

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 0072

9976 HOUSE RESOURCES

HCR

2

Alaska State Legislature

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Representative John Coghill

Date: May 4, 1999

To: Representative Scott Ogan

From: Representative John Coghill

A handwritten signature in cursive script, appearing to read "JCO", written over a horizontal line.

Re: HCR 2 Sovereignty

I am requesting that HCR 2 be heard in House Resources Committee as soon as possible. This Resolution calls for the resolve of the fish and game management issue by the U.S. Supreme Court and should be passed by the Legislature before we adjourn.

I have enclosed the resolution, sponsor statement and backup information. Thank you for your consideration.

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Room 416



Representative John Coghill

HCR 2 - Sovereignty of the State of Alaska Sponsor Statement - March 8, 1999

The recent debate over subsistence has become one fueled with a lot of emotion but must focus on the doctrines of law. To understand Alaska's dilemma, we must look at the history of the Congressional actions that brought us to this point and scrutinize the actions of Congress and the Department of Interior.

The Department of Interior, Clinton Administration, Congress, and the Knowles Administration insist on dividing Alaskans on equality and wildlife consumption issues. The real issue before us is one of State sovereignty and the federal governments continued denial of the State's basic constitutional standing, equal footing and public trust. ANILCA did not preempt nor diminish the State of Alaska's sovereign authorities over its own lands, water and resources. ANILCA did not specifically preempt state management nor grant specific authority to the secretaries of Agriculture and Interior to preempt state management of navigable waters, submerged lands, nor the resources therein.

Does two wrongs make a right? The answer is no.

The McDowell ruling concluded that "statutes granting preference to rural residents to take fish and game for subsistence purposes violates Alaska constitutional provisions prohibiting exclusive or special privileges in the taking of fish and wildlife." Because of that decision the Department of Interior and Congress want the Alaskan people to change their constitution to allow inequality (division by race) in the management and use of Alaska's fish and wildlife resources.

Putting an equal protection to a vote on the ballot would set a precedence of allowing fundamental rights to become vulnerable to politics and rhetoric. If the legislature passed a referendum for the ballot and the voters of Alaska approved a rural preference, it would be swiftly met with legal challenges because such a change to our Constitution would be unconstitutional under Article XIV of the U.S. Constitution.

HCR 2 restates the historical events that gave the State of Alaska the responsibility for the management of Alaska's fish and wildlife resources. It also challenges the Department of Interior to agree to allow the United States Supreme Court decide who will manage Alaska's resources.

HCR 2 - Short History

Public Law 85-508 - Alaska Statehood Act (July, 1958):

Section 1: Upon proclamation by the President as provided in Section 8(c) of Act Alaska is **admitted into the Union on an equal footing with the other States in all respects whatsoever.**

Section 6 (e): once the Secretary of Interior has certified to Congress that the State of Alaska can administer, manage, and conserve fish and wildlife resources in Alaska, the U.S. government **transfers and conveys to State of Alaska all real and personal property of the United States situated in the Territory which is used for the sole purpose and protection of the fisheries and wildlife in Alaska**

Section 7(m): provides that **the Submerged Lands Act of 1953 shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States.**

Section 8 (c): provides that by proclamation of the President, **Alaska shall be admitted on an equal footing** as provided in Section 1.

On January 3, 1959, President Eisenhower signed the proclamation, Presidential Proclamation No. 3269 with the following language: **admission of the State of Alaska into the Union on an equal footing with the other States of the Union is now accomplished.**

Public Law 86-70 - The Alaska Omnibus Act (June 25, 1959)

Section 45(a) Allows the President, at his discretion, to transfer and convey to the State of Alaska, without reimbursement, any property or interest in property, real or personal, situated in Alaska which is owned or held by the United States for a function that has been terminated by the federal government and assumed by the State of Alaska.

- Alaska adopted a comprehensive fish and game code on April 17, 1959;
- The Secretary of Interior certified to Congress on April 27, 1959 that the Alaska State Legislature has made adequate provisions for the administration, management, and conservation of such resources in the broad national interest.

- President signed Executive Order No. 10857 terminating federal management of fish and wildlife in Alaska and transferring ownership of that function to the state of Alaska.

1953 Submerged Lands Act - Section 1311, Rights of States

This Act is a quitclaim title transfer under, of federal authority and ownership to the States of:

- Lands beneath navigable waters within the boundaries of the respective States and the natural resources within such lands and waters;

Note: Alaska owns its navigable waters, submerged lands and the fish that swim in those waters.

- The right and power to manage, administer, lease, develop, and use the said lands and natural resources in accordance with State law

Note: Management of those resources is subject to State (not Federal) law.

Equal Footing Doctrine -

The Equal Footing Doctrine brought the 37 new States, including Alaska, into the Union as equals with the original 13 states. The federal government explicitly specified this is both the Alaska Statehood Act and Presidential Proclamation No. 3269.

In 1997, in U.S. v. Alaska, 521 U.S. 1 (1997), also known as (**Dinkhum Sands**), the Court ruled that title to public assets passed from the federal government to Alaska throughout the equal footing doctrine is an essential element of sovereignty.

Dinkhum was upheld by the Supreme Court in Printz v. U.S., 117 S.Ct. 2365 (1997). In **Printz** the Court held that State legislatures are not subject to federal direction.

Note: Ownership of submerged land - which carries with it the power to control navigation, fishing, and other public uses of water - is essential property of [State] sovereignty.

Dual sovereignty - Tenth Amendment

In New York v. U.S., 505 U.S. 144 (1992), the Supreme Court held that the Tenth Amendment to the U.S. Constitution provides that powers not specifically delegated to the U.S. by the Constitution are reserved to the states respectively.

The Court further addressed **dual sovereignty** by holding that "the framers explicitly chose a constitution that confers upon Congress the power to regulate individuals, not state."

Property Clause - reads:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

The federal government claims this clause gives Congress limited power over the administration of public lands. This is **the argument the federal government is using** to allow Congress to Grant the Secretary of Interior the power to **allocate wildlife harvest** on Federal lands and to **allocate fish harvest in certain (if not all) of Alaska's navigable waters** simply by passing an act authorizing those actions.

In Kansas v. Colorado, 206 U.S. 46 (1907), the U.S. Government claimed that the Property Clause gave Congress power beyond those powers in Article I, Section 8 of the Constitution when it came to federal lands. The Court held that **the 10th Amendment constrains Congress, even when Congress acts under the Property Clause and that Congress can not act outside the enumerated powers granted by Article 1, Section 8 of the U.S. Constitution.**

In Kleppe v. New Mexico, 426 U.S. 529 (1976), the Court held that:

"Unquestionably, the States have broad trustee and police powers over wild animals within their jurisdictions...No doubt it is true that as between a State and its inhabitants the State may regulate the killing... of [wildlife]."

Public Trust Doctrine -

This doctrine provides that:

- **Public trust lands, waters, and living resources in a State are held by the State in trust for the benefit of all people;**
- **The public has a right to fully enjoy public trust lands, waters and living resources for a wide variety of uses.**
- **Has been used and upheld by the U.S. Supreme Court, the lower Federal Courts and State Courts since the earliest days of this Nation.**

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Representative John Coghill

WHEREAS ANALYSIS OF HCR 2

WHEREAS #1: Alaska has equal footing with all other states:

1. **Section 1 of The Alaska Statehood Act** *(Public Law 85-508 -July 7, 1958.) provides that Alaska was admitted into the Union on an equal footing with and with all the same rights and responsibilities as the other States. It says:

"[U]pon issuance of the proclamation required by section 8(c) of this Act, the State of Alaska is hereby declared - admitted into the Union on an equal footing with the other States in all respects whatever,..."

