dog Creek to be representative of a self-sustaining or robust aquatic community. The aquatic life at station 20 consisted of three individual organisms of the same taxa.

Based on the very limited data available, EPA recommends that the aquatic life use designation be retained for Shelley and Sulfur Creeks, in addition to Connie Creek. All three of the creeks in question have simplified aquatic communities, however these communities have developed and adapted to the natural mineralized conditions found in the area. (See attached synthesis of available information.) We suggest that additional field work in the future could provide information that would help to resolve whether the biota found in Sulfur and Shelly Creeks represent functioning aquatic communities.

The major difference between Connie Creek and the other two (Shelley and Sulfur) creeks is that Connie Creek has a greater abundance of Chironomidae. Aquatic macroinvertebrate abundance is a variable measure and can be extremely patchy. The information presented in the Red Dog Use Attainability Analysis: Aquatic Life Component Report is from a semi-quantitative, one time sampling event (July 1995) with 5 replicates. The abundance encountered in Connie Creek may be due, in some part, to the sampling method and the nature of macroinvertebrate distribution within the

stream. Therefore, we do not believe that there is sufficient information to justify differentiating between Connie and, Shelley and Sulfur Creeks.

The comparison to the "reference" stream , North Fork Red Dog creek, is also difficult. North Fork Red Dog creek has limited mineralization, so it would not be expected to have a similar community to those waterbodies that have naturally occurring mineralization.

Taxa present in 1983 data - "baseline data"

Class - Oligochaeta - 2 taxa - difficult to identify to genus - specialist required - many changes in taxonomy since 1983
Diptera - Family Chironomidae - 11-13 taxa - many changes in taxonomy since 1983
Plecoptera - 3 taxa
Ephemeroptera - 3 taxa

Taxa present in 1995 data

Acarina
Nematoda
Diptera - 3 taxa
 Tipulidae
 Chironomidae
 Simuliidae
Ephemeroptera - 3 taxa
 Heptagenidae
 Baetidae
 Siphonuridae
Plecoptera - 1 taxa
 Capniide
Tripcoptera (no family given)

.....
SULFER CREEK = under consideration for removal of aquatic life use
No baseline data available

Orders/families present in 1995 data

Plecoptera
 Nemouridae - genus in this family range from intolerant to to relatively tolerant.
Nematoda wide tolerance range - parasite/collector-gatherer/macrophyte herbivore
Diptera
 Chironomidae - often, not always, intolerant (depends on genus)

.....
SHELLEY CREEK = under consideration for removal of aquatic life use
No baseline data available

Families/orders present in 1995 data

Nemouridae
genus in this family range from intolerant to to relatively tolerant.
Nematoda
wide tolerance range - parasite/collector-gatherer/macrophyte herbivore
Chironomidae
- often, not always, intolerant (depends on genus)

.....
CONNIE CREEK = proposed for retainment of aquatic life use
No baseline data available

Families/orders present in 1995 data

Nemouridae
genus in this family range from intolerant to to relatively tolerant.
Nematoda
wide tolerance range - parasite/collector-gatherer/macrophyte herbivore
Diptera
 Chironomidae - often, not always, intolerant (depends on genus)
 Tipulidae
 Simuliidae
Ephemeroptera

MICHAEL J. FRANK
ATTORNEY AT LAW
2224 TURNAGAIN PARKWAY
ANCHORAGE, ALASKA 99517
(907) 248-5078

RECEIVED

May 29, 1996

MAY 31 1996

DEPT. OF ENVIRONMENTAL
CONSERVATION
NRO

Joyce Beelman
Alaska Department of Environmental Conservation
610 University Avenue
Fairbanks, Alaska 99709-3643

Re: Red Dog Creek, etc. reclassification

Dear Ms. Beelman:

Thank you very much for your response to my May 6, 1996 letter. I received it on May 22, 1996, just as I was leaving town for the Memorial Day weekend. I trust that the following comments on the proposed reclassification will still be considered timely and will be considered by DEC.

I do not believe the public notice announcing the proposed reclassification and the associated agency documentation [Red Dog and Ikalukrok Creeks Draft Use Attainability Analysis (March 1996) and ADF&G's Red Dog Use Attainability Analysis - Aquatic Life Component, Technical Report No. 96-1] are sufficient to either adequately inform the public or to justify reclassification at this time, except to the extent the proposals relate to elimination of fresh water supply as a use for waters near the mine site. As to the latter, as there may be some risk to the public in an assumption that waters near the mine are safe for human consumption, a reclassification would seem appropriate to protect public health. ✓

First, in the documentation little mention is made of the potential impact of the proposed reclassification. In particular, the documentation does not mention the impact, if any, the reclassification may have on terms of the NPDES and/or state waste water permits at the mine. What impact, for example, might reclassification have on the effluent limitations? On the size of the mixing zone? On other permit terms?

Second, the documentation does not remark at all on the compliance history of the facility. This, it seems, is a critical omission, because past or continuing compliance violations may have impacted existing water quality. ✓

As chronicled in Permitting Research Project (July 1992) prepared for the State of Alaska's Citizens' Oversight Council on Oil and Other Hazardous Substances, the Red Dog mine facility was seriously out of compliance with its NPDES permit and state waste water permitting requirements in the early years of its operations. While the NPDES permit, AK-003865-2, p. 3, § I.A.2, allows discharges only from May 1 through October 30 each year, i.e., winter discharge is forbidden, in fact, at least in the early years of operations the mine facility discharged beyond these NPDES permit deadlines, exceeding the annual discharge limitations, and violated effluent ?

limitations. Since startup, Cominco has been subject to two state and one federal compliance orders. The most recent state Compliance Order was just signed, on May 9, 1996. In it, DEC and Cominco agree that during the 1996 discharge season (May 1 through October 31, 1996), Cominco will violate AS 46.03 and the NPDES permit, by

- (1.) discharging without a current state discharge permit;
- (2.) exceeding the flow limit in the administratively extended NPDES permit; and
- (3.) violating the water quality standards for TDS and sulfate as set out in 18 AAC 70.020.

Compliance Order By Consent, p. 3, §1.1.(1) - (3).

Despite this situation, EPA allows Cominco to continue to operate under the terms of the original NPDES permit, administratively extended by EPA almost five years from the original 1991 expiration date, and has issued a "no action assurance letter," or letters, meaning that EPA has decided to take no enforcement action while Cominco may (may not?) be operating in violation of federal law. (That Cominco may have a state waste water discharge permit for that part of the year not covered by the NPDES permit does not, of course, satisfy the requirements of the federal Clean Water Act, or excuse any non-compliance.)

Given this history, the Use Attainability Analysis should have chronicled the mine's discharge history, noted any permit violations, explained the important details of discharge limitation violations and significant changes made in the mine's predicted operational configuration since it began, and most importantly, made some considered judgment as to whether such changes or permit violations may or may not have adversely affected "existing uses." See 40 CFR § 131.10(g) (1) - (3) [indicating a use/attainability analysis must describe the "(n)aturally occurring pollutant concentration(s)" and "(n)atural ... flow conditions or water levels" and "Human caused conditions or sources of pollution ... (that) cannot be remedied ..."]. Only with such information could the public possibly judge for itself whether the DEC is correct in concluding now that certain water uses were not "existing uses" on or after November 28, 1975, per 40 CFR § 131.3(e). Use Attainability Analysis, at pp. 10 - 19.

For example, Cominco's Red Dog Mine Annual Stream Impacts Report(s) show that 910,648,000 gallons of treated water were discharged in 1994 (from January 6, 1994 to October 31, 1994) and 1,999,883,000 gallons of treated water were discharged in 1995 (May 9 through October 21, 1995). The NPDES permit, AK-003865-2, p. 3, § I.A.1, allows a maximum 30 day average flow of 5.4 million gallons per day (30 day average), or a total of 993,600,000 gallons for the discharge season. Discharging during winter months, as was done in 1994) may have different (perhaps adverse? cumulative?) environmental effects than summer discharges, and that potential deserves some analysis. A discharge volume at over the twice the permitted annual volume, as apparently occurred in 1995, deserves a similar analysis. Also, both the 1994 and 1995 report indicate a daily discharge volume of "0 to 16,825,000 gallons", when the permit limit is a maximum of 7,100,000 gallons per day. Id. Could a discharge volume of 16,825,000 gallons on a single day cause adverse environmental impacts affecting existing uses?

That further data analysis is needed to make a considered judgment on DEC's proposal is evident from an internal DEC memorandum dated October 26, 1990 (copy attached). The memorandum follows in time the numerous early difficulties associated

with waste water discharges from the mine. In the memorandum, DEC noted that "After 1988, we cannot be sure that the opening of the ore body did not affect water quality of the Red Dog/Ikalukrok/Wulik River system." Id., p. 2. It would certainly seem that studies completed after 1988 that find a lack of aquatic life in certain creek segments, or water quality unsuitable for recreation or other uses, cannot provide a complete data set for deciding what were existing uses in 1975 unless the studies take into account the potential impacts on water quality occasioned by the mine's operations.

In fact, evidence collected before Red Dog mine's start up shows that certain of the uses which DEC now believes did not exist were in fact attainable before 1988, when the mine began operation. For example, the Dames & Moore Environmental Baseline Studies Red Dog Project (1983) indicates that in the study years aquatic life could be found

about station 41 to station 20 (just above the North Fork confluence), the stream is nearly devoid of macrobenthos although an occasional representative of one of the above groups can be found with diligent searching, especially downstream of one of the clean water tributaries. Below the North Fork (station 11 to 10), a more reliable but still impoverished invertebrate population is possible.

Id., p. 2-18. (The "above groups" referenced in the quote refer to aquatic life species previously mentioned in the text and found in Red Dog Creek proper.) The Department of the Interior's Final Environmental Impact Statement ("FEIS") for the mine also noted the existence of aquatic life in creek sections that are now proposed for downgraded use classifications, citing both the Dames & Moore studies and those done by E.V.S. Consultants Ltd. in 1983. Id., at p. IV - 30. While the pre-1988 studies note that aquatic life was sparse, perhaps the sparse aquatic life might nonetheless be an important load component in maintenance of downstream health. At least, it is striking that ADF&G's recent studies could not find any aquatic life.

← ADF&G

The FEIS further predicted that "Operation of the mine and tailings pond is expected to decrease the naturally occurring metals content of Red Dog Creek." Id., p. V - 13. DEC's recent Compliance Order By Consent also asserts that "Habitat suitable for fish has increased since Cominco began discharging effluent under these conditions." Id., at p. 3, § 1.G. By the way, these assertions, if true, would seem to preclude a finding under 40 CFR § 131.10(g)(3) or (4) that "Human caused conditions or sources of pollution" cannot be remedied or that "hydrologic modifications preclude the attainment of the use", at least with respect to the aquatic life use protected by 18 AAC 70.050(b)(1)(C).

If, as DEC once thought, mine operations might conceivably have adversely affected "existing uses" in the applicable drainages, the public should be so informed before DEC makes a final decision as to the proposed reclassifications. And, before use reclassification occurs DEC must better explain to the public, in a use attainability analysis or elsewhere, why "Such uses (cannot) ... be attained by implementing effluent limits required under sections 301(b) and 306 of the (Clean Water) Act and by implementing cost-effective and reasonable best management practices for nonpoint source control." 40 CFR § 131.10(h)(2). DEC may not, of course, by use downgrading in effect "adopt waste transport or waste assimilation as a designated use" for Red Dog and associated creeks. 40 CFR § 131.10(a). See also, 40 CFR § 131.12 (anti-degradation policy set out).

Thank you for considering my comments and for your cooperation in supplying the documents previously requested. I will return the public hearing tapes to you as soon as I have finished listening to them.

Sincerely,


Michael J. Frank

enclosures

cc: Ms. Charlotte MacKay

DAMES + MOORE (1983)

September. Chironomids and simuliids dominated an abundant insect population in Ikalukrok above Red Dog Creek in mid-September with many baetids, plecopterans, and other groups also present.

By late October, when much of stations 9 and 10 at the Ikalukrok/Red Dog confluence were iced over, limited invertebrate sampling showed a marked drop from September (Table 2-1) although ice conditions prevented resampling the exact areas sampled previously. In Ikalukrok Creek (station 9), oligochaetes were relatively more abundant than during the summer.