2. **Section 8(c) of The Alaska Statehood Act** provides that Alaska enters the Union with all the same rights as the original 13 States -as soon as the President issues his proclamation to that effect. It provides:

"Upon the issuance of said proclamation by the President, the State of Alaska shall be deemed admitted into the Union as provided in section 1 of this Act." (i.e. equal footing with the other States in all respects whatever).

3. **Presidential Proclamation No. 3269: President Eisenhower, January 3, 1959**
This Proclamation declared Alaska admitted into the United States as an equal with the other States of the Union. It says, in part:

"ADMISSION OF THE STATE OF ALASKA INTO THE UNION."

"I, DWIGHT D. EISENHOWER, President of the United States of America, do hereby declare and proclaim that the procedural requirements imposed by the Congress on the State of Alaska to entitle that State to admission into the Union have been completed with in all respects and that admission into the Union on an equal footing with the other States of the Union is now accomplished."

WHEREAS #2:

a. The Alaska statehood compact guarantees that Alaska has exclusive authority to manage its fish and wildlife resources.

1. **Alaska Statehood Act** (July 7, 1958) Public Law 85-508:

Section 6 (e): "once the Secretary of Interior has certified to Congress that the State of Alaska can administer, manage, and conserve fish and wildlife resources in Alaska, the U.S. government **transfers and conveys to State of Alaska all real and personal property of the United States situated in the Territory which is used for the sole purpose and protection of the fisheries and wildlife in Alaska**"

2. **The Alaska Omnibus Act** (June 25, 1959) - Public Law 86-70:

Section 45(a) Allows the President, at his discretion, to **transfer and convey** to the State of Alaska, without reimbursement, **any property or interest in property, real or personal, situated in Alaska which is owned or held by the United States for a function that has been terminated by the federal government and assumed by the State of Alaska.**

- Alaska adopted a comprehensive fish and game code on April 17, 1959;
- The Secretary of Interior certified to Congress on April 27, 1959 that the Alaska State Legislature has made adequate provisions for the administration, management, and conservation of such resources in the broad national interest.
- President signed Executive Order No. 10857 terminating federal management of fish and wildlife in Alaska and transferring ownership of that function to the state of Alaska.

3. **Executive Order No. 10857**, signed by President Eisenhower, effective December 29, 1959.

This Executive Order **terminated Federal management of fish and wildlife** and in effect quitclaimed any interest owned or held by the Federal Government in fish and wildlife in Alaska effective December 31, 1959. It reads, in part:

"TERMINATION OF FEDERAL FUNCTIONS IN ALASKA AND TRANSFER OF PROPERTY HELD BY UNITED STATES."

WHEREAS section 6(e) of the act of July 7, 1958 as amended provides that **the administration and management of the fish and wildlife resources of Alaska shall be transferred to the State of Alaska on the first day of the**

first calendar year following expiration of ninety calendar days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of such resources in the broad national interest; and

WHEREAS the Secretary of the Interior made such certification to the Congress on April 27, 1959; and

WHEREAS section 45(a) of the Alaska Omnibus Act provides that if the President determines that any function performed by the Federal Government has been terminated by the Federal Government and that performance of such function or substantially the same function has been or will be assumed by the State of Alaska, the President may transfer and convey to the State of Alaska, without reimbursement, any property or interest in property, real or personal, situated in Alaska which is owned or held by the United States in connection with such function; and

WHEREAS it appears that it would be in the public interest to delegate to the Secretary of the Interior, to the extent hereunder indicated, the authority vested in the President by section 45(a) of the Alaska Omnibus Act:

NOW THEREFORE, by virtue of the authority vested in me by section 45(a) of the Alaska Omnibus Act - and section 301 of title 3 of the United States Code, as the President of the United States, it is ordered as follows:

Section 1. It is hereby determined that the functions performed by the United States in Alaska pursuant to the Alaska game law of July 1, 1943 the act of June 26, 1906 and act of June 6, 1924 and the acts amending or supplementing such acts, will terminate on December 31, 1959, and that the same functions or substantially the same functions will be assumed by the State of Alaska.

Section 2. There is hereby delegated to the Secretary of the Interior, effective January 1, 1960, the authority vested in the President by section 45(a) of the Alaska Omnibus Act to transfer and convey to the State of Alaska, without reimbursement, any property or interest in property, real or personal, situated in Alaska which is owned or held by the United States in connection with the functions described in section 1 hereof.

4. The U.S. Supreme Court recognized this in *Metlakatla Indians v. Egan*, 369 U.S. 45, (1962):

"On April 17, 1959, Alaska adopted a comprehensive fish and game code and "received full control over her resources soon afterward." (Federal

control was terminated and full control was transferred to Alaska by Presidential Executive Order No. 10857.)

b. Alaska Statehood Compact guarantees that all submerged lands and fish are exclusive property of the State of Alaska.

1. Section 7(m) of the Alaska Statehood Act includes Alaska as a beneficiary to the Submerged Lands Act of 1953 -with identical rights as all other States. It provides:

"The Submerged Lands Act of 1953 - shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder."

2. The Submerged Lands Act is a quitclaim of Federal authority or ownership and provides that, like all other States, Alaska owns its navigable waters, submerged lands and the fish that swim in those waters. It also provides that management of those resources is subject to State (not Federal) law. It says:

§ 1311. Rights of States (a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use. It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States in which the land is located .

Executive Order 10857**DETERMINING THE TERMINATION OF CERTAIN FEDERAL FUNCTIONS IN ALASKA AND DELEGATING TO THE SECRETARY OF THE INTERIOR THE AUTHORITY OF THE PRESIDENT TO TRANSFER TO ALASKA PROPERTY OWNED OR HELD BY THE UNITED STATES IN CONNECTION WITH SUCH FUNCTIONS**

WHEREAS section 6(e) of the act of July 7, 1958, 72 Stat. 339, as amended, provides that the administration and management of the fish and wildlife resources of Alaska shall be transferred to the State of Alaska on the first day of the first calendar year following the expiration of ninety calendar days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of such resources in the broad national interest; and

WHEREAS the Secretary of the Interior made such certification to the Congress on April 27, 1959; and

WHEREAS section 45(a) of the Alaska Omnibus Act (73 Stat. 152) provides that if the President determines that any function performed by the Federal Government in Alaska has been terminated by the Federal Government and that performance of such function or substantially the same function has been or will be assumed by the State of Alaska, the President may, until July 1, 1964, in his discretion, transfer and convey to the State of Alaska, without reimbursement, any property or interest in property, real or personal, situated in Alaska which is owned or held by the

United States in connection with such function; and

WHEREAS it appears that it would be in the public interest to delegate to the Secretary of the Interior, to the extent hereinafter indicated, the authority vested in the President by section 45(a) of the Alaska Omnibus Act;

NOW, THEREFORE, by virtue of the authority vested in me by section 45(a) of the Alaska Omnibus Act (73 Stat. 152) and section 301 of title 3 of the United States Code, and as President of the United States, it is ordered as follows:

SECTION 1. It is hereby determined that the functions performed by the United States in Alaska pursuant to the Alaska game law of July 1, 1943, 57 Stat. 301, the act of June 26, 1906, 34 Stat. 478, the act of June 6, 1924, 43 Stat. 405, and the acts amending or supplementing such acts, will terminate on December 31, 1959, and that the same functions or substantially the same functions will be assumed by the State of Alaska.

SEC. 2. There is hereby delegated to the Secretary of the Interior, effective January 1, 1960, the authority vested in the President by section 45(a) of the Alaska Omnibus Act to transfer and convey to the State of Alaska, without reimbursement, any property or interest in property, real or personal, situated in Alaska which is owned or held by the United States in connection with the functions described in section 1 hereof.

SEC. 3. The Secretary of the Interior is hereby authorized to redelegate to (1) the Assistant Secretary for Fish and Wildlife, (2) the Commissioner of Fish and Wildlife, (3) the Directors of the Bureaus of Commercial Fisheries and

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Sport Fisheries and Wildlife, and (4) the Regional Directors, Alaska Region, of the Bureaus of Commercial Fisheries and Sport Fisheries and Wildlife all or any part of the authority delegated to the Secretary of the Interior by section 2 hereof.

Sec. 4. All transfers and conveyances made under or pursuant to this order shall be made in accordance with such policies, conditions, and procedures as may be prescribed by the Secretary of the Interior.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,

December 29, 1959.

Tony Knowles
Governor
P.O. Box 110001
Juneau, Alaska
99811-0001
NEWS RELEASE

State of Alaska
Office of the Governor

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FOR IMMEDIATE RELEASE: March 4, 1999 99-042

STATE TO SUE INTERIOR DEPT. OVER GLACIER BAY FISHING

Knowles Asserts Claim to Submerged Lands within Park

Seeking to protect the rights of Alaska commercial and subsistence fishermen, the State of Alaska will file suit against the federal government to establish its ownership of the submerged lands underlying the marine waters of Glacier Bay National Park, Gov. Tony Knowles announced today.

"For years, Alaskans have worked hard to find a compromise solution to the Glacier Bay fishing issue," Knowles said. "Unfortunately, that good work did not resolve all the jurisdictional conflicts regarding ownership of these submerged lands and tidelands in Glacier Bay. Over the years, the Park Service has proposed and issued regulations restricting access and activities on these state-owned waters and recently demonstrated their intent to enforce these regulations affecting commercial fishermen. The state must now take this important step to resolve this disagreement between the state and the federal government."

Established by Presidential Proclamation in 1925, Glacier Bay National Monument was expanded in 1939 and expanded again and designated a national park in 1980. Since the original withdrawal that created the monument did not include submerged lands underlying navigable waters or tidelands, the state believes these lands were passed on to Alaska at statehood.

Regulatory conflicts between the state and the Park Service have increased in recent years, placing Alaska users in a difficult situation. The Park Service has refused to recognize state-authorized subsistence activities and has engaged in repeated attempts to restrict or eliminate commercial fisheries. These comparatively small-scale fisheries have taken place for 100 years and are managed conservatively and compatibly with the purposes and values of the park.

"I strongly support protection of the natural values of this magnificent National Park," Knowles said. "In fact, the record shows that State-managed fisheries have been, and continue to be, compatible with Park values. These fisheries are also important for the commercial and subsistence users of the region and the communities in which they live. We are not seeking increased activity in the Bay, but to protect the limited activity of Alaska families that work there. The recent boarding of commercial crab vessels in Glacier Bay demonstrates the seriousness of federal sanctions. The State's decision to sue is intended to bring a final and stable

resolution to the ongoing questions over ownership and management jurisdiction in Glacier Bay."

As required by federal law, the state today notified the Interior Department of its intent to sue over Glacier Bay and must wait 180 days, or until early fall, to file its lawsuit in federal court.

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Broadcasters note: Video of today's news conference will be available at 3:30 pm on the Governor's window. Radio actualities are available by calling 1-800-478-5669 or (907) 465-5213.

Cases in 9th Circuit Court of Appeals

These seven cases have been stayed until October 1, 1999. The Department of Law lists each of these cases in their Natural Resources litigation.

In the brief description of the case, it is noted that each is "*one of the jointly-managed ANILCA subsistence cases. These cases have been stayed until October 1, 1999, the date the federal subsistence fisheries regulations will take effect unless the Alaska legislature places a subsistence amendment on the ballot.*"

1. *State of Alaska v. Babbit* plaintiffs allege that ANILCA requires the federal government to manage fisheries in navigable waters of Alaska.
2. *Stevens Village v. McVee and Rosier* plaintiffs filed suit against Federal Subsistence Board and ADF&G alleging they are being denied their federal subsistence priority within Game Management Unit 25(d) West. **Holland expressed no opinion on the question of whether the Secretaries of Interior or Agriculture themselves have the authority to regulate subsistence, but indicated that he would entertain further briefing on the issue.**

The parties agreed to stay the case while the Secretaries consider the petition.

3. *Native Village of Quinhagak v. United States* Plaintiffs seek declaratory and injunctive relief allowing the harvest of rainbow trout from the Kanetok and Goodnews Rivers for subsistence.

The parties agreed to stay proceedings pending final action on the proposed regulations extending federal subsistence program to navigable waters.

4. *Peratrovich v. United States* Plaintiffs contend that (1) federal government owns submerged lands within Tongass National Forest as a result of prestatehood withdrawal and (2) that the waters in question are "public lands" within the meaning of ANILCA, on a reserved water rights theory.

In 1997, the state intervened with a counterclaim that the state owns the lands beneath the marine waters of the Tongass. **The United States' motion for judgment on the pleadings was under advisement when the case was stayed.**

5. *Fish & Game Fund v. Alaska and United States* Commercial fishermen in Yukon and Kuskokwim Rivers challenge the False Pass fishery citing the Magnuson Act and ANILCA and seek to have Sec of Commerce or Interior take over management of commercial and subsistence fisheries in several management areas of the state. **Judge Holland had a motions to dismiss under advisement that was filed by the state and the feds when the case was stayed.**

6. *Kluti Kaah v. Alaska* Plaintiffs challenged state and federal regulations governing subsistence hunting of caribou in the Copper River. Case has been consolidated with *Arctic Reginal Council v. United States* and stayed until October 1, 1999.
7. *Arctic Reginal Council v. United States* challenged several federal regulations adopted by Federal Subsistence Board including failure of fed regs to extend to navigable waters and territorial seas.



alaska department of law / natural resources

Updated February 3, 1999

Significant Natural Resources Cases

The following is a summary of many of the active subsistence, statehood defense, and other significant lawsuits being handled by the Natural Resources Section of the Alaska Department of Law.

FEDERAL COURT CASES

1. State of Alaska v. Babbitt
2. Stevens Village v. McVee and Rosier
3. Native Village of Quinhagak v. United States
4. Peratovich v. United States
5. Fish and Game Fund v. Alaska and United States
6. Kluti Kaah v. Alaska
7. Arctic Regional Council v. United States
8. State v. Harrison
9. Alaska v. United States
10. Confederated Tribes & Bands of the Yakama Indians, et al. v. Malcolm Baldrige
11. U.S. v. Washington
12. American Rivers, et al. v. Nat'l Marine Fisheries Service
13. State of Alaska v. United States - *expansion of submerged waters Act*
14. Seldovia v. CIRI, United States, and Alaska
15. Alaska v. United States and Bruce Babbitt
16. Hyak Mining Co. v. U.S.
17. British Columbia v. United States, Washington and Alaska
18. Harold Kalve v. Frank Rue

*Jointly managed ANILCA cases
that have been stayed until
October 1, 1999.*

STATE COURT CASES

1. Rutter v. Alaska Board of Fisheries
2. Native Village of Elim v. State
3. Kenaitze Indian Tribe v. State
4. Brady v. State
5. Wilhelmsen v. Walsh
6. Interior Airboat Ass'n v. State
7. Beluga Mining Co. v. State
8. O'Callaghan and Sweat v. State
9. Ellingstad v. State and University
10. Triem v. State, Dep't of Natural Resources
11. Aloha Lumber Company v. University of Alaska, Board of Regents, and the Statewide Office of Land Management, Wasser & Winter, Inc., and the State of Alaska

12. Kachemak Bay Conservation Society, et al. v. State, DNR
13. Kashwitna Farms, Inc., Harry and Consuelo Wassink v. State
14. Fish and Wildlife Enforcement Actions
15. State of Alaska v. Lanman