The nature of invertebrate populations in Red Dog Creek is strongly influenced by the Red Dog ore deposit. The uppermost reaches of the main fork (station 45 on Figure 2-2), portions of the South Fork (station 24 and upstream), and most tributaries (stations 47, 40, 38, all of the North Fork, stations 12 through 18) have productive invertebrate fauna that likely are typical of similar stream orders in this region. Dipterans (Simuliidae, Chironomidae), plecopterans (Capnia, Nemoura, Isogenus), ephemeropterans (Baetis, Cinygmula), and tricopterans (Limnephilidae) were the most abundant groups seen.

Beginning about station 43 (Figure 2-2), there is a sharp reduction in benthic fauna that corresponds with the first influx of metals-rich water from the Red Dog deposit and persists throughout the main stem of Red Dog Creek. From about station 41 to station 20 (just above the North Fork confluence), the stream is nearly devoid of macrobenthos although an occasional representative of one of the above groups can be found with diligent searching, especially downstream of one of the clean water tributaries. Below the North Fork (station 11 to 10), a more reliable but still highly impoverished invertebrate population is possible. Densities just above the creek's mouth (station 10) increased from 2.7 organisms per $0.1 \cdot m^2$ ($n=3$) in early July to 25.5 organisms per $0.1 m^2$ ($n=2$) in mid-August. The mayfly Baetis sp. (76 percent), followed by chironomids (16 percent), and the stonefly Capnia (4 percent) were the dominant groups in August (Table 2-1).

FEIS

the relatively clean North Fork diluting the poorer water quality of the other two forks. The water is a calcium-magnesium bicarbonate type with elevated levels of sulfate, normal pH and alkalinity, and elevated total dissolved solids. Very toxic concentrations of cadmium, lead, silver and zinc are present, and concentrations of aluminum, chromium, mercury and nickel also exceed EPA criteria for aquatic life. Levels of total suspended solids, settleable solids and turbidity are generally low except during breakup and storm events. Alkalinity, carbon dioxide, hardness and conductivity levels are lowest at breakup, and gradually increase throughout the year to reach maximum levels in late winter.

Biology

Invertebrates

Benthic invertebrate fauna in the project area was studied by E.V.S. Consultants in 1982 (E.V.S. Consultants Ltd., 1983). They found that aquatic invertebrate communities typical of cold fast streams occurred on sections of Ikalukrok Creek (sites corresponding to Dames & Moore Stations 8 and 9; Fig. IV-8), on the North and South Forks of Red Dog Creek (Dames & Moore Stations 12 and 22), and in the headwaters of Red Dog Creek above the main ore body (Dames & Moore Station 43). These stations generally had high abundances of organisms, and contributed 70 percent of the total number of individuals sampled at all stations (Fig. IV-8). Midgefly larvae (Chironomidae; subfamilies Diamesinae and Orthocladiinae) were most abundant in these communities. Other abundant taxa included stonefly nymphs (Plecoptera), segmented worms (Oligochaeta*), mayfly nymphs (Ephemeroptera), caddisfly larvae (Trichoptera), blackflies (Simuliidae), dancefly larvae (Empididae), biting midges (Ceratopogonidae), water mites (Hydracarina), seed shrimp (Ostracoda) and roundworms (Nematoda).

The lowest number of individuals was collected along the main stem of Red Dog Creek below the ore body (sites corresponding to Dames & Moore Stations 47, 40, 30, 20 and 10; Fig. IV-8). Although numbers were reduced at these stations, taxa collected were generally similar to those found at stations with greater abundance, and included stoneflies, mayflies, oligochaetes, midgeflies and water mites. Taxa absent at those sites in Red Dog Creek with reduced abundance included roundworms, seed shrimp, mayflies (Family Heptageniidae) and oligochaetes (Family Tubificidae).

The distribution of sites with reduced numerical abundance along Red Dog Creek coincided with areas of elevated heavy metal concentrations near the ore body. The most severely stressed area in terms of reduced numbers of benthic invertebrate individuals and taxa extended from the ore body (Dames & Moore Station 47) downstream nearly to the confluence of Red Dog and Ikalukrok Creeks (Dames & Moore Station 10). The site with the least numerical abundance of invertebrates occurred at Dames & Moore Station 30 near the confluence of the main stem and South Fork of Red Dog Creek (Fig. IV-8).

Toxic metal effects on aquatic invertebrate populations may be a result of direct physiological toxicity, or an indirect result of the elimination of food

* Defined in Glossary.

MEMORANDUM

STATE OF ALASKA

XTRA COPY

TO: C. Leonard
P. McGee/P. Bateman
D. Redburn
D. Henkins

DATE: October 26, 1990

FILE NO: NPDES AK 00386-2

TELEPHONE NO: 452-1714

FROM: J. Beelman
ADEC/Fairbanks

SUBJECT: Red Dog Mine

I would appreciate your comments on the following mixing zone issue since we are getting close to having the draft NPDES for this project:

EPA has decided:

1. To use BATs for effluent limits
2. All mine drainage (surface water and groundwater upwelling) is part of the point source discharge and must be collected and sent to the Tailings Impoundment for future treatment.
3. The BMPs will describe how the ore body drainage will be addressed.

I believe this is a good approach because:

1. The BAT effluent limits will dilute the Red Dog Creek system during low flows when dissolved metals are concentrated in the system. The effluent discharge will be diluted during high creek flows when dissolved metals concentrations in the creek water are low.
2. The BMPs will evolve out of the state Compliance Order by Consent #90320323301 requirements for a 1991 Preventative Plan and a Long Term Plan. These documents are to address and assure that water quality in Red Dog Creek, Ikalukrok Creek and the Wulik River no longer exceeds historic naturally occurring levels of heavy metals contamination.

We still have to resolve the following:

1. EPA's permit is for open water discharge only. To have year-round discharge, a revision of the EIS would be required. ADEC believes that year-round discharge is going to be the norm rather than the exception and is in favor of an EIS review at this time.
2. Mixing zone - Since the EPA BAT effluent limits will exceed Water Quality Criteria, does the state need to declare a mixing zone? This is complicated by the fact that there is no known location on the Red Dog/Ikalukrok/Wulik system where some WQ Criteria has not been exceeded naturally at some time.

According to L. Peterson, the point of complete mixing of Red Dog Creek within Ikalukrok Creek is at Station 73. This is approximately 5 miles upstream of the first Dolly Varden spawning area (first fishery use).

X ADF&G is helping ADEC put together a complete baseline data base on computer. This includes but is not limited to the Dames and Moore 1982-83 information from the EIS and DMRT reports through 1988. After 1988, we cannot be sure that the opening of the ore body did not affect the water quality of the RedDog/Ikalukrok/Wulik River system. Is difficult as it may be, we will (with a lot of work and maybe the help of a consultant), be able to show baseline water quality trends which are flow dependent. Then, we could set mixing zone limits to meet water quality standards, by subtracting out baseline. Is that what ADEC wants to do?

Please note that even if we take this approach; i.e., setting a mixing zone and subtracting out the baseline metals levels, we may still not come up with Water Quality Criteria numbers. This would depend on if the BAT limits would be diluted down to Water Quality Criteria levels at the edge of the mixing zone.

I prefer what was done on the last NPDES permit...have BAT effluent limits, monitor downstream, but don't set a mixing zone or require Water Quality Criteria to be met at any point on the water system. It seems to me that, at least for the next 5 years, the BAT effluent limits plus the BMPs will protect the water quality of the system and consequently the fishery.

Please send your comments as soon as possible.

jb



Cominco Alaska, Inc.

November 27, 1996

Ms. Joyce Beelman
Alaska Department of Environmental Conservation
610 University Avenue
Fairbanks, Alaska 99709-3643

RECEIVED
NOV 29 1996
DEPT. OF ENVIRONMENTAL
CONSERVATION
NPD

Re: Red Dog Mine Petition for Reclassification

Dear Ms. Beelman:

Cominco Alaska withdraws its request, in its December 15, 1995 revised petition to you, to remove the "growth and propagation of fish, shellfish, other aquatic life and wildlife" use from Rachel Creek, Shelly Creek and Sulfur Creek. Cominco Alaska has concerns over the lack of a regulatory definition for this use and the possibility that this could delay a final decision on the rest of our petition. We prefer to drop the request as to these three creeks, reserving our right to renew a request in the future.

Sincerely,

Charlotte L. MacCay

Charlotte L. MacCay
Senior Administrator
Environmental and Regulatory Affairs

cc: Lawrence Hartig
Ernesta Ballard
Cameron Leonard
Al Ott
Roger Moshnik
Paul Bateman
Jim Kulas
File



REPRESENTATIVE NORMAN ROKEBERG

2/12/97

John,

I thank you for the
heads up on AIDEA's
export financing history.

We will be talking up
a UCC bill on international
letters of credit, perhaps
we can work this in (?)

also, AIDEA is under
L & C committee jurisdiction.

Norman

3/13/97

Called Cowdrey's office -
left message on the
above to call and let
me know if they
received the info they
requested and whether
they want to do an
agreement at any time

Alaska State Legislature

FEB 13 1997



Special House Committee
on
International Trade and Tourism

Representative
John J. Cowdery
Chair

10 February 1997

Dear Norm,

On January 28th, Mr Jim Mcmillan, Deputy Director of AIDEA, testified before the Special House Committee on International Trade and Tourism that AIDEA's export assistance program has not performed a single export assistance function in the ten years since it's inception.

AIDEA offers as one of several reasons for the program failure, the "reluctance on the part of the banking community to get involved with export financing".

AIDEA will be providing my committee with their recommendations for fixing the program. Alternatively, we could just eliminate the program. If, in the course of your committee's activity you have the opportunity to query members of the banking community about their approach to international financing it may be useful.

Possibly we should also consider a joint hearing of the Commerce and International Trade committees on this subject. I am interested in your views.

Sincerely,

A handwritten signature in cursive script, appearing to read "John J. Cowdery".

John J. Cowdery
Chairman

ALASKA BAR ASSOCIATION



Fiduciary Duties of a Real Estate Agent:

Why All the Fireworks Over Dual Agency?

Wednesday, October 2, 1996

8:30 AM - 1:30 PM

Hotel Captain Cook
Anchorage, Alaska

Sponsored by the Real Estate Law Section

P.O. Box 100279
Anchorage, AK
99510-0279

A. The National Association of Realtors' New Policy	51
B. State Legislation Defining Permissible Relationships & Mandating Disclosure	52
1. Comprehensive Provisions	52
a. California	52
b. Colorado	55
c. Florida	59
d. Georgia	60
e. Illinois	61
f. Indiana	62
g. Maine	63
h. Maryland	64
i. Michigan	65
j. Minnesota	65
k. Nebraska	65
l. New York	67
m. Oregon	67
n. Rhode Island	68
o. Wisconsin	68
2. Minimal Provisions	69
a. Alabama	69
b. Arkansas	69
c. Delaware	69
d. Louisiana	70
e. South Dakota	70
f. Other States	70
VI. CRITICISMS OF THE VARIOUS LEGISLATIVE SOLUTIONS	72
A. Misconceptions Will Exist Despite Disclosure	73
B. Disclosure May Constitute Unauthorized Practice of Law	77
VII. THE REALISTIC SOLUTION: A STATUTORY BROKERAGE RELATIONSHIP	79
VIII. CONCLUSION	83
IX. APPENDICES	84
A. Salient Elements of State Disclosure Laws	84
B. Typical Disclosure Forms	86
1. California's Disclosure Form	86
2. Minnesota's Disclosure Form	88
3. New York's Disclosure Form	91
4. Oregon's Disclosure Form	95

REAL ESTATE BROKERAGE: RECENT CHANGES IN RELATIONSHIPS AND A PROPOSED CURE

RONALD BENTON BROWN†
JOSEPH M. GROHMAN††
MANUEL R. VALCARCEL†††

TABLE OF CONTENTS.

I. INTRODUCTION	27
II. TRADITIONAL REAL ESTATE AGENCY — BROKERS REPRESENT THE SELLER	31
A. Listing Broker as Agent of the Seller; Selling Broker Subagency	31
B. The Multiple Listing Services Reinforce the Traditional Approach	37
C. Misconceptions Among Consumers and Practitioners	39
III. MODIFICATIONS TO THE TRADITIONAL APPROACH	42
A. Buyers' Brokers	42
B. Independent Contractors/Transaction Brokers/ Facilitators	44
IV. SIGNIFICANT LITIGATION INVOLVING REAL ESTATE BROKER AGENCY AND DISCLOSURE	45
A. <i>Dismuke v. Edina Realty, Inc.</i>	45
B. <i>Bokusky v. Edina Realty, Inc.</i>	46
C. <i>Huijers v. DeMarrais</i>	47
D. <i>L. Byron Culver & Assoc. v. Jaoudi Indus. & Trading Corp.</i>	47
E. <i>Moser v. Bertram</i>	48
F. <i>Inland Commercial Prop. Sales v. Atlantic Assocs., Inc.</i>	49
G. <i>Market Force, Inc. v. Wauwatosa Realty Co.</i>	49
H. <i>Gillmore v. Morelli</i>	50
V. REACTIONS	51

Copyright © 1995 by Ronald Benton Brown and Joseph M. Grohman

† Professor of Law, Nova Southeastern University Shepard Broad Law Center.