ADMINISTRATIVE PROCEEDINGS

1. In Re: Native Allotment Application of Donna Huff
2. In Re: Native Allotment Application of May J. Colberg
3. In re: Native Allotment Application of Alfred Bayou
4. In the Matter of: Alaska DNR and Carpenter Contracting, Inc.
5. FPA Enforcement Actions

FEDERAL COURT CASES

1. *State of Alaska v. Babbitt* (known as the *Katie John* case; United States District Court No. A90-484-CV (HRH) (Judge Holland); Ninth Cir. No. 94-35481; U.S. Supreme Court No. 95-1084; our file no. 223-91-0275; state's attorneys: Joanne Grace and Henry Wilson; plaintiffs' attorney: Heather Kendall of NARF; U.S.' attorneys: Dean Dunsmore and Elizabeth Ann Peterson). This is one of the jointly-managed ANILCA subsistence cases. These cases have been stayed until October 1, 1999, the date that federal subsistence fisheries regulations will take effect unless the Alaska legislature places a subsistence amendment on the ballot. The plaintiffs alleged that ANILCA requires the federal government to manage fisheries in navigable waters of Alaska, and accordingly, that the Federal Subsistence Board should take over management of the Copper River and authorize a subsistence fishery at Bazulnetas.

Both the District Court and the Ninth Circuit Court of Appeals agreed in part and held that the term "public lands" includes navigable waters in which the United States has reserved water rights. (Under the reserved water rights doctrine, when the United States withdraws land and reserves it for a federal purpose -- for example, a national park or wildlife refuge -- it also reserves by implication water rights necessary to fulfill the purposes of the reservation). The court remanded the case to the Departments of Interior and Agriculture to identify those waters. The state's petition to the U.S. Supreme Court asking it to review the Ninth Circuit decision was denied in 1996.

In January 1999, the departments of Interior and Agriculture published final regulations to assume management of subsistence fisheries. The regulations cover subsistence activities on all waters within or adjacent to the exterior boundaries of 34 identified federal areas, including national parks, refuges, preserves, monuments, wild and scenic rivers, and national forests (excluding the marine waters of the Tongass and Chugach National Forests). They also will extend the Federal Subsistence Board's management to some federal lands selected under the Alaska Native Claims Settlement Act or the Alaska Statehood Act until conveyed. In addition, the rules purport to confirm the Secretaries' authority to restrict or eliminate hunting, fishing, and trapping on state and private lands when these activities interfere with the subsistence priority on the public lands.

Congress included a plan to phase in the federal subsistence fisheries regulations in the

FY 99 Omnibus Appropriations Bill. A total of \$11 million has been appropriated to implement and enforce the federal fisheries regulations, but a moratorium has been placed on the expenditure of the funds, to give the Alaska legislature a further opportunity to amend the state constitution. If the legislature fails to place a subsistence amendment on the ballot by June 1, 1999, Interior will receive \$1 million to begin data gathering and implementation planning. If the legislature fails to place a subsistence amendment on the ballot by September 30, 1999, Interior and Agriculture will receive the balance of the \$11 million and the federal regulations will be implemented. However, if the legislature does place a subsistence amendment on the ballot, the federal regulations will not be implemented, and the state will receive the \$11 million for management. The plan also eliminates amendments to ANILCA which would have taken effect if the legislature had amended the state constitution under the moratorium provision in last year's budget bill.

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2. *Stevens Village v. McVee and Rosier* (United States District Court No. A92-567-CV (HRH) (Judge Holland); our file no. 221-93-0123; state's attorneys: Joanne Grace and Henry Wilson; plaintiffs' attorney: Carol Daniel; U.S.' attorneys: Bruce Landon and Dean Dunsmore). This is one of the jointly managed ANILCA cases that have been stayed until October 1, 1999, the date that federal subsistence fisheries regulations will take effect unless the Alaska legislature places a subsistence amendment on the ballot.

In 1992, plaintiffs filed suit against the Federal Subsistence Board (FSB) and ADF&G, alleging they are being denied their federal subsistence priority within Game Management Unit 25(D) West. Following denial of a TRO, the federal defendants moved for a voluntary remand to the FSB. On remand, the FSB changed its regulations to accommodate plaintiffs' requests for: an extension of the season; provisions allowing a permittee to designate another person to hunt on his or her behalf; and closing federal public lands in GMU 25D West to hunting by non-local residents. The parties filed cross-motions for summary judgment on the only remaining issue: whether the FSB has authority to regulate hunting on state-managed lands adjacent to federal lands in GMU 25D West to protect subsistence uses on "public lands" in GMU 25D West. Judge Holland has characterized this as the "where II" issue.

Judge Holland tentatively indicated in the stay order that the FSB lacks authority off "public lands" because the Secretaries of Interior and Agriculture did not grant such authority in the regulations establishing the FSB. Judge Holland expressed no opinion on the question of whether the Secretaries themselves have that authority, but indicated that he would entertain further briefing on the issue. Meanwhile, the Stevens Village plaintiffs and others submitted a rulemaking petition to the Secretaries of Agriculture and Interior, requesting that they extend the FSB's authority to state and private lands. The parties agreed to stay the case while the Secretaries considered the petition.

In January 1999, the Departments of Interior and Agriculture published final regulations that purport to confirm the Secretaries' authority to restrict or eliminate hunting, fishing, and trapping on state and private lands when these activities interfere with the subsistence priority on the public lands.

Congress included a plan to phase in the federal subsistence fisheries regulations in the FY 99 Omnibus Appropriations Bill. A total of \$11 million has been appropriated to implement and enforce the federal fisheries regulations, but a moratorium has been placed on the expenditure of the funds, to give the Alaska legislature a further opportunity to amend the state constitution. If the legislature fails to place a subsistence amendment on the ballot by June 1, 1999, Interior will receive \$1 million to begin data gathering and implementation planning. If the legislature fails to place a subsistence amendment on the ballot by September 30, 1999, Interior and Agriculture will receive the balance of the \$11 million and the federal regulations will be implemented. However, if the legislature does place a subsistence amendment on the ballot, the federal regulations will not be implemented, and the state will receive the \$11 million for management. The plan also eliminates amendments to ANILCA which would have taken effect if the legislature had amended the state constitution under the moratorium provision in last year's budget bill.

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3. *Native Village of Quinhagak v. United States* (United States District Court No. A93-023-CV (HRH) (Judge Holland); Ninth Cir. No. 93-35496; our file no. 221-93-0041; state's attorneys: Henry Wilson and Joanne Grace; plaintiffs' attorneys: Carol Daniel, John Starkey (AVCP); U.S.' Attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases that have been stayed until October 1, 1999, the date that federal subsistence fisheries regulations will take effect unless the Alaska legislature places a subsistence amendment on the ballot.

The plaintiffs (the villages of Quinhagak and Goodnews Bay, the AVCP, and individual Yup'ik Natives) seek declaratory and injunctive relief allowing the harvest of rainbow trout from the Kanektok and Goodnews Rivers for subsistence. The plaintiffs claim that navigable rivers are "public lands" for purposes of ANILCA, that the state has no subsistence jurisdiction over the waters of the Kanektok and Goodnews River systems, and that the federal government has the authority to regulate non-public lands and waters owned by the state when necessary to provide for subsistence uses. In September of 1994, the Ninth Circuit reversed Judge Holland's order denying the plaintiffs' motion for preliminary injunction. On remand, the court entered an order prohibiting the state and federal defendants from enforcing regulatory prohibitions on the subsistence harvest of rainbow trout while the case is pending. The plaintiffs were awarded partial attorneys fees incurred in connection with the motion for preliminary injunction and appeal.