†† Professor of Law, Nova Southeastern University Shepard Broad Law Center.

††† Goodwin Research Fellow, Nova Southeastern University Shepard Broad Law Center.

I. INTRODUCTION

The law of real estate brokers slowly evolved over the last hundred years, but recently experienced an upheaval.¹ The longstanding practice of brokers theoretically representing sellers while actively dealing with buyers was the catalyst for this upheaval.² Encouraged by the National Association of Realtors ("NAR") and local broker organizations, many state legislatures enacted statutes requiring written disclosure of the broker-client relationship.³ Some states now recog-

1. Real estate brokerage began in the United States in the nineteenth century with the westward expansion and population of the western states. D. BARLOW BURKE, JR., *LAW OF REAL ESTATE BROKERS*, § 1.1 at 1:1 (2d ed. 1992) [hereinafter *Burke*]. Syndicates started to purchase large tracts of land from the government for later sale. *Id.* There was little organization in this practice early on, with most agents engaging in the practice as a part-time job. *Id.* Some individuals formed land development companies whose members included homesteaders, speculators and other investors from the eastern states and foreign countries. *Id.* at 1:2. Yet others served as land locators for settlers moving west. *Id.* Because the maximum holdings allotted to each homesteader by the homestead laws were often too small for efficient farming, early land brokers also had a market in resales of relinquished and abandoned properties. *Id.*

The real estate broker as a specialist is a more recent phenomenon, originating since the latter portion of the nineteenth century. *Id.* at 1:3. Real estate firms arose during the turn of the century, and the first state licensure laws came after World War I. *Id.* Since then, real estate brokers have steadily become more common, creating for themselves a livelihood in the practice of putting buyers and sellers in contact with each other. *Id.* Services have expanded to include property management, inspection, and investment counseling. *Id.* In the 1980s, over three million existing dwellings were sold each year, and one half to three quarters of a million additional new dwellings were sold per year. *Id.* at 1:3-4. With most commissions based on the steadily appreciating price of homes, the brokerage industry has been able to stay ahead of inflation. *Id.* at 1:4. The numbers peaked in the late 1980s, with National Association of Realtors ("NAR") membership at 810,000. *Id.* Today, there are over 100,000 real estate firms with about 125,000 offices. *Id.* at 1:5. These firms are usually small, closely held corporations. *Id.* Some firms such as Coldwell Banker, a division of Sears, Roebuck & Company; Century 21, owned by Metropolitan Life Insurance Company; and ReMax are examples of franchised mega firms. *Id.* § 1.2 at 1:8. Most firms are affiliated with the 50 statewide boards of realtors and the 1,760 local boards and most participate in Multiple Listing Services ("MLS"). *Id.* § 1.1 at 1:5. These transactions listed on the MLS account for an estimated 80 to 90 percent of broker sales. *Id.* at 1:6.

2. See generally, Michael K. Braswell & Stephen L. Poe, *The Residential Real Estate Brokerage Industry: A Proposal for Reform*, 30 AM. BUS. L.J. 271, 282 (1992) (discussing the confusion created by traditional real estate agency and reviewing the state of the law prior to the recent enactment of disclosure laws); Matthew M. Collette, *Sub-Agency In Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality*, 61 S. CAL. L. REV. 399 (1988) (discussing the problems created by listings and selling broker subagency, and recommending a form of subagency with limited fiduciary duties, noting that changes to the traditional approach could create new problems).

3. One hundred twenty brokers founded the NAR in Chicago, Illinois in 1908. BURKE, *supra* note 1, § 1.3 at 1:11. It is recognized as the trade association representing the real estate brokerage industry. NAR membership approximates one third of all licensed brokers and salespersons. *Id.* The NAR adopted standards for the industry in 1971. *Id.* at 1:14. The standards govern industry practices, brokers' professional conduct, and their use of MLS systems. *Id.* Members who comply with the standards are entitled to use the copyrighted trademark "realtor," NAR-sponsored errors and omissions insurance, and NAR litigation support. *Id.*

nize the concept of buyers' brokers. Other states condone a dual agency relationship where the broker simultaneously enters into an agency relationship with both the buyer and seller in the same transaction. Despite new statutes which require disclosure and define the brokers' permissible relationships and duties, in most instances, state legislatures left the common law of agency in effect.

Common law agency imposes a greater fiduciary duty on brokers than current statutory law. This was forcefully brought to the attention of brokers by two Minnesota cases involving Edina Realty Corporation ("Edina Realty"), the fourth largest real estate brokerage firm in the United States.⁴ Despite Edina Realty's compliance with Minnesota's agency disclosure laws, the court found that Edina Realty breached the more stringent common law fiduciary duty.⁵ At issue were damages approximatng \$210 million in commissions Edina Realty earned between 1986 and 1992.⁶ Although ultimately settled for a mere \$19.9 million, the Edina Realty litigation caused an uproar among brokers who, as a consequence of the litigation, were as uncertain as ever on how to proceed without liability.⁷

During its 1993 annual convention, NAR reacted by requesting state legislatures to enact "statutory agency" in order to preempt common law agency.⁸ The NAR proposal addressed the following issues:

4. See *Dismuke v. Edina Realty, Inc.*, No. 92-8716, 1993 WL 327771 (Minn. Dist. Ct. June 17, 1993) (holding defendant's failure to furnish full disclosure of dual agency is a breach of fiduciary duty); *Bokusky v. Edina Realty, Inc.*, No. 3-92 CIV. 223, 1993 WL 515827 (D. Minn. Aug. 6, 1993) (granting plaintiff class certification motion regarding sufficiency of defendant's dual agency disclosure forum); see *infra* notes 73-133 and accompanying text.

5. *Dismuke v. Edina Realty, Inc.*, No. 92-8716, 1993 WL 327771 (Minn. Dist. Ct. 1993); *Bokusky v. Edina Realty, Inc.*, No. 3-92 CIV. 223, 1993 WL 515827 (D. Minn. 1993).

6. Neal Gendler, *Dual-Agency Suits Against Edina Settled: Real Estate Firm Admits No Wrongdoing in Multimillion-Dollar State, U.S. Action*, MINNEAPOLIS STAR TRIBUNE, Feb. 2, 1995, at 3D [hereinafter Gendler].

7. Scott Carlson, *Plaintiffs Win Cash in Agency Case*, CHL TRIB., Feb. 12, 1995, at TV. The settlements included an award of attorney's fees to the plaintiffs' lawyers of approximately \$4.4 million. See Gendler, *supra* note 6, at 3D.

See Willard Woods, *Burnet Realty Inc. Lists Change in Policy: Agents From Other Brokers Can't Represent Burnet Sellers, Move Formally Ends Firm's Participation In Decades-Old System*, MINNEAPOLIS STAR TRIBUNE, May 8, 1993 at 1D (discussing one large Minnesota real estate firm's reaction to the Edina Realty decisions). The firm decided to discontinue offering sub-agency to outside selling brokers; instead, the firm will be the only agent of the seller in its listings, and will deal only with buyer's brokers. *Id.* This approach resembles the proposal discussed in Part VIIA. See *infra* notes 293-98 and accompanying text for a discussion of realistic solutions. See also Willard Woods, *Ruling May Cost Edina Realty Millions: 30,000 Sellers Could Get Refunds*, MINNEAPOLIS STAR TRIBUNE, June 23, 1993, at 1A (discussing broker reactions to the Edina decisions).

8. See Terry Sheridan, *Realtors To Be Advised: Represent Someone*, MIAMI HERALD, Oct. 31, 1993, at 1G [hereinafter Sheridan] (quoting Sharon Millett, vice chairman of the facilitator advisory group of NAR, who explained:

1) protecting the consumer from liability for the acts of agents; 2) delineating the duties owed by brokers to their clients when acting as buyer's brokers, seller's brokers, dual agents, and limited agents; 3) determining an agent's obligations when the relationship ends; 4) determining what property conditions must be disclosed; 5) clarifying a real estate agency relationship versus other agency relationships, including the creation of a presumption of limited agency unless the parties bargain for more; and 6) recommending that new legislation dealing with real estate agency supersede all previous case law.⁹ In 1992, NAR announced that it would drop its requirement that selling agents using Multiple Listing Services ("MLS") become subagents of the seller. This change lessened the incidence of dual agency and allowed the emerging trend of buyer's agents to grow.¹⁰

Many brokers have further demanded freedom to practice as "facilitators," also known as independent contractors or transaction brokers. In this capacity, brokers represent the deal and not the parties, thereby avoiding fiduciary duties to either the buyer or the seller. NAR has not endorsed the "facilitator" concept.¹¹ Despite NAR's resistance, however, some states have provided for facilitator status in their new statutes.¹² Notably, it does not seem that facilitators lower their commissions even though brokers acting only as facilitators relieve themselves of a major source of potential liability. The supporters of this approach argue that the use of facilitators will reduce litigation. Furthermore, proponents argue that new statutes requiring full written disclosure of broker relationships, permitting independent contractor status, and allowing avoidance of common law

What we are trying to say is that (who and how an agent represents) seems to be very important to consumers and integral to the industry, and if liability concerns have been encouraging the move away from agency (toward facilitators and other nonagents), then maybe the better solution is to clarify what the agent's duties are).

See also H. Jane Lehman, *Association to Redefine Agent Roles*, WASHINGTON POST, Nov. 20, 1993, at e1 (hereinafter Lehman) (reporting on the outcome of NAR's 1993 annual meeting, and interviewing Laurens K. Janik, general counsel for NAR, who stated that "'statutory agency' [is] a means of codifying the common law duties that apply to real estate agents and eliminating the irrelevant").

9. Sheridan, *supra* note 8, at 1G.

10. See Steve Kerch & T.J. Howard, *Changing the Rules, Realtors' Move May Make Using Buyer Brokers Easier*, CHI. TRIB., Jan. 10, 1993, at 1 Real Estate.

11. See Judy Stark, *A Scorecard on Agents: Whose Side Are They On?*, ST. PETERSBURG TIMES, Nov. 21, 1993, at 3 At Home (discussing NAR's decision not to endorse the facilitator concept, referring to an NAR survey of home sellers which found that 76 percent felt "it was very important that their agent represent them exclusively; [60] percent of buyers said it was very important that the agent owe fiduciary duties to them").

12. See *infra* notes 138-280 and accompanying text for a discussion of state legislation defining permissible relationships and mandating disclosure.

agency will better serve consumers.¹³ However, the facilitator approach creates new problems and does not completely solve the current ones.¹⁴

First, many of the new disclosure laws require brokers to define and explain to their clients the legal relationship into which they are entering. Giving this type of advice requires a trained lawyer. Performed by a broker, these disclosure explanations would probably constitute an unauthorized practice of law. If the broker provides disclosure information in written form only, consumer confusion will occur regarding the distinction between a facilitator, agent, or dual agent. Few consumers would heed a broker's warning to seek advice from a lawyer before entering the relationship.

Second, conflicts of interest occur when the brokers must explain their limited responsibility under facilitator or dual agency representation while at the same time trying to "land" the client. It is unrealistic to expect that, at the moment a broker is trying to win the business of a potential customer, the broker will successfully explain the limited responsibility owed to the client as a dual agent or facilitator. This is particularly true when the broker is competing for the business with brokers who are willing to enter into a traditional agency relationship. Moreover, in today's consumer market, real estate brokers must provide more service to their clients, not less. If brokers want to continue commanding their current commission rates and insist that their calling is a profession, facilitator/independent contractor status is not the solution.

Third, the current system is impractical in its application. A broker may have a different relationship with each client.¹⁵ In fact, it is possible that a broker's relationship with a client may differ depending on which property is involved. To further complicate matters, the current system confuses customers about what to expect from their broker. This confusion leads to unfulfilled expectations and disillusionment, though perhaps unjustified, with the brokerage profession. Brokers need a simple and consistent set of guidelines in order to practice their profession safely and prosperously. This article pro-

13. See Lehman, *supra* note 8, at e1 (quoting NAR's general counsel, who stated "I can not identify any benefit or any rights being taken away by this proposal").

14. See Richard Kindleberger, *The Middlemen Get Put in the Middle*, BOSTON GLOBE, Dec. 12, 1992, at 37 Real Estate (reporting on reactions to the facilitator concept, including comments by the president of the Massachusetts Association of Buyer Agents, stating that "at a time when Realtors are trying to increase their professional stature . . . it is a mistake to offer a diminished service that won't give customers the benefit of the advice, research, confidentiality and advocacy that consumers are entitled to from buyer and seller agents").

15. See Terry Sheridan, *Law to Clarify Real Estate Agents' Roles Muddies the Waters*, THE DAILY BUSINESS REVIEW-BROWARD COUNTY FLORIDA, April 28, 1995, at A6.

poses a simple statutory scheme which will eliminate the problems and satisfy the needs of all the participants in a real estate sale.

Part II of this article discusses the traditional approach to real estate agency. Part III discusses the major modifications to the traditional approach; namely, the use of buyer's brokers and the concept of facilitators/independent contractors in real estate sales. Part IV surveys some of the more significant cases involving issues of real estate broker agency and disclosure, particularly in the context of dual agency situations. Part V surveys the reactions by NAR and state legislatures that have resulted in various new statutes defining the permissible brokerage relationships and prescribing disclosure. Part VI analyzes the various legislative approaches and identifies several problems the approaches have in common. Part VII discusses the proposed solution. The Appendices include a table comparing the statutes' features and examples of the new disclosure forms.

II. TRADITIONAL REAL ESTATE AGENCY — BROKERS REPRESENT THE SELLER

A. LISTING BROKER AS AGENT OF THE SELLER; SELLING BROKER SUBAGENCY

The traditional real estate brokerage practice consists of a broker undertaking representation of a seller of real property. The seller-broker relationship is one of principal and agent.¹⁶ "Agency" is defined as a "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."¹⁷ Whether an agency relationship exists "is a question of fact, unless the facts can be interpreted in only one way."¹⁸ An agency relationship may be created by oral or written contract or by conduct.¹⁹ The agency relationship between the broker and the seller is easy to identify, because it is expressly created through the execution of a listing agreement which

16. RESTATEMENT (SECOND) OF AGENCY § 1(2) (1957) (defining "principal" as "the one for whom action is to be taken"). The Restatements define "agent" as "[t]he one who is to act." *Id.* § 1(3). See GEORGE LEFCOE, REAL ESTATE TRANSACTIONS, ch. 2 (1993) [hereinafter *Lefcoe*].

17. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1957).

18. Joseph M. Grohman, *A Reassessment of the Selling Real Estate Broker's Agency Relationship with the Purchaser*, 61 ST. JOHN'S L. REV. 560, 567 (1987) (citing *Thayer v. Pacific Elec. Ry.*, 360 P.2d 56, 62, cert. denied, 368 U.S. 826 (1961); *Brokaw v. Black-Foxe Military Inst.*, 231 P.2d 816, 818 (Cal. 1951)).

19. RESTATEMENT (SECOND) OF AGENCY § 1(1) cmt. b (1957); see Sandra Nelson, *The Illinois Real Estate "Designated Agency Amendment": A Minefield for Brokers*, 27 J. MARSHALL L. REV. 953, 958 n.34 (1994) (discussing the creation of an agency relationship); HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY & PARTNERSHIP, at § 12 (2d ed. 1990).

usually authorizes the broker to act as the seller's exclusive agent.²⁰ The broker is the seller's agent, and the broker owes the seller the fiduciary duties of good faith and loyalty, reasonable care and diligence, disclosure, and accounting.²¹ A broker who breaches the fiduci-

20. *Lofcoe, supra* n.16, at 28-30 (explaining the types of listing arrangements).

21. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 845 (1976) (defining fiduciary relation as "the relation existing where one person justifiably reposes confidence, faith, and reliance in another whose aid, advice, or protection is sought in some matter"). See *BURKE, supra* note 1, § 7.2 at 7:2. These duties are often mentioned but seldom defined. *Id.* The duty of good faith and loyalty is usually understood to mean that unless the principal agrees otherwise, an agent must act exclusively for the benefit of the principal in all matters connected with the agency. RESTATEMENT (SECOND) OF AGENCY § 387 (1957). See *Meinhard v. Salmon*, 164 N.E. 546 (N.Y. 1928). In *Meinhard*, Judge Cardozo defined loyalty as "[n]ot honesty alone, but the punctilio of an honor the most sensitive." *Meinhard*, 164 N.E. at 546.

The Florida Real Estate Commission, in its Handbook, explains the duty in simpler and more conventional terms:

Loyalty of the agent is a must. A broker must always place the interests of the principal above the interests of anyone else. The fiduciary relationship prevents a broker from revealing any information that may harm the principal. For example, a broker may not reveal such information such as the principal's financial condition, the fact that the principal will accept a lower price than the listing price for the property, or any similar facts that may damage or alter the principal's financial bargaining position. . . . The duty of loyalty also requires the broker to obtain the most favorable price and terms for the principal . . . [and] cannot withhold information from the principal . . . [I]f the broker learns any harmful information about the principal, the broker cannot disclose or otherwise use such information — even after the transaction is completed and the fiduciary relationship is dissolved. While the fiduciary relationship generally ends when the broker and principal have fulfilled their duties to one another, the broker's obligation to keep information confidential remains.

FLORIDA REAL ESTATE COMMISSION HANDBOOK, Ch. 2 § 2(a)(4) at 2-16-17 (1993). RESTATEMENT (SECOND) OF AGENCY § 379(1) (1957) (defining the duty of reasonable care and diligence as "to act with standard care and with the skill which is standard in the locality for the kind of work which [the agent] is employed to perform and, in addition, to exercise any special skill that [the agent] has"). See also MICHAEL L. CLOSEN & GARY S. ROBIN, AGENCY & PARTNERSHIP, 137 (1992); FLORIDA REAL ESTATE COMMISSION HANDBOOK, Ch. 2 § 2(a)(4) at 2-14 (1993). The FLORIDA REAL ESTATE COMMISSION HANDBOOK states in relevant part:

As professionals, brokers must maintain a standard of care that requires, among other things, they understand matters concerning the land, title, and physical characteristics of the property they have listed. They need not be attorneys, but to qualify for state licenses, brokers must know and understand the real estate license law. Brokers should also know and be able to explain to clients in simple terms the practical effects of common financing terms, contingency clauses, restrictions and limitations, and routine contract provisions. A broker, therefore, should use reasonable care in the following: 1) [d]etermining a listing price and advising the client as to a reasonable offer; 2) [u]ncovering material facts and informing the client of these facts; 3) [l]earning all the facts relevant to the sale, such as whether any physical defects exist; 4) [p]reparing and explaining key portions of listing and sales contracts as well as any other legal documents related to the transaction; 5) [s]uggesting the seller seek other expert advice when appropriate; 6) [a]dhering to deadlines [and] closing dates; and 7) [m]aking a reasonable effort to fulfill the obligations of the employment contract; this includes holding open houses, advertising, and listing in multiple listing service

Id.

In exchange for these services, the seller agrees to pay the broker a commission based on a percentage of the actual sales price obtained for the property. The seller also authorizes the broker to procure potential purchasers, cooperate with other brokers through the MLS, show the property, and act as the seller's representative in the negotiations. This process screens out buyers who are not qualified or serious about purchasing. When the listing broker, either alone or through the cooperation of another broker participating in the MLS, produces a buyer who is ready, willing, and able to purchase the seller's property, the listing broker becomes entitled to the commission.²⁴

Those brokers who do not have a direct relationship with the seller based on a written agreement are called selling brokers. Selling brokers earn a commission by selling, not listing, the seller's property. In the usual case involving a selling broker who is not the listing broker, the listing broker agrees to share the commission with the selling broker. These selling brokers who market the seller's property through access to the MLS are deemed subagents of the seller under the traditional approach.²⁵ The subagency approach makes collecting a share of the commission easier for the selling broker and usually leads to greater cooperation with the seller and the listing agent.²⁶

In order to market the seller's property, either the listing broker or the MLS-participating selling broker must deal actively with both the seller and the buyer. The buyer often perceives, because of the broker's friendly and helpful salesmanship, that the broker is working for the buyer, or at least on the buyer's behalf. Under the traditional approach, the buyer is unrepresented unless the buyer expressly contracts with a broker for representation. The traditional approach recognizes that the broker's legal relationship and loyalties are to the seller. Additionally, if the buyer does contract with the listing broker for representation, the listing broker becomes a dual agent with divided loyalties.²⁷

As the foregoing discussion indicates, the traditional relationship between the buyer and the broker is not usually considered an agency relationship. However, if principles of agency are used to analyze the

24. BURKE, *supra* note 1, § 3.2 at 3:3.

25. Lefcoe, *supra* note 16, at 42-44. See RESTATEMENT (SECOND) OF AGENCY § 5(1) (1957) (defining a "subagent" as "a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible").

26. For example, subagency makes it easier and less risky to use lockboxes for access to unoccupied properties listed for sale. See Matthew M. Collette, *Sub-Agency In Residential Real Estate Brokerage: A Proposal To End the Struggle With Reality*, 61 S. CAL. L. REV. 399, 445 (1988).

27. See *infra* notes 49-54 and accompanying text for a discussion of dual agency.

typical interactions between buyers and brokers, an agency relationship arguably does exist.²⁸ Under agency law, the parties may create an agency relationship by contract or by conduct. Although the buyer usually does not enter into a written agreement with the broker, an agency relationship may arise "where one person manifests his intention that another shall act on his behalf, the other person consents to such, and the party for whom the other acts has the right to control the ultimate direction of the cooperative effort."²⁹ If such manifestations exist, then the consequences of an agency relationship may attach even though neither the principal nor the agent receives consideration.³⁰ Thus, analysis of buyer and broker conduct under objective standards reasonably infers the existence of an agency relationship.

Buyers typically initiate the relationship with a selling broker either through a phone call or a visit to the broker's office. The buyer may inquire about a specific property advertised by the broker or may seek the broker's assistance in general pursuit of a home purchase. The buyer usually expresses a desire to have the broker obtain information about prospective properties, such as: fair market value, repair needs, homeowners' association, homeowners' association fees and regulations, property tax and insurance costs, prevailing financing rates, and assumability of mortgages. Usually, the buyer relies on the broker to arrange for inspections, title examination, financing, and closing. This conduct, combined with the conversations that typically follow, may be reasonably interpreted as the buyer's manifestation of his intent to have the broker act on his behalf.³¹ When the broker prequalifies the buyer, shows the buyer properties, submits offers to

28. See Joseph M. Grohman, *A Reassessment of the Selling Real Estate Broker's Agency Relationship with the Purchaser*, 61 *ST. JOHN'S L. REV.* 560, 567-70 (1987) (discussing the necessary elements for establishing an agency relationship, and finding them to exist in the typical interactions between buyers and brokers).

29. Grohman, 61 *ST. JOHN'S L. REV.* at 567.

30. *Id.* at 569; see Roy T. Black, *Proposed Alternatives to Traditional Real Property Agency: Restructuring the Brokerage Relationship*, 22 *REAL EST. L.J.* 201, 205 (1994) (discussing the creation of "accidental agency") (citing *Hale v. Wolfson*, 276 *Cal. App. 2d* 285 (1968); *Gray v. Fox*, 151 *Cal. App. 3d* 482 (1984)). It can be argued that both the buyer and the broker receive consideration through their relationship. The buyer does pay for the broker's services indirectly, however, by purchasing the property. No broker earns a commission unless the buyer purchases, and it is from the sales proceeds that the listing broker receives his commission, which he in turn shares with the selling broker. Therefore, the broker does receive consideration. Similarly, the buyer receives consideration in the form of the broker's services and ultimately in finding a satisfactory property.

31. In fact, state of the art real estate marketing includes brokers visiting the prospective buyer's home and using online services to provide assistance to buyers "on their turf." Such shop at home services only increase the buyer's perception that the broker is their agent.

sellers, and negotiates on the buyer's behalf, the buyer may reasonably interpret the broker's conduct as the broker's manifestation of consent to act on the buyer's behalf.³² In addition, further manifestations of the broker's consent occur when the broker assists in arranging financing, property inspections, insurance coverage, title examination, and closing for the buyer.