The parties agreed to stay proceedings on the merits of the case pending final action on the proposed rulemaking that would extend the federal subsistence program to navigable waters in which the United States has a reserved water right.

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4. *Peratrovich v. United States* (United States District Court No. A92-734-CV (HRH) (Judge Holland); our file no. 221-93-0340; state's attorneys: Henry Wilson and Joanne Grace; plaintiffs' attorneys: Thomas Luebben and Richard Young of Albuquerque, New Mexico; U.S.' attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases. The case has been stayed pending further order of the court.

In an amended complaint filed on October 24, 1996, plaintiffs seek declaratory and injunctive relief requiring the Federal Subsistence Board (FSB) to issue a collective permit allowing the harvest of up to 366,000 pounds of herring roe on kelp (1000 pounds per individual for 366 applicants) from the marine waters of southeast Alaska as "customary trade." (The state "customary trade" regulation allows sale of up to 32 pounds of herring roe on kelp by an individual, and up to 158 pounds per household.) The FSB has taken the position that it lacks jurisdiction over the navigable waters where the harvest would occur.

Plaintiffs contend primarily that (1) the United States owns the submerged lands within the Tongass National Forest as a result of a prestatehood withdrawal, and (2) that the waters in question are "public lands" within the meaning of ANILCA, on a reserved water rights theory. On December 18, 1996, the United States moved for judgment on the pleadings, arguing that the case should be dismissed for failure to join the state as an indispensable party, and also on the grounds that the plaintiffs have not exhausted administrative remedies, and that the plaintiffs' remaining claims have been rejected by the Ninth Circuit in the Katie John decision.

In 1997, the state's motion to intervene and file a proposed counterclaim and answer to plaintiffs' amended complaint was granted. The state's counterclaim seeks, among other things, a declaration that the state owns the lands beneath the marine waters of the Tongass. The United States' motion for judgment on the pleadings was under advisement when the case was stayed.

5. *Fish and Game Fund v. Alaska and United States* (United States District Court No. A92-0443-CV (HRH) (Judge Holland); our file no. 221-92-0832; state's attorneys: Joanne Grace and Henry Wilson; plaintiff's attorneys: Edgar Paul Boyko; U.S.' Attorney: Dean Dunsmore; intervenor attorneys: Mike Stanley and Marc Slonim). This is one of the jointly managed ANILCA cases that have been stayed until October 1, 1999, the date that federal subsistence fisheries regulations will take effect unless the Alaska legislature places a subsistence amendment on the ballot.

A coalition of commercial salmon fishermen in the Yukon and Kuskokwim Rivers challenge the Area M (False Pass) fishery also addressed in the Elim state court case. Plaintiffs raise various constitutional and statutory grounds, including violation of the Magnuson Act and Title VIII of ANILCA, and seek to have the Secretary of Commerce or Interior take over management of commercial and subsistence fisheries in Area M and in the Y-K region. A coalition consisting of the Peninsula Marketing Association, Concerned Area M Fishermen, Aleutians East Borough, and various Area M Native groups have intervened. The state, federal defendants, and intervenors have filed motions to dismiss plaintiffs' second amended complaint. Judge Holland had the matter under advisement when the case was stayed.

6. *Kluti Kaah v. Alaska* (United States District Court No. A90-004-CV (HRH) (Judge Holland); our file no. 221-90-0433; state's attorneys: Joanne Grace and Henry Wilson;

plaintiff's attorneys: Heather Kendall of the Native American Rights Fund (NARF) and Mike Walleri of Tanana Chiefs' Conference (TCC); U.S.' attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases that have been stayed until October 1, 1999, the date that federal subsistence fisheries regulations will take effect unless the Alaska legislature places a subsistence amendment on the ballot.

Plaintiffs and intervenors initially challenged state and federal regulations governing subsistence hunting of caribou in the Copper River basin. Plaintiffs claimed, among other things, that the federal regulations impermissibly fail to cover caribou located on state lands. This case has been consolidated with Arctic Regional Council v. United States. Kluti-Kaah filed an amended complaint which does not include any claims against the state. The court granted an unopposed motion by the federal government to dismiss TCC's claims against it and the court dismissed all of the claims against the state following an unopposed motion by the state.

7. Arctic Regional Council v. United States (United States District Court No. A90-419-CV (HRH) (Judge Holland); our file no. 221-90-0433; (state not a party, but case is consolidated with Kluti Kaah v. Alaska -- Joanne Grace and Henry Wilson, state's attorneys)). This is one of the jointly managed ANILCA cases that have been stayed until October 1, 1999, the date that federal subsistence fisheries regulations will take effect unless the Alaska legislature places a subsistence amendment on the ballot.

Plaintiffs challenge several aspects of regulations adopted by the Federal Subsistence Board including the failure of federal regulations to extend to navigable waters and territorial seas.

8. State v. Harrison (United States District Court No. A94-464-CV (HRH) (Judge Holland); our file no. 221-95-0270; state's attorneys: John Baker and Robert Nauheim; U.S.' attorneys: Ann Juliano and Bruce Landon; private defendants' attorney: none). This action involves the state's assertion of a right-of-way for the Chickaloon River Road across the Native allotment owned by members of the Harrison family, who claim that the allotment constitutes sovereign Indian country. The Harrisons have relied on Chickaloon's inclusion on the 1993 BIA list of tribes to claim immunity from Alaska law, including charges of obstructing lawful public use of the Chickaloon River Road. The United States moved to dismiss the state's original complaint, initially arguing that the Quiet Title Act, 28 U.S.C. § 2409a, forbids any judicial inquiry into the validity of the state's right-of-way to the extent that "trust or restricted Indian land" is implicated. We amended our complaint to seek a title adjudication under 25 U.S.C. § 357, the federal condemnation statute. The United States moved to dismiss a number of cross-claims brought by the Harrisons against it alleging that the United States breached its trust obligation to the Harrisons as Natives by not defending the Harrisons' alleged ownership of the road.

In February 1997, Judge Holland dismissed the Harrisons' cross-claims against the United States and in May 1998, the court dismissed the Harrisons' counterclaims against the state. In October 1998, Judge Holland issued an order granting the state

partial summary judgment on the state's claim of title to the road. Still to be addressed is the extent, if any, to which the current alignment of the road deviates from the original right-of-way. On January 25, 1999, the court issued an order allowing the Harrisons' most recent attorney, Santiago Juarez, to withdraw due to a conflict. Judge Holland also stayed the case through March 23, 1999, and set a deadline of April 23, 1999, by which the state is to file a motion for summary judgment on the remaining issues, regardless of whether the Harrisons have obtained substitute counsel.

9. *Alaska v. United States* [Kandik/Nation and Black Rivers] (United States District Court No. A93-437-CV (JKS) (Judge Singleton); Ninth Cir. No. 94-36176; our file no. 221-97-0298; state's attorney: Joanne Grace; U.S.' attorney: Dean Dunsmore; Doyon's attorney: Nathan Bergerbest). The state filed suit in November 1993, to quiet title to the beds of three rivers in northeast Alaska. The United States previously had determined that all three rivers were navigable at statehood, but claims it is not bound by these navigability determinations.

The United States moved to dismiss the case, arguing that the district court did not have jurisdiction because Alaska could not show that the United States actively claimed an interest in the submerged lands. The court agreed with the state that the mere possibility that the United States might own the riverbeds constituted a cloud on the state's title sufficient to trigger the waiver of sovereign immunity in the Quiet Title Act and denied the United States' motion. The United States appealed. The Ninth Circuit held that the United States did not have a right to appeal until the decision before the district court is final.