The only other requirement for an agency relationship is the principal's right to control the agent. The principal may exercise the right to control before or during the time in which the agent acts; the principal may even choose not to exercise his right to control.³³ All that the principal must establish is the right to control, not the act of control.³⁴ This right to control requirement is arguably satisfied by the very nature of the relationship: the buyer decides on which properties to make offers, and the buyer has the final decision regarding the terms of any offer submitted or counteroffer accepted.³⁵ One further indicator of the buyer's right to control is the right to terminate the relationship and seek the services of another broker. Thus, in the typical real estate transaction, agency law does not support the traditional view that the buyer and the selling broker have not entered into an agency relationship.³⁶

If application of the law of agency arguably indicates that an agency relationship between the buyer and the broker does exist even though not supported by contract, then the selling broker would owe the buyer full fiduciary duties. However, the selling broker's simultaneous subagency and attendant fiduciary duties to the seller creates a dual agency situation. In order to avoid this problem, courts in most

32. Grohman, 61 *ST. JOHN'S L. REV.* at 568 (stating that: no specific words are necessary to find such an acceptance. Where one finds that the principal communicated to the purported agent his desire that the agent act on his behalf and the agent proceeded to act as requested without communicating to the principal by words or action that he did not intend to act on the principal's behalf, the principal may reasonably infer from the agent's performance that he performed on the principal's behalf).
(citing *RESTATEMENT (SECOND) OF AGENCY* § 15 cmt. b, illus. 3 (1957)).

33. *Id.* (citing *RESTATEMENT (SECOND) OF AGENCY* § 14 cmt. a).

34. *Id.*

35. If the selling broker is not an agent of the buyer, then the buyer could argue that he cannot be bound by his offer because the broker had no authority to submit it on his behalf. However, the buyer is usually bound when a seller accepts the buyer's offer when submitted by the selling broker. This ability of the selling broker to bind the buyer is a further indication supporting the existence of an agency relationship.

36. Grohman, 61 *ST. JOHN'S L. REV.* at 589-90; see *Duffy v. Setchel*, 347 N.E.2d 218, 219-22 (Ill. App. Ct. 1976) (holding that a selling broker was the agent of the buyer, relying on the following factors: 1) the purchaser initiated the contact with the broker; 2) the purchaser asked the broker to make an offer to the sellers; 3) the broker had no prior relationship with the sellers regarding the property; 4) the buyer considered the broker to be her agent; 5) the broker did in fact submit the buyer's offer to the sellers; and 6) the broker negotiated the terms of the sale until agreement was reached).

cases prefer to apply the presumption of a selling broker subagency to the seller and will not apply the above analysis to infer an agency relationship between buyers and selling brokers.³⁷ As discussed in Part II. B. below, NAR and local real estate boards have made this presumption a requirement for participation in MLS systems. Thus, under traditional subagency relationships, selling brokers owe purchasers no fiduciary duties. Injured buyers, however, may sue in tort for negligence or misrepresentation.³⁸ The alternative, which would comport with the parties' expectations and the law of agency, would be to eliminate the presumption of the selling broker's subagency to the seller. This alternative was recently implemented and does not create a presumption of the selling broker's agency to the buyer.

B. THE MULTIPLE LISTING SERVICES REINFORCE THE TRADITIONAL APPROACH

A multiple listing service ("MLS") offers brokers in a given locale the opportunity to pool their listings in order to maximize the exposure of properties for sale.³⁹ In exchange for such cooperation, brokers agree to share their commissions.⁴⁰ Brokers who are members of the MLS submit listings with data sheets describing the property to an appraisal committee.⁴¹ The appraisal committee then determines whether the sales price is reasonable. The MLS compiles the pooled listings into a book or computer data base. The MLS also provides a gauge of the current market; brokers are required to notify the service of sales of listed properties and the price obtained.⁴² Through the increased market exposure to member brokers, the MLS is intended to produce quicker sales at higher sales prices for vendors.

To participate in the service, brokers must first execute a listing agreement with the seller/owner of a property.⁴³ The usual agreement provides the broker with an exclusive right to sell the property, making the listing broker the agent of the seller. The listing entitles

37. See *Stortroen v. Beneficial Finance Co.*, 736 P.2d 391, 400 (Colo. 1987) (en banc); *Kruse v. Miller*, 300 P.2d 865, 857-58 (Cal. Dist. Ct. App. 1956).

38. *BURKE*, *supra* note 1, § 8.3 at 8:39.

39. *Id.* § 1.4 at 1:12.

40. *Id.* Because access to the service is restricted to member brokers, the service has been the subject of antitrust litigation, including actions against MLS listing brokers for paying referral fees rather than split commissions when dealing with buyers' brokers. See *Market Force, Inc. v. Wauwatosa Realty Co.*, 706 F. Supp. 1387 (E.D. Wis. 1989), *aff'd*, 906 F.2d 1167 (7th Cir. 1990) (addressing antitrust issues in a real estate transaction).

41. *BURKE*, *supra* note 1, § 1.4 at 1:13-14.

42. *Id.*

43. Consumers are not allowed direct access to multiple listing services, and must use a broker who is a member of the local service in order to have their properties advertised on MLS.

the listing broker to a commission when the property is sold or when any broker produces a buyer who is ready, willing, and able to purchase. If a broker other than the listing broker uses the MLS and procures the buyer, that broker is called the selling broker.

Until recently, the MLS rules required members to make an offer of subagency to the other non-listing brokers when submitting a listing. Procurement of a ready, willing, and able buyer constituted substantial performance and, thus, acceptance of the listing broker's offer. The selling broker received consideration from the listing broker in the form of a share of the listing broker's commission. The selling broker, therefore, usually became a subagent of the listing broker who, in turn, was the agent of the seller.

Although the seller was not the principal of the selling broker, the seller could be held liable for the selling broker's actions. If the seller was held liable as the principal for wrongful actions by the subagent/selling broker, the seller had a remedy against the listing broker. Even though the law of agency allows the listing broker to employ subagents, such as the selling broker in this situation, agency law does not allow the listing broker to delegate duties that the listing broker owes the seller.⁴⁴ Thus, subagency creates additional potential liability for the listing broker, who might not be aware of the selling broker's conduct when dealing with a buyer.

Although the MLS presumption of subagency became the favored approach, the selling and listing broker could also, legally, be considered joint venturers, partners, or independent contractors.⁴⁵ In addition, because of the presumption of subagency, the use of the MLS still left the buyer unrepresented. Since the selling broker is not often the listing broker, the selling broker tends to have much more contact with the buyer than with the seller. Arguably, therefore, the MLS adds to the buyer's misconception that the broker with whom the buyer is dealing works for the buyer.

Most jurisdictions removed the requirement of an offer of subagency as a condition for participation in the MLS. NAR recommended this change in 1992 and replaced the mandatory offer of subagency with an elective offer of "cooperation and compensation" to brokers who assist the listing broker in selling a property.⁴⁶ This change seems to be a move away from agency law to contract law,

44. BURKE, *supra* note 1, § 1.5 at 1:18.

45. *Id.* at 1:17.

46. NATIONAL ASSOCIATION OF REALTORS, HANDBOOK ON MULTIPLE LISTING POLICY — RESIDENTIAL, at § 1.2 (1993). This new approach could create new problems. A selling agent who is not a buyer's broker may have trouble collecting a share of the sales commission paid to the listing broker if the selling broker is no longer automatically a subagent. Although quantum meruit comes to mind as a possible remedy, litigation

allowing brokers to create working relationships according to their own terms.⁴⁷

An exception to this rule is usually made for in-house sales — sub-agency is still mandatory when the listing and selling brokers work for the same firm. Once the listing broker places the property on the MLS, this exception automatically applies, regardless of whether another in-house broker actually uses the MLS. This exception attempts to reduce the incidence of dual agency arising when one firm represents both sides of one transaction. The removal of the presumption of subagency has allowed the practice of buyer agency to grow and should also lessen the potential liability of the listing broker for the acts of selling brokers.

Despite NAR's recommended change, subagency still seems to be the most common approach used by brokers. NAR's main purpose behind the new approach apparently was to recognize buyer's brokers. However, because selling broker subagency is still required for in-house sales, buyers may believe that the selling broker works for them.

C. MISCONCEPTIONS AMONG CONSUMERS AND PRACTITIONERS

As identified above, the common problem in the traditional real estate agency relationship occurs when the selling broker acts as the subagent of the listing broker. As a subagent of the listing broker, the selling broker works for the seller, not the buyer. However, in typical transactions, the selling broker deals mostly with the buyer, showing properties and probably discussing things that the buyer assumes the broker will not reveal to the seller. The selling broker often has contact with the seller only when showing the seller's property or submitting offers. Because of the selling agent's subagency to the listing broker, the selling agent is legally obligated to work in the seller's best interests, which would require the disclosure of the discussions with the buyer. The actual legal relationship between the parties is the opposite of what the buyer believes. Furthermore, this relationship makes the listing broker liable for the actions of the selling broker with respect to both the buyer and the seller.

If, as now permitted under the new MLS rules, the selling broker is the agent of the buyer, then the selling broker would owe the buyer fiduciary duties such as loyalty, disclosure, and diligence. Because of

may be necessary for selling brokers to protect themselves with contracts spelling out the terms of "cooperation and compensation."

47. See Black, 22 REAL EST. LJ. 201 (1994) (discussing confusion caused by removal of mandatory subagency). These working relationships may rise to the level of subagency.

this, the selling broker must disclose to the buyer any knowledge of adverse facts the selling broker acquires from the listing broker or the seller.⁴⁸ Even if not disclosed, the information would be imputed to the buyer, resulting in the buyer losing causes of action such as rescission and restitution against the seller.

The problems increase when the broker acts as a dual agent. Dual agency is the situation that arises when a broker represents both the buyer and the seller in one transaction.⁴⁹ A dual agency can arise when a buyer's broker shows a buyer one of the broker's own listings, when a listing broker contracts to represent the buyer as well as the seller in the same transaction, and in transactions involving a listing broker and a buyer's broker who work for the same firm.⁵⁰ Dual agency does not usually arise until at least one party in a transaction contracts for representation. The law permits dual agency, provided the broker discloses his or her dual representation to all parties in the transaction and the parties consent in writing. Failing to disclose and obtain consent may have dire consequences, including loss of the broker's commission and even avoidance of the sale.⁵¹

48. Most states already impose a duty on brokers to inspect the seller's property and disclose facts relating to the condition of the seller's property, such as whether the property is "psychologically impacted" from past incidents such as murders. This duty is imposed regardless of whether or not the broker has an agency relationship with the buyer, and represents a departure from the traditional rule of caveat emptor. See, e.g., Constance Frisby Fain, *An Overview of Real Estate Agent or Broker Liability*, 23 REAL EST. L.J. 257 (1995) (discussing cases where brokers have been held liable for failing to disclose to purchasers facts relating to the condition of the seller's property); Note, *Imposing Tort Liability on Real Estate Brokers Selling Defective Housing*, 99 HARV. L. REV. 1861 (1986) (advocating a system of broker liability in instances involving defective housing sales). In some states, this duty has been codified. See, e.g., CAL. CIV. CODE § 2079.3 (West Supp. 1995) (requiring disclosure of all material facts affecting the value of the property which a reasonable visual inspection would reveal).

49. The Restatement (Second) of Agency provides: "Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party in a transaction connected with his agency without the principal's knowledge." RESTATEMENT (SECOND) OF AGENCY § 391 (1957).

50. One other dual agency situation which is seldom discussed is that which arises when a broker represents more than one potential purchaser at the same time with regard to one property. See BURKE, *supra* note 1, § 7.5.1 at 7:38-39 (citing *Stefani v. Baird & Warner, Inc.*, 510 N.E.2d 65, 69 (Ill. App. Ct. 1987) (holding that, when a broker acts as the agent of one buyer, if he arranges a sale to another buyer for a higher price, his undisclosed dual representation is a breach of fiduciary duty)). This problem does not arise with multiple representation of sellers because each of the sellers' properties is unique. Therefore there are distinguishable reasons beyond the broker's control that account for one seller's property being sold more quickly.

51. See *Taborsky v. Mathews*, 121 So.2d 61, 62 (Fla. 2d Dist. Ct. App. 1960) (holding that because the real estate broker failed to disclose his dual agency, the buyers were entitled to avoid the sale and purchase money mortgage which was being foreclosed in the action). The court stated:

In our jurisprudence it is well established that an agent for one party to a transaction cannot act for the other party without the consent of both principals. Where an agent assumes to act in such a dual capacity without such

Brokers often inserted into the fine print of their listing agreements a clause permitting dual agency. By doing so, a broker could obtain a seller's signature on a listing agreement by claiming that he represented the seller. At the time the listing agreement was executed, the broker would indeed only represent the seller and would probably possess confidential information about the seller and the property. The broker may already be representing potential buyers, having executed agreements with them which also permit dual agency. The broker would probably also possess confidential information about these potential buyers. Dual agency would still not exist, because, even though the broker represents buyers and sellers, the broker is not representing buyers and sellers in the same transaction. However, once the broker brings the parties together by showing the seller's property to the buyer, dual agency exists. At this point, the broker possesses confidential information about both parties and could also receive payment from both parties. In a dual agency situation, the broker cannot disclose to either party the confidential information the broker possesses. If the broker maintains these confidences, the broker does not have complete loyalty to either party.

More likely, however, the broker discloses whatever the broker can get away with in order to close the sale. Even if the broker does not disclose the information the broker possesses, he or she is faced with the inherent, and arguably unconsentable, conflict of interest of trying to obtain the best price for both parties.⁵² The buyer expects to obtain the lowest possible price, while the seller expects to obtain the highest possible price. Clearly, this is not possible, and this is why

assent, the transaction is voidable as a matter of public policy No principle is better settled than that a man cannot be the agent of both the seller and the buyer in the same transaction, without the intelligent consent of both. Loyalty to his trust is the most important duty which the agent owes to his principal. Reliance upon his integrity, fidelity, and ability is the main consideration in the selection of agents; and so careful is the law in guarding his fiduciary relation that it will not allow an agent to act for himself and his principal, nor to act for two principals on opposite sides in the same transaction. In such cases the amount of consideration, the absence of undue advantage, and other like features are wholly immaterial. Nothing will defeat the principal's right of remedy, except his own confirmation, after full knowledge of all the facts. Actual injury is not the principle upon which the law holds such transactions voidable. The chief object of the principle is not to compel restitution where actual fraud has been committed, or unjust advantage gained, but it is to prevent the agent from putting himself in a position in which to be honest must be a strain on him, and to elevate him to a position where he cannot be tempted to betray his principal.'

Taborsky, 121 So. 2d at 62.

52. See Gene Austin, *Dual Agency Controversy Grows*, *CIL. TRM.*, Sept. 12, 1992 at 12 Home Guide; Lew Sichelman, *Buyers Need to Be Sure the Realtor isn't a 'Double Agent'*, *CIL. TRM.*, Feb. 6, 1993 at 11 Home Guide.

dual agency has been called an oxymoron. One party will probably feel less satisfied than the other.⁵³

In an attempt to rid themselves of fiduciary duties, brokers avoid entering into agency relationships and instead act as finders, facilitators, independent contractors, or transaction brokers.⁵⁴ By acting in these capacities, brokers merely bring the parties together but do not participate in negotiations and are not considered agents of either party.

III. MODIFICATIONS TO THE TRADITIONAL APPROACH

A. BUYERS' BROKERS

The trend of representing buyers began primarily on the west coast in the mid-1980's when states enacted the first agency disclosure laws making the practice viable. The practice was already common in the commercial real estate setting with large businesses hiring brokers to find suitable properties and brokers seeking to maximize their business volume by earning commissions from either side of the transaction. Buyers' brokerage has expanded from commercial to residential real estate transactions, with several aggressive brokers offering representation to buyers.

Statistics show that "[t]oday, as many as 50,000 real estate agents have been trained as home buyers' brokers — about 2,000 represent buyers exclusively."⁵⁵ A 1993 survey conducted by NAR revealed that thirty percent of buyers used a buyers' broker.⁵⁶ In addition, many large firms have become involved in buyers' brokerage. One such firm, Buyer No. 1, in Austin, Texas, claimed in 1993 to have represented buyers in over 300 transactions since 1988.⁵⁷ One Colorado firm, Buyer's Resource, established a national franchise that represents only buyers.⁵⁸ Another example is DeWolfe, New England, which in 1993 became the first real estate firm in New England to represent buyers. Vowing to put consumers first, Mr. DeWolfe has been called "DeWolfe in sheep's clothing" by a representative of the Massachu-

53. See generally Joe Catalano, *The Homestretch: A Survival Guide to Buyers, Sellers, Owners, Renters and Landlords—A Closer Look—Sellers Say, No Fair! Say Some Brokers Pressure Them to Set Low Prices*, NEWSDAY, Aug. 31, 1991 at 37 (discussing the tactic of brokers agreeing to list properties at the seller's price, then negotiating the seller down to a price for which the property could arguably be sold without the "aid" of a broker).

54. See *infra* notes 55-72 and accompanying text.

55. Vivian Marino, *Buyer-Broker Transactions On Rise Across Nation*, CHL. TRIB., May, 16, 1993 at 2R [hereinafter Marino].

56. See Thomas J. Pryor, *Dual Agency Disclosure Issues Unresolved*, NEW JERSEY LAWYER, Mar. 7, 1994, at 35 [hereinafter Pryor].

57. Marino, *supra* note 55, at 2R.

58. *Id.*

setts Home Buyer's Club.⁵⁹ Even lenders are beginning to get involved. First Portland Mortgage Corporation of Maine reported in 1993 that it has begun offering, not only financing, but also buyer representation in real estate transactions.⁶⁰ Real estate schools are beginning to offer courses in the area of buyers' brokerage, and those who take enough of their courses receive the new title of Certified Buyer Broker.⁶¹

Many practitioners accustomed to the traditional approach view the emerging trend of buyers' brokers as a new "scam."⁶² These practitioners point to the risks of liability for undisclosed dual agency arising from the use of buyers' brokerage as a means of increasing income by earning commissions from both sides of a deal.⁶³ However, consumer advocates support the practice of buyers' brokerage. Consumer watchdogs such as Ralph Nader of The Center for the Study of Responsive Law and Stephen Brobeck of the Consumer Federation of America spoke out in support of buyers' brokerage as a positive step toward changing the "cartel that caters to sellers' interests while slighting the buyer."⁶⁴ Nader joined forces with other prominent consumer advocates such as Jerilyn Coates, a frequent NAR lecturer, to recommend that consumers confront brokers with a "loyalty pledge" expressly stating the broker's fiduciary duties in brokerage agreements.⁶⁵ Nader also called for the creation of a national association of

59. Richard Kindleberger, *Peril or Profits: DeWolfe Walks Where No Local Realtor Has Tread*, BOSTON GLOBE, Jan. 10, 1993 at A1 (hereinafter Kindleberger).

60. Low Sichelman, *Lender Takes On Role of Buyer's Realty Agent*, CHI. TRIB., Sept. 25, 1993 at 17 Home Guide. The lender claimed the practice would protect consumers by eliminating brokers as middlemen who collect kickbacks for referring clients to lenders. *Id.* Loan officers prequalify their customers so they will not shop beyond their means. *Id.* Then, the same loan officers take the customers househunting. *Id.* The loan officers are paid a commission just as real estate brokers, and they actively negotiate the deal. *Id.* This does not seem to be a very prudent move, however, when one thinks of all the additional liability it could potentially create.

61. See Neal Gendler, *Dual Agency in Home Sales: Some Say it Isn't a Problem*, MINNEAPOLIS STAR TRIBUNE, Mar. 18, 1995 at 5H.

62. See Terry Sheridan, *Buyers Bite Into Multiple Listing Service*, THE MIAMI HERALD, June 27, 1993 at 1G (discussing the mostly negative reactions of various Miami brokers to the practice of buyers' brokering).

63. See Robert J. Brass, *Realty Q & A-Buyers Should Have Own Broker*, CHI. TRIB. Apr. 24, 1993 at 18 Home Guide; Kindleberger, *supra* note 59, at A1.

64. Matt Carroll & Richard Kindleberger, *Lots & Blocks*, BOSTON GLOBE, Mar. 21, 1993 at A26. See generally, GAIL G. LYONS & DONALD L. HARLAN, *BUYER AGENCY: YOUR COMPETITIVE EDGE IN REAL ESTATE* (1991) (discussing the benefits of buyer agency).

65. The agency contract Nader advocates would include express promises that the agent will:

- 1) Be on your side and negotiate the best possible price and terms for you[;]
- 2) Never represent both the buyer and the seller (or the landlord and the tenant) in the same transaction[;]
- 3) Never accept any type of kickback, fee, gift or profit individually from any mortgage provider, title insurance company . . . or other real estate service provider that is involved in your transaction.

home buyers to lobby legislators to enact consumer protection real estate laws.⁶⁶

As discussed previously, MLS rules have been changed throughout the nation so that these rules usually specify that the selling agent is not necessarily a subagent of the listing agent. This measure allows for the existence and operation of buyers' brokers. Selling brokers must now specify whether they will work with buyers' brokers and what commission the selling broker will pay. Even if the seller is the actual source of the commission, buyers' brokers owe their fiduciary duties to the buyer; the typical rationalization is that the buyer indirectly pays the commission as part of the sales price. Buyers' brokers sometimes want the buyer to sign exclusive agency contracts and ask for retainers. Others are paid a percentage commission by the buyer, such as two to three percent of the buyer's target price or a split of the listing agent's commission.⁶⁷ Some prefer the buyer to pay an hourly rate, usually in the range of sixty to one hundred dollars per hour, for their services.⁶⁸

For these fees, the buyers' brokers claim that they obtain for their clients reductions in sales prices from four to seven percent.⁶⁹ A survey conducted by U.S. Sprint substantiates this claim. The survey reported that 232 relocating employees who hired buyers' brokers paid on average 91% of a home's list price, while those using traditional agents paid 96.5% of the list price.⁷⁰ With such documented results, the concept of buyers' brokerage has gained acceptance by the real estate industry.⁷¹ Because the relationship conforms to the buyer's expectation that the broker is the buyer's loyal representative working to protect the buyer's best interests, it is a rational approach. However, the practice can lead to dual agency when the buyer is interested in one of the broker's own listings. As noted previously, most MLS rules still require selling broker subagency to the listing broker in an in-house sale.

B. INDEPENDENT CONTRACTORS/TRANSACTION BROKERS/FACILITATORS

Brokers have lobbied for independent contractor status with increasing success in recent years. Basically, this form of brokerage is

Frank Cook, *Advocates Say Real Estate Agents Should Vow 'Loyalty'*, MIAMI HERALD, Aug. 22, 1993 at 4G.

66. *Id.*

67. Marino, *supra* note 55, at 2R.

68. *Id.*

69. *Id.*

70. *Id.*

71. Joe Catalano, *More Punch-Brokers Who Represent Buyers Trying To Boost Visibility And Business. Sidebar: More About Buyer's Brokers*, NEWSDAY, Sept. 12, 1992 at 26 Real Estate (discussing growth of buyers' brokers in New York).

non-representative. Brokers act as finders, putting buyers and sellers in contact and facilitating the progress of the deal. Neither party controls the independent contractor whose only responsibility is to produce a closed transaction. Independent contractors cannot bind either party or make any decisions on either party's behalf. While this eliminates liability of the principal (either the buyer or seller) for the agent's acts, it also eliminates remedies available under agency law. Most statutes that allow independent contractor status require that the broker act reasonably and in good faith; some statutes have a list of specific limited duties. This independent contractor status seems to add to the confusion. The traditional seller agency approach contradicts the buyer's expectations; the independent contractor approach contradicts the expectations of both the buyer and the seller who expect loyalty in exchange for commissions. It is also uncertain to what degree brokers will dispel the parties' perception of loyalty when attempting to obtain business.⁷²

IV. SIGNIFICANT LITIGATION INVOLVING REAL ESTATE BROKER AGENCY AND DISCLOSURE

A. *DISMUKE v. EDINA REALTY, INC.*⁷³

Dismuke v. Edina Realty, Inc. involved sellers who sued the realty company for representing both the sellers and the buyers without adequately disclosing the realty company's dual agency.⁷⁴ Edina Realty disclosed the dual agency status using one of its own forms, signed by all of the parties.⁷⁵ The sellers sued for breach of fiduciary duty because Edina Realty did not adequately explain the dual agency to the sellers.⁷⁶ Although the disclosure form complied with statutory requirements, the form did not fulfill common law requirements of undivided loyalty and complete disclosure.⁷⁷ The court subsequently certified the case as a class action involving approximately 22,000 sell-

72. One Florida real estate firm, The Keyes Company, purports to operate exclusively as a transaction brokerage. However, The Keyes Company recently distributed promotional advertisements stating that the Company is acting as the "exclusive agent" of two sellers in the author's neighborhood. This is a clear example of the misunderstanding which exists between real estate agents and real estate brokers, and their legal advisors. The agents who deal directly with the consuming public continue to create a perception which is the opposite of what the broker/executives claim.