The district court directed the United States to answer the state's complaint. After the United States answered the complaint, the state moved for judgment on the pleadings based on the United States' failure to admit or deny the state's factual allegations of navigability. The district court granted the state's motion, and entered final judgment. The United States appealed to the Ninth Circuit, again raising the jurisdictional argument, among others. The case has been briefed and argued, and the court has the matter under consideration.

10. *Confederated Tribes & Bands of the Yakama Indian Nation, et. al v. Malcolm Baldrige* (U.S. District Court for the District of Washington; state's attorneys: Mike Stanley and Myles Conway). This case has been resolved by a long term agreement in the Pacific Salmon Treaty. However, the court retains jurisdiction over the controversy. For details, see this report dated April 8, 1997.

11. *U.S. v. Washington* (U.S. District Court for the Western District of Washington; state's attorney: Myles Conway). In *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), Judge Boldt held that certain northwest Indian Tribes have a treaty fishing right to harvest 50 percent of the harvestable fish passing through recognized tribal fishing grounds. Under the continuing jurisdiction of

the federal court, the northwest tribes now seek a ruling that their treaty rights include salmon caught in southeast Alaska that would otherwise return to tribal fishing grounds.

In response to motions for summary judgment filed by the States of Alaska, Washington and Oregon, Judge Barbara Rothstein ruled that the tribes must first show changed circumstances under Fed. R. Civ. P. 60(b) before the court will revisit the treaty/non-treaty fish allocation created by District Court Judge Boldt in 1974. Only if the tribes can show a change in the equities since Judge Boldt's ruling will the court adjudicate whether portions of the southeast Alaska salmon catch should be included in the non-treaty share for purposes of the treaty/non-treaty allocation in the Pacific Northwest. Judge Rothstein reserved ruling on Alaska's legal arguments that the treaties cannot, as a matter of law, be interpreted to encompass the Alaska catch.

The parties conducted extensive discovery on the existence of changed circumstances in preparation for trial in 1997. Shortly before trial, the parties negotiated an Agreed Order to Stay the Proceedings, which Judge Rothstein signed. The Agreed Order originally stayed proceedings until December 14, 1998, to facilitate a new round of negotiations in the Pacific Salmon Treaty, which may provide a basis for settlement of this case. The stay has now been extended until December 14, 2000, and treaty negotiations continue.

12. *American Rivers, et al. v. Nat'l Marine Fisheries Service* (U.S. District Court, Portland, Oregon, case no. 96-384-MA; Ninth Cir. No. 97-36159, our file no. 221-96-0761; state's attorney: Henry Wilson). A coalition of environmental groups and commercial and sportfishing organizations challenged actions of the National Marine Fisheries Service, the United States Army Corps of Engineers, and the United States Bureau of Reclamation relating to the operation of the Federal Columbia River Power System (FCRPS) under the Endangered Species Act (ESA). Alaska was granted leave to participate as amicus curiae on the side of the plaintiffs. Alaska has an interest in the case because Columbia River salmon stocks, including threatened Snake River fall chinook, spend a portion of their lives in the marine waters off the coast of southeast Alaska, where they are incidentally harvested in commercial and sport fisheries. Hydropower operations that adversely affect Snake River salmon stocks adversely affect Alaska's interest in the use of salmon harvested in its waters as well.

Judge Marsh denied the plaintiffs' motions for summary judgment and entered final judgment in favor of the federal defendants. The plaintiffs appealed to the Ninth Circuit. Briefing is complete and oral argument was held in January 1999.

13. *State of Alaska v. United States* [PLO 82] (United States District Court, A87-450-CV (HRH); Ninth Circuit No. 98-80132; our file no. 221-98-0582; state's attorney: Joanne Grace; U.S.' attorney: Bruce Landon; Intervenor Arctic Slope Regional Corp. attorney: David Crosby). Following administrative proceedings, the state brought this action in 1987 to quiet title to the lands underlying inland navigable waters in an area withdrawn in 1943 by Public Land Order 82 (PLO 82). The U.S. Supreme Court

has held that title to submerged lands passes to new states at statehood as a matter of constitutional grace under the equal footing doctrine. At stake in this case is title to the lands underlying the navigable waters on 48 million acres. The United States maintains that the submerged lands within PLO 82 did not pass to the state because the area was reserved at statehood (the reservation was revoked in 1960). The state argues that the United States has not overcome the strong presumption against finding that Congress intended both to reserve the submerged lands and to defeat state title to them. Arctic Slope Regional Corporation intervened in the case because it claims an interest in the submerged lands as well.

On March 29, 1996, Judge Holland granted the state's motion for partial summary judgment, holding that the prestatehood withdrawal did not defeat the state's title to the submerged lands, which passed to the state under the equal footing doctrine. The United States has appealed the decision. Briefing has been completed, and oral argument was held on January 5, 1999.

14. *Seldovia v. CIRI, United States, and Alaska* (United States District Court No. A91-076 (Judge Singleton); our file no. 221-92-0067; state's attorney: Elizabeth Barry; Seldovia's attorney: R. Collin Middleton; CIRI's attorney: Mark Rindner; U.S.' attorney: Bruce Landon). Seldovia filed this suit seeking to overturn a portion of the 1976 Cook Inlet land exchange, known as the Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area (T & C). Seldovia seeks land it selected under § 12(b) of ANCSA that was promised to the state in the T&C. The Interior Board of Land Appeals denied Seldovia's appeal of a decision to issue conveyance to the state and the district court upheld that denial. The district court also ruled against Seldovia on most of its breach of trust claims against CIRI. Seldovia moved to file a fourth amended complaint to clarify its remaining claims which could affect state interests. Seldovia, CIRI, and the other Cook Inlet Region villages also filed new suits against the U.S. challenging a related but distinct aspect of the T & C. In December 1998, the parties agreed to a settlement in which Seldovia dismissed all of its claims with prejudice.

15. *Alaska v. United States and Bruce Babbitt*, [RS 2477] (U.S. District Court No. F97-0009-CV (Judge Singleton); our file no. 221-97-0574; state's attorneys: Myles Conway, Rob Nauheim and Laura Bottger; U.S.' attorney: Bruce Landon). On March 26, 1997, the state filed a quiet title action in federal court seeking to adjudicate an R.S. 2477 route on the Harrison Creek-Portage Creek Trail. The state has obtained entry of default against the mining claimants with claims located on the trail. The state is moving forward with discovery against the federal defendants and is preparing for trial.

16. *Hyak Mining Co. v. U.S.*, [RS 2477] (U.S. District Ct. No. A96-0478-CV (HRH); our file no. 221-97-0707; state's attorney: Elizabeth Barry; plaintiff's attorney: Mary Nordale; U.S.' attorney: Bruce Landon). Hyak Mining Co. sued the United States to quiet title to the Jualin Mine Road in Berner's Bay in southeast Alaska. The state is not

TESTIMONY ON HCR NO. 2

Joanne Grace, Assistant Attorney General

April 26, 1999

My name is Joanne Grace. I am an Assistant Attorney General in the Natural Resources Section in Anchorage. Thank you for the opportunity to testify on HCR No. 2.

Presumably the committee understands that the Governor will not follow the resolution's suggestion to file an original action in the United States Supreme Court challenging the constitutionality of title VIII of ANILCA. The Governor has consistently stated since he took office that he does not believe litigation is the answer to Alaska's subsistence dilemma. Even in the unlikely event he were to change his mind, such a case would face insurmountable jurisdictional problems such as res judicata and the running of the statute of limitations. If the Legislature wishes to pass the resolution anyway, it might want to reconsider some of the resolution's supporting language.