73. No. 92-8716, 1993 WL 327771 (Minn. Dist. Ct. June 17, 1993).

74. *Dismuke v. Edina Realty, Inc.*, No. 92-8716, 1993 WL 327771, at *1 (Minn. Dist. Ct. June 17, 1993).

75. *Dismuke*, 1993 WL 327771 at *1.

76. *Id.*

77. *Id.* at *3.

ers.⁷⁸ The court held that the common law fiduciary duty was inflexible, that Edina Realty had breached the common law duty, and that the plaintiffs need not prove actual injury or intentional fraud.⁷⁹ The court found that "[n]othing will defeat the principal's right or remedy except his own prior consent or ratification after full disclosure of all the facts."⁸⁰ Edina Realty lost its commissions. The parties ultimately reached a settlement in the amount of \$5.9 million, partially in cash and partially in the form of transferable coupons for one hundred dollar discounts on future real estate transactions.⁸¹ The settlement was given final court approval in February, 1995.⁸²

B. *BOKUSKY v. EDINA REALTY, INC.*⁸³

This class action was brought by buyers and sellers under six theories: breach of a state statute, breach of a real estate regulation, fraud, breach of fiduciary duty, breach of contract, and noncompliance with the Racketeer Influenced and Corrupt Organizations Act ("RICO").⁸⁴ These complaints resulted from allegations based upon a conflict of interest due to dual agency.⁸⁵ Again, Edina Realty relied on its own disclosure form to explain the dual agency relationship.⁸⁶ Edina Realty sought dismissal of the RICO claim and moved to stay, abstain, and/or dismiss the federal court action, but the court denied Edina Realty's motion.⁸⁷ The court also certified this case as a class action.⁸⁸ In February, 1995, Edina Realty reached a settlement with the plaintiff class members in the aggregate amount of \$12.3 million.⁸⁹

78. See Neal Gandler, *Firm May Make Market For Edina Realty Coupons: Way To Sell Them May Be Part Of Settlement Order In Two Class-Action Lawsuits*, MINNEAPOLIS STAR TRIBUNE, Jan. 21, 1995, at 1D.

79. *Dismuke*, 1993 WL 327771 at *3.

80. *Id.*

81. See Scott Carlson, *Plaintiffs Win Cash in Agency Case*, CHI. TRIB., Feb. 12, 1995, at 7V [hereinafter Carlson]. Three \$100 coupons were issued to each claimant, each valid for one successive year. See Neal Gandler, *Firm May Make Market For Edina Realty Coupons: Way To Sell Them May Be Part Of Settlement Order In Two Class-Action Lawsuits*, MINNEAPOLIS STAR TRIBUNE, Jan. 21, 1995, at 1D.

82. Carlson, *supra* note 81, at 7V.

83. No. 3-92 CIV. 223, 1993 WL 515827 (D. Minn. Aug. 6, 1993).

84. *Bokusky v. Edina Realty Inc.*, No. 3-92 CIV. 223, 1993 WL 515827, at *1 (D. Minn. Aug. 6 1993).

85. *Bokusky*, 1993 WL 515827, at *1.

86. *Id.*

87. *Id.*

88. *Id.* at *11.

89. See Carlson, *supra* note 81 at 7V. The remaining \$1.7 million covers damages in a related suit involving two affiliates of Edina Realty. *Id.*

*C. HUIJERS v. DEMARRAIS*⁹⁰

In this action, the buyers sought specific performance of the purchase contract, and the sellers cross-claimed against the buyers and the real estate agent for fraud, misrepresentation, breach of fiduciary duty, rescission, and declaratory relief.⁹¹ The lower court held for the buyers.⁹² The Court of Appeal, Second District, Division 6, however, ruled that the sellers did not have to pay the real estate commission even though the agent provided the sellers with an agency disclosure form at the time the purchase contract was signed.⁹³ The California statute at issue required that the listing agent make the agency disclosure when the seller signed the listing agreement.⁹⁴ Because of the improper timing of the agency disclosure, the court "reverse[d] for further findings on whether under the circumstances the misstatement constituted grounds for revision [of the purchase contract]."⁹⁵ The court construed the disclosure statute as adding to, rather than removing, common law duties of disclosure.⁹⁶ Consequently, disclosure alone was not enough; disclosure must also be timely and fully explained. This arguably requires a lawyer, not a broker.

*D. L. BYRON CULVER & ASSOC. v. JAOUDI INDUS. & TRADING CORP.*⁹⁷

L. Byron, a real estate firm, lost its sales commission in a land sale for failing to disclose its dual agency relationship.⁹⁸ The real estate firm acted as the buyers' broker.⁹⁹ When the firm found a suitable property for the buyers, a broker for the firm contacted the property owner and entered into a listing agreement with the owner.¹⁰⁰ The broker never made formal disclosure of the dual representation.¹⁰¹ In support of its holding affirming the real estate firm's forfeiture of its commission, the court quoted a 1917 case stating:

The reason for the rule [requiring written disclosure of dual agency or the loss of the commission] is that [the agent]

90. 14 Cal. Rptr. 2d 232 (Cal. Ct. App. 1992).

91. *Huijers v. DeMarrais*, 14 Cal. Rptr. 2d 232, 235 (Cal. Ct. App. 1992).

92. *Huijers*, 14 Cal. Rptr. 2d at 235-36.

93. *Id.* at 239.

94. *Id.*

95. *Id.*

96. *Id.* at 238.

97. 1 Cal. Rptr. 2d 680 (Cal. Ct. App. 1992).

98. *L. Bryon Culver & Assoc. v. Jaoudi Indus. & Trading Corp.*, 1 Cal. Rptr. 2d 680, 683 (Cal. Ct. App. 1992).

99. *L. Bryon Culver & Assoc.*, 1 Cal. Rptr. 2d at 681.

100. *Id.*

101. *Id.* at 671-82.

thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful to both principals, a position which is against sound public policy and good morals. His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double dealing.¹⁰²

E. *MOSEY V. BERTRAM*¹⁰³

This case involved a prospective buyer suing a listing agent for breach of fiduciary duty.¹⁰⁴ The buyer claimed that the property's listing agent owed the buyer a fiduciary duty because both the buyer's broker and the listing agent worked for the same brokerage firm.¹⁰⁵ Having gone out of business, the brokerage firm under which both the listing and buyer's agent worked was never effectively served with process.¹⁰⁶ This seems to explain why the plaintiff-buyer did not seek relief against the firm for undisclosed dual agency and instead attempted to hold the listing agent liable. The employer/broker should be liable in such a case because the broker receives a percentage of whatever sales the broker's agents produce.¹⁰⁷ The brokerage firm is, in effect, a dual agent for both parties, even if the listing agent and buyer's agent claim allegiance only to the seller and buyer respectively. However, the court stated that "this case does not involve an issue of dual agency."¹⁰⁸ The buyer claimed that because the buyer's agent worked for the same firm as the listing agent, the buyer's agent's fiduciary duty applied to all members of the firm.¹⁰⁹ The court disagreed, holding that the listing agent could not be charged with the buyer's agent's fiduciary duties or liability resulting from the breach of those duties.¹¹⁰ The only action for which the listing agent could be

102. *Id.* at 682-83 (quoting *Glenn v. Rice* 162 P. 1020, 1021 (Cal. 1917)).

103. 858 P.2d 854 (N.M. 1993).

104. *Moser v. Bertram*, 858 P.2d 854, 854-55 (N.M. 1993).

105. *Moser*, 858 P.2d at 854-55.

106. *Id.* at 855 n.1.

107. See *Fraioli v. Bobby Byrd Real Estate, Inc.*, 630 So. 2d 1131, 1132 (Fla. Dist. Ct. App. 1993) (holding that a real estate broker is liable for any misrepresentation by his real estate agent regardless of agent's actual or apparent authority, where the broker received a substantial commission from the seller based on the agent's actions).

108. *Moser*, 858 P.2d at 856.

109. *Id.*

110. *Id.*

liable is for fault in appointing, supervising, or cooperating with the buyer's agent (i.e. no vicarious liability).¹¹¹

F. *INLAND COMMERCIAL PROP. SALES V. ATLANTIC ASSOCS., INC.*¹¹²

Inland, the broker, sued to recover its commission from the buyer, Atlantic, which had contracted with Inland to acquire commercial property.¹¹³ Inland acted as a dual agent, representing Atlantic as well as the sellers, and claimed to have made adequate disclosure.¹¹⁴ Atlantic argued that it had not consented to dual agency.¹¹⁵ Each party filed affidavits in support of motions for summary judgment.¹¹⁶ The court denied the motions, holding that there existed a genuine issue of material fact as to Atlantic's consent to dual agency.¹¹⁷ The Illinois real estate statute at issue in this case required written disclosure of dual agency.¹¹⁸ Atlantic relied on the statute, but the court ruled that the statute did not provide a private cause of action.¹¹⁹ This ruling effectively eviscerated the statute, preventing its application where it was most needed, enforcing written disclosure. Illinois has since enacted statutes requiring written disclosure.¹²⁰

G. *MARKET FORCE, INC. V. WAUWATOSA REALTY CO.*¹²¹

This case discusses another aspect of the buyers' broker movement. Market Force, Inc., a buyers' brokerage, firm sued Wauwatosa Realty Co., another realty company, in an antitrust action.¹²² Market Force claimed that, by paying only a referral fee and not a regular commission, Wauwatosa and other Milwaukee firms were guilty of antitrust conspiracy.¹²³ Market Force operated exclusively as a buyers' broker, pledging complete loyalty to buyers, though not charging a commission. The listing brokers compensated Market Force through a

111. *Id.*

112. No. 90 C 1036, 1991 WL 278311 (N.D. Ill. Dec. 18, 1991).

113. *Inland Commercial Property Sales v. Atlantic Assoc., Inc.*, No. 90 C 1036, 1991 WL 278311, at *1 (N.D. Ill. Dec. 18, 1991) (mem.).

114. *Inland Commercial Property Sales*, 1991 WL 278311 at *1 (mem.).

115. *Id.* (mem.).

116. *Id.* (mem.).

117. *Id.* at *2 (mem.).

118. *Id.* at *1 n.3 (mem.) (citing ILL. ANN. STAT. ch. 111 para. 5818.2 (Smith-Hurd Supp. 1991)).

119. *Id.* (mem.).

120. See *infra* notes 184-93 and accompanying text for a discussion of the recently enacted Real Estate License Act in Illinois.

121. 706 F. Supp. 1387 (E.D. Wis. 1989), *aff'd*, 906 F.2d 1167 (7th Cir. 1990).

122. *Market Force, Inc. v. Wauwatosa Realty Co.*, 706 F. Supp. 1387, 1388 (E.D. Wis. 1989), *aff'd*, 906 F.2d 1167 (7th Cir. 1990).

123. *Market Force, Inc.*, 706 F. Supp. at 1388.

split commission.¹²⁴ Many real estate brokers operating under the traditional subagency approach decided not to share their commissions with Market Force, instead paying the buyers' broker a much smaller referral fee.¹²⁵ The court held that Market Force failed to show that the hostile firms had acted together in conspiring to hold down commissions paid to buyers' brokers.¹²⁶ The court found Wauwatosa gave adequate reasons for its practice: 1) Wauwatosa might have to pay a selling agent a commission in addition to that of the buyer's broker, as can occur when the selling agent holds an open house and the buyer's agent brings his client; 2) buyers' brokers do not list on MLS and therefore have lower expenses; and 3) Wauwatosa paid out-of-state brokers the same referral fee.¹²⁷ This case is important in that it discusses many of the issues which arise in real estate agency transactions, including: the conflict created by the MLS presumption of subagency; the question of who really pays the commission — the seller, from the sales proceeds, or the buyer, as part of the purchase price; and whether identification of the recipient of fiduciary duties should be based on who pays the commission.

H. *GILLMORE V. MORELLI*¹²⁸

In this case, a real estate broker sued the seller to recover his commission.¹²⁹ The seller countersued to collect attorneys' fees the seller incurred in defending against an action for specific performance brought by the prospective purchaser.¹³⁰ The court ruled in favor of the seller, denying the broker his commission and entering a judgment against the broker for the seller's attorneys' fees in the prior action.¹³¹ The court found that the purchase agreement the broker executed while acting as the listing broker for the seller was so favorable to the purchaser and unfavorable to the seller as to constitute a breach of fiduciary duty.¹³² The evidence also showed that the broker actively assisted the buyer in negotiating the purchase terms.¹³³

124. *Id.* at 1389.

125. *Id.* at 1390.

126. *Id.* at 1395-96.

127. *Id.* at 1390-91.

128. 472 N.W.2d 738 (N.D. 1991).

129. *Gillmore v. Morelli*, 472 N.W.2d 738 (N.D. 1991).

130. *Gillmore*, 472 N.W.2d at 739.

131. *Id.* at 741.

132. *Id.* at 740-41.

133. *Id.*

V. REACTIONS

A. THE NATIONAL ASSOCIATION OF REALTORS' NEW POLICY

On November 15, 1993, the National Association of Realtors ("NAR") met in Miami Beach, Florida, to decide what position to promote regarding the growing trend of buyers' brokers, dual agents, and facilitators (also known as transaction brokers, independent contractors, or finders). NAR voted to ask each state legislature to enact "statutory agency" to preempt the traditional common law agency rules. This was undoubtedly in response to the large judgment entered in the then recently decided *Edina Realty* cases. NAR also decided not to endorse the facilitator concept, which allows brokers to act as dealmakers and charge commissions without owing clients any fiduciary duties.

NAR formulated this policy based on the recommendations that its Presidential Advisory Group on Agency listed in its March, 1992, report. These recommendations resulted from a study finding that most real estate agents do not understand the common law agency rules. A NAR task force, created in 1985 in response to complaints by consumer groups, conducted the study. This study also produced an important change in MLS policies — as of July 1, 1993, an offer of subagency by listing brokers using the service was no longer mandatory.¹³⁴ Instead, listing brokers can now offer "cooperation and compensation" to either subagents, buyers' agents, or both.¹³⁵

Additionally, NAR revised its Code of Ethics and Standards of Practice to recognize buyer agency with fiduciary duties owed to the buyer, not the seller.¹³⁶ Brokers can act exclusively as selling/listing agents or as buyers' agents. Brokers may combine the two, resulting in a disclosed dual agency which is permitted for in-house sales.¹³⁷

134. NATIONAL ASSOCIATION OF REALTOR, HANDBOOK ON MULTIPLE LISTING POLICY — RESIDENTIAL, § L2 (1993). See *supra* note 46 and accompanying text.

135. *Id.* A new problem arises with this optional MLS arrangement: What is the status of a selling broker who has no buyer's broker agreement, and who is not offered subagency by the listing broker? See *supra* notes 121-27 and accompanying text.

136. See, e.g., NATIONAL ASSOCIATION OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE (1994) (discussing Standard 7-1(c), which imposes a duty upon buyers' brokers to submit all offers by the buyer; Standard 7-2, which provides that "[r]ealtors, when seeking to become a buyer/tenant representative, shall not mislead buyers or tenants as to savings or other benefits that might be realized through use of the [r]ealtor's services;" Standard 21-12, which states that "[r]ealtors, acting as agents of buyers or tenants, shall disclose that relationship to the seller/landlord's agent at first contact and shall provide written confirmation of that disclosure to the seller/landlord's agent not later than execution of a purchase agreement or lease").

137. NATIONAL ASSOCIATION OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE (1994). Standard 9-10(b) provides in relevant part: "When entering into contracts to represent buyers/tenants, [r]ealtors must advise potential clients of: 1) the [r]ealtor's general company policies regarding cooperation with other firms; and 2) any potential

B. STATE LEGISLATION DEFINING PERMISSIBLE RELATIONSHIPS & MANDATING DISCLOSURE

In response to the changes in real estate brokerage relationships and the resulting problems, many states enacted laws requiring the broker to disclose in writing who the broker represents. Generally, these laws require the broker to provide the disclosure to all parties involved in a transaction. However, a concerted effort has not been made to address the need for uniformity in this area of the law.

Some states have very detailed laws defining the permissible capacities in which brokers may act as well as prescribing the items to be included in the disclosure forms; some state statutes even include approved disclosure forms that brokers must use. Other states just have a vague requirement of disclosure that could constitute the unauthorized practice of law. Many states require the broker to make the required disclosures only before submitting an offer, which may be too late in the relationship to be effective. Some states have abrogated the common law of agency as applied to real estate brokers, while most preserve the traditional agency presumption. The majority of states have not taken any recent legislative action regarding real estate brokers. Most of the new laws are recently enacted; some just became effective in 1995. What follows is a survey of the salient provisions of these new laws.

1. *Comprehensive Provisions*

a. California

The first state to enact comprehensive statutes defining agency relationships in real property transactions and mandating disclosure was California.¹³⁸ The relevant sections took effect January 1,

for the buyer/tenant representative to act as a disclosed dual agent, e.g., listing broker, subagent, landlord's agent, etc." *Id.*

138. See CAL. CIV. CODE §§ 2373-82 (West Supp. 1995). The stated legislative purpose of the California act is as follows:

(a) Further the education of consumers on the existence of various types of agency relationships which may occur in residential real property transactions covered by this act.

(b) Require disclosure to the parties by the agent or agents of the various types of agency relationships which may occur in residential real property transactions covered by this act in a manner which explains in simple, comprehensible, and nontechnical terms, the elements of these relationships.

(c) Afford protection to consumers involved in residential real property transactions covered by this act by requiring the disclosure set forth in this act.

(d) Require uniformity of this disclosure as a means of clarifying consumer understanding of these terms, usages, and relationships.

(e) Make clear that associate real estate licensees act as agents of brokers under whom they are licensed and who, in turn, are agents of buyers, sellers, or buyers and sellers in residential real property transactions covered by this act. However, by this enactment, the Legislature does not intend to diminish any

1988.¹³⁹ As previously noted, the concept of buyers' brokers began to take hold first during the mid to late eighties in the western states, primarily in California. Section 2373 of the California Civil Code is an extensive definitions section, providing definitions for "dual agent," "buyer," "listing agent," and "selling agent," among others.¹⁴⁰ Section 2374 requires that listing and selling agents provide the seller and buyer in a residential real property transaction with a copy of a disclosure form and obtain a signed acknowledgment of receipt from each party.¹⁴¹ The listing agent must provide the disclosure in its prescribed form to the seller prior to entering into the listing agreement.¹⁴² The selling agent must do the same "as soon as practicable prior to presenting the seller with an offer to purchase," unless the selling agent is also the listing agent.¹⁴³ The selling agent must provide disclosure to the buyer:

as soon as practicable prior to execution of the buyer's offer to purchase, except that if the offer to purchase is not prepared by the selling agent, the selling agent shall present the disclo-

liability to buyers and sellers which may exist for tortious conduct in connection with these real property transactions.

(f) Provide an explicit basis for maintaining the confidentiality of price information provided by the consumer to a dual agent in a residential real property transaction covered by this act and an explicit method for modifying that confidentiality, while at the same time retaining without change the existing law with respect to confidentiality of other information.

(g) Delay the requirements of this act until January 1, 1988, in order to provide sufficient time to familiarize consumers and agents with the provisions of this act.

Id. at Historical Note.

139. See generally Ruth Ryon, *New State Laws, Assist, Confuse Professionals*, LOS ANGELES TIMES, Dec. 20, 1987 at 20 Real Estate (reporting on California's new disclosure and broker education laws).

140. "Dual agent" is defined as "an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction." CAL. CIV. CODE § 2373 (d) (West Supp. 1995).

"Buyer" is defined as

a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. 'Buyer' includes vendee or lessee.

CAL. CIV. CODE § 2373(c) (West Supp. 1995).

"Listing agent" is defined as "a person who has obtained a listing of real property to act as an agent for compensation." CAL. CIV. CODE § 2373(f) (West Supp. 1995).

"Selling agent" is defined as

a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.

CAL. CIV. CODE § 2373(a) (West Supp. 1995).

141. *Id.* § 2374.

142. *Id.* § 2374(a).

143. *Id.* § 2374(b).

sure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer.¹⁴⁴

Section 2375 provides the statutory disclosure form which must be used.¹⁴⁵ The prescribed language defines and lists the duties owed by the "seller's agent," "buyer's agent," and "agent representing both seller and buyer" and admonishes the consumer not to sign the disclosure form without first having carefully read and understood the relationship being created.¹⁴⁶

An additional disclosure is required by section 2375.5: the real estate agent must confirm the relationship "in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent prior to or coincident with execution of that contract."¹⁴⁷ Section 2377 expressly provides that the payment of compensation to an agent by either the seller or buyer is "not necessarily determinative of a particular agency relationship between an agent and the seller or buyer."¹⁴⁸ Similarly, the sharing of a commission between the listing and selling agent does not necessarily imply any subagency relationship.¹⁴⁹ Section 2376 states what seems obvious: namely, that "[n]o selling agent in a real property transaction may act as an agent for the buyer only, when the selling agent is also acting as the listing agent in the transaction."¹⁵⁰ Additionally, listing agents can still act as selling agents, and this dual role will not by itself create a dual agency.¹⁵¹ The main prohibition imposed on dual agents is against disclosing one party's price negotiating limit to the other party.¹⁵² The relationship may be modified "at any time before the performance of the act which is the object of the agency with the written consent of the parties to the agency relationship."¹⁵³ The "object of the agency relationship" is arguably to sell the property. Therefore, under the vague statement in the statute, the parties seem able to alter their relationship up until the contract is executed and possibly until closing.

Finally, the new disclosure requirements do not diminish the common law duties of disclosure and fiduciary duties owed by agents,

144. *Id.* § 2374(d).

145. *Id.* § 2375.

146. *Id.* The statutory disclosure language is included in the Appendices to this Article. See Appendix B(1).

147. *Id.* § 2375.5(a).

148. *Id.* § 2377.

149. *Id.*

150. *Id.* § 2376.

151. *Id.* § 2380.

152. *Id.* § 2379.

153. *Id.* § 2381.

nor are the common law remedies limited by the new laws.¹⁵⁴ Escrow agents are not deemed agents for purposes of these disclosure requirements.¹⁵⁵ California also requires real estate licensees to take a three hour course in agency relationships and duties, "including instruction in the disclosures to be made and the confidences to be kept in the various agency relationships."¹⁵⁶ Because the California State Legislature did not expressly abrogate common law fiduciary duties, the same situation exists for potential *Edina Realty* type litigation. Furthermore, the point at which the broker must disclose, "before executing an offer," may be too late in the relationship. As this Article notes, other states impose the duty to disclose much earlier — "at the first substantive contact."

b. Colorado

In 1993, Colorado made comprehensive changes to its real estate brokerage laws, complete with new specifically defined brokerage capacities.¹⁵⁷ Colorado also added specific sections dealing with each

154. *Id.* § 2382.

155. *Id.* § 1102.11.

156. CAL. BUS. & PROF. CODE § 10170.5(a)(2) (West Supp. 1995).

157. See COLO. REV. STAT. §§ 12-61-801-811 (Supp. 1994). Section 12-61-802 provides the new brokerage capacities definitions as follows:

(1) "Broker" shall have the same meaning as set forth in subsection (2) or (3) of section 12-61-101, except as otherwise specified in this part 8. For purposes of this part 8, "broker" may include a "salesperson" as defined in section 12-61-101(3).

(2) "Dual agent" means a broker who, with the written informed consent of all parties to a contemplated real estate transaction, is engaged as a limited agent for both the seller and buyer or both the landlord and tenant.

(3) "Limited agent" means an agent whose duties and obligations to a principal are only those set forth in section 12-61-804, 12-61-805, or 12-61-806, with any additional duties and obligations agreed to pursuant to section 12-61-803(5).

(4) "Single agent" means a broker who is engaged by and represents only one party in a real estate transaction. A single agent includes the following:

(a) "Buyer's agent", which means a broker who is engaged by and represents the buyer in a real estate transaction;

(b) "Landlord's agent", which means a broker who is engaged by and represents the landlord in a leasing transaction;

(c) "Seller's agent", which means a broker who is engaged by and represents the seller in a real estate transaction; and

(d) "Tenant's agent", which means a broker who is engaged by and represents the tenant in a leasing transaction.

(5) "Subagent" means a broker engaged to act for another broker in performing brokerage tasks for a principal. The subagent owes the same obligations and responsibilities to the principal as does the principal's broker.

(6) "Transaction-broker" means a broker who assists one or more parties throughout a contemplated real estate transaction with communication, interposition, advisement, negotiation, contract terms, and the closing of such real estate transaction without being an agent or advocate for the interests of any party to such transaction. Upon agreement in writing pursuant to section 12-61-803(2)(a) or a written disclosure pursuant to section 12-61-808(2)(d), a transaction-broker may become a single agent, subagent, or dual agent.