Scott v. Sanford

I strongly urge this committee to eliminate the resolution's reference to *Scott v. Sanford*, for two reasons. First, the case does not support the resolution, as I will explain

in a minute, but more importantly, the drafters of this resolution have chosen a most inappropriate case for the Legislature to cite for any reason, presumably unintentionally. *Scott v. Sanford* is better known as the "Dred Scott case," a pre-Civil War action brought by a slave for his freedom. The case is widely considered to mark one of the low points in Supreme Court history, because the Court held that a slave is not a "person" or a "citizen" under the Constitution, and that Congress did not have authority to abolish slavery. The case was overruled by the Thirteenth Amendment in 1865. Aside from the fact that the case has no application today, its premise that the plaintiff was property rather than a citizen and its language about the unfairness to slave owners both are highly offensive in today's world. Again, I know that the drafters did not intend any offense and will want to take out this reference.

In any event, the case does not support the resolution. In making the statement cited by the resolution, the Court was considering whether Congress had authority to enact "the Missouri compromise," which prohibited slavery in the territories. The plaintiff argued that Congress had authority under the Property Clause of the Constitution, which states that "Congress shall have power to dispose of and to make all needful rules and regulations respecting the territory and other property belonging to the United States." The Court disagreed, holding that the Property Clause only gives Congress authority to dispose of federal land and property, not property that belongs to

citizens, the property in question being slaves. It was in this context that the Court made the gratuitous statement cited in the resolution, that Congress could not use the Property Clause to destroy or impair the civil rights of the citizens of the United States, or to establish inequalities amongst those citizens by creating privileges in one class and disenfranchisement of other classes, meaning that Congress could not use the Property Clause to prohibit some citizens to own slaves while permitting others to do so.

Therefore, the "holding" of *Scott* that the resolution references, is simply that the Property Clause does not give Congress authority to dispose of the property of citizens. This may have been noteworthy in 1856, but in 1999 nothing could be more obvious. It adds nothing to the resolution to include this case, but certainly will be considered objectionable by many people because of its subject matter.

United States v. New York & Printz v. United States

The resolution quotes language from the *New York* and *Printz* cases without explanation of how they might relate to title VIII of ANILCA. Both cases hold that the federal government may not compel the states to implement federal law. At issue in *New York* were the provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required states either to enact legislation providing for the disposal of

radioactive waste generated within their borders, or to take title to, and possession of the waste--effectively requiring the states either to legislate pursuant to Congress's directions, or to implement an administrative solution. The Court concluded that Congress could not constitutionally require the states to do either. At the same time, the Court noted that it did not violate the Tenth Amendment for Congress to offer states the choice of regulating an activity according to federal standards or having state law pre-empted by federal regulation, and it cited title VIII of ANILCA as an example of such a law. Therefore, *New York* does not support the resolution's suggestion that title VIII is unconstitutional, but expressly finds it to be valid. *Printz* has a similar holding; in *Printz*, a county sheriff brought an action to declare the Brady Act unconstitutional as violative of the Tenth Amendment. The Supreme Court held that the Act's requirement that state officials conduct background checks on prospective handgun purchasers imposed an unconstitutional obligation on state officers to execute federal laws. The basis of both cases is that the federal government cannot compel states to implement federal law. The Department of Interior has not interpreted title VIII of ANILCA to require state implementation, however; it interprets title VIII to require federal implementation if state law does not grant the subsistence priority to rural residents. For this reason, the state does not have a Tenth Amendment claim.

United States v. Alaska

While the resolution is correct that the Supreme Court stated in *United States v. Alaska* that the Alaska Statehood Act expressly provides that the Submerged Lands Act applies to Alaska, that fact is self-evident. The fact that the Supreme Court took note of this is irrelevant to its application. The resolution would be clearer simply to state that the Alaska Statehood Act expressly incorporates the Submerged Lands Act. It is unclear, however, why the resolution links title to submerged lands to a constitutional challenge to title VIII of ANILCA. I am aware of no court precedent holding that the power to control fishing is an essential attribute of state sovereignty.

In summary, the cases the resolution cites do not support a constitutional challenge to title VIII of ANILCA. I particularly recommend that this committee eliminate the paragraph referring to the Dred Scott case, as I am sure the Legislature does not intend the offense that this citation will cause the public.

I am happy to answer any questions. Thank you.

HCR

4



ALASKANS FOR JUNEAU

Dedicated to Clean, Healthy Economic Diversity in the Capital City

March 27, 1999

The Honorable Scott Ogan, Chairman
House Resources Committee
Alaska State Legislature
Juneau, Alaska 99811

Dear Chairman Ogan,

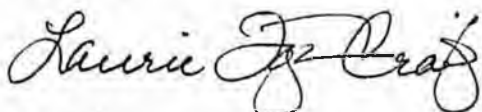
Thank you for your interest in the Alaska Supreme Court decision clarifying the legal opinion that phased permitting is unlawful. I am enclosing a copy of the decision, as you requested.

As you may recall, I mentioned this ruling in my testimony yesterday before the House Resources Committee considering HCR 4 on the Tulsequah Chief Mine. The court, in *Thane Neighborhood Association v. City and Borough of Juneau*, September 6, 1996, determined that permitting the Alaska-Juneau Gold Mine in a segmented manner was improper. The court concluded:

"The [City and Borough of Juneau Planning] Commission deferred approval of components of the mine which are interlinked with other components, creating an unacceptable danger that cumulative impacts would not be sufficiently analyzed.... If allowed to use such phasing in response to defects in mining applications, the Commission could grant approval to any permit application no matter how deficient it is, making the Juneau code virtually meaningless and Commission decisions effectively unreviewable."

My purpose in noting the court's decision in my testimony was to suggest that a cautious approach should be taken by the Legislature in supporting the Canadian mine and British Columbia's permitting process which in a similar situation in Alaska was found to be unlawful. I hope the attached opinion is helpful in determining that HCR 4 should not be passed.

Sincerely,



Laurie Ferguson Craig
Issues Coordinator

enclosure

Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0607, fax (907) 264-0878.

THE SUPREME COURT OF THE STATE OF ALASKA

THANE NEIGHBORHOOD ASSOCIATION,)	
ALASKANS FOR JUNEAU,)	Supreme Court No. S-6710
)	
Appellants,)	
)	Superior Court No.
v.)	1JU-93-1609 CI
)	
CITY AND BOROUGH OF JUNEAU,)	O P I N I O N
)	
Appellee,)	
)	[No. 4395 - September 6, 1996]
and)	
)	
ECHO BAY ALASKA, INC.,)	

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THE SUPREME COURT OF THE STATE OF ALASKA

THANE NEIGHBORHOOD ASSOCIATION,)
ALASKANS FOR JUNEAU,) Supreme Court No. S-G710
)
Appellants,)
) Superior Court No.
v.) 1JU-93-1609 CI
)
CITY AND BOROUGH OF JUNEAU,) O P I N I O N
)
Appellee,)
) [No. 4395 - September 6, 1996]
and)
)
ECHO BAY ALASKA, INC.,)
)
Intervenor-Appellee.)
_____)

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Michael A. Thompson, Judge.

Appearances: Eric Smith, Anchorage, for Appellants. John R. Corso, City & Borough Attorney, Juneau, for Appellee City & Borough of Juneau. James F. Clark, Terry L. Thurbon, Robertson, Monagle & Eastaugh, Juneau, for Intervenor-Appellee Echo Bay Alaska.

Before: Compton, Chief Justice, Rabinowitz, Matthews, Eastaugh, Justices, and Carpeneti, Justice, pro tem.

MATTHEWS, Justice. Echo Bay Alaska, Inc., applied to the City and Borough of Juneau in November 1990 for a large mine permit for the AJ Mine. The proposed mine is located four miles from downtown Juneau. The tailings that will result from the processed ore are to be pumped into a tailings pond created by constructing a dam in Sheep Creek Valley. The proposed dam will be 332 feet high and 750 feet long. If the mine goes into production 100 million tons of tailings are expected to be produced and pumped into the pond. The excess water from the tailings pond will be discharged into Gastineau Channel. The discharge from the tailings pond to the channel could be as great as 250 cubic feet per second. The City and Borough of Juneau Planning Commission

(Commission) approved the application in a notice of decision issued on May 14, 1993. The approval was subject to a set of conditions. The permit was to be issued after a financial warranty was paid and after Echo Bay agreed to the conditions and signed a mitigation agreement. Approval of the tailings dam and impoundment and the discharge of wastewater was withheld until additional information was provided.

Appellants, Thane Neighborhood Association (TNA) and Alaskans for Juneau (AFJ), appealed the Commission's decision to the City and Borough of Juneau Assembly (CBJ) on June 7, 1993. Echo Bay was granted permission to participate as a party. The CBJ heard oral argument on August 30, 1993, and issued a decision denying the appeal on September 22, 1993. TNA and AFJ then appealed to the superior court and Echo Bay was permitted to intervene. On October 26, 1994, the superior court affirmed the decision of the CBJ. In this appeal, the appellants argue that the "CBJ impermissibly used a 'phased' approach in approving" the permit and that the CBJ's finding that issuance of the permit complied with standards set forth in the CBJ mining ordinance is not supported by substantial evidence. In December 1995 CBJ and Echo Bay filed a supplemental brief, and TNA and AFJ filed a response addressing the issue of whether the "Planning Commission [could] assure future compliance with the substantive standards for mining operations . . . by imposing permit conditions requiring future performance rather than by demanding pre-application-approval demonstration of future ability to comply."

THE CODE

The review of large mine permits is governed by the Code of the City and Borough of Juneau (CC&BJ) 49.65 (1989). CC&BJ 49.65.110 provides in part: "It is the purpose of this article to foster the development of a safe, healthy and environmentally sound mining industry while protecting the overall interests of public health, safety and the general welfare and minimizing the environmental and surface effects of mining projects for which an exploration notice or mining permit is required."

The procedure for obtaining a large mine permit is governed by CC&BJ 49.65.130. CC&BJ 49.65.130(b) requires an application for a large mine permit to

be submitted in the form of a report containing sufficient information so that the department can, after reviewing the application, evaluate, in accordance with the standards of subsection 49.65.135(a), the impacts[(EN1)] described in this subsection that the mining operation may have on the city and borough. The application shall contain a map on a scale of 1:63,360 or a more detailed scale, a description of the mine site and affected surface; a description and timetable of the proposed mining operation, including all roads, buildings, processing and related facilities; a description and timetable of proposed reclamation of affected surface; a description of proposals for the sealing of open shafts, adits and tunnels upon the completion or temporary cessation of mining operations; a description of methods to be used to control, treat, transport and dispose of hazardous substances, sewage and solid waste; and a description of other potential environmental, health, safety and general

welfare impacts, as well as neighboring property impacts and measures to be taken to mitigate their adverse effects. The application shall also contain additional information normally prepared by the operator for its feasibility studies and mining plans, including information establishing the right to use the affected surface, labor force characteristics and timing, payroll projections, anticipated duration of the mining operation, construction schedules, infrastructure description, and other information reasonably requested by the department in the preapplication conference held pursuant to Section 49.15.330(b)

(Emphasis added.) Likewise, CC&BJ 49.15.130(b), which governs applications for land use permits in general, provides that "[a]n application is complete when it contains all of the information necessary to determine if the development will comply with all of the requirements of the permit applied for."

CC&BJ 49.65.130(f) requires the Community Development Department (Department) to conduct an application review, which shall include, but not be limited to, the following determinations: whether air and water quality will be maintained in accordance with federal, state, and city and borough laws, rules and regulations; where sewage, solid waste, hazardous and toxic materials will be properly contained and disposed of in accordance with federal, state, and city and borough laws, rules and regulations; the extent to which the operator will agree to mitigate adverse impacts on the city and borough; whether the mining operation will be conducted in such a way as to minimize safety hazards to the extent reasonably practicable and will mitigate adverse impacts on the public and on neighboring properties such as those from traffic overloading, noise, dust, unsightly visual aspects, surface subsidence, avalanches, landslides and erosion; and whether appropriate historic sites will be protected. [(EN2)]

CC&BJ 49.65.130(f) further provides:

The department shall form a recommendation as to whether the permit should be approved The department's recommendation may include such conditions or stipulations as the department deems to be reasonably necessary to mitigate any adverse environmental, health, safety, or general welfare impacts which may result from the proposed mining operation. . . . If the [planning] commission determines that the application, with stipulations or conditions [(EN3)] as appropriate, satisfies the standards of Sections 49.65.135 and 49.15.330, it shall approve the application

The primary requirements for a large mine permit are contained in CC&BJ 49.65.135 (1989), which states:

STANDARDS FOR ISSUANCE OF PERMITS AND CONDUCT OF OPERATIONS. (a) In determining whether to recommend issuance of a permit, the [community development] department shall require that:

(1) The mining operations be conducted in accordance with this article, Section 49.15.330, [(EN4)] and any other applicable provisions of the city and borough code in such a way as to mitigate adverse environmental, health, safety and general welfare impacts;

(2) Air and water quality be maintained in accordance with federal, state, and city and borough laws, rules and regulations;

(3) Hazardous and toxic materials, sewage, and solid waste be properly contained and disposed of in accordance with applicable federal, state, and city and borough laws, rules and regulations;

(4) The operator conduct all mining operations according to the standards of the city and borough as contained in this article, Section 49.15.330, the permit, and any other applicable provisions of the city and borough code, so as to minimize to the extent reasonably practicable safety hazards and to control and mitigate adverse impacts on the public and neighboring properties, such as from traffic overloading, noise, dust, unsightly visual aspects, surface subsidence, avalanches, landslides and erosion;

(5) Appropriate historic sites designated as significant by the city and borough be protected;

(6) Reclamation of the affected surface be in accordance with the approved reclamation plan of the operator; and

(7) With respect to a large mine permit application, the operator negotiate and enter into a mitigation agreement with the city and borough

(b) Reclamation of all affected surfaces shall be completed as soon as is reasonable after affected surface areas are no longer being used in exploration and mining operations. Reclamation shall include the following: cleanup and disposal of dangerous, hazardous or toxic materials; regrading of steep slopes of unconsolidated material to create a stable slope; backfilling underground shafts and tunnels to the extent appropriate; adequate pillaring or other support to prevent subsidence or sloughing; plugging, or sealing of abandoned shafts, tunnels, adits or other openings; adequate steps to control or avoid soil erosion or wind erosion; control of water runoff; revegetation of tailings and affected

surface areas with plant materials that are capable of self-regeneration without continued dependence on irrigation and equipment where appropriate; rehabilitation of fisheries and wildlife habitat; and any other conditions imposed by the commission. Subsequent to the issuance of a permit or the grant of authority under an exploration notice, the operator's compliance shall be measured against the requirements contained in that permit or the conditions of the exploration notice and the operator's plans submitted with the permit application or the notice.

THE LARGE MINE PERMIT

After making its determination, the Commission issued a notice of decision, granting approval for the application for a large mine permit subject to a set of conditions. The notice of decision lists the six requirements that are applicable to all conditional use permits as set forth at CC&BJ 49.15.330 and the twenty-one requirements set forth in the mining ordinance (CC&BJ 49.65.100-195), and states its findings for each of these requirements.

TNA and AFJ argue that the findings and conditions in the notice of decision evidence a lack of compliance with the code. They argue that the CBJ used a "'phased' approach in approving the large mine permit." They point to three ways in which they believe the CBJ engaged in phasing. First, the Commission withheld approval of the dam, the tailings pond and marine water discharges until further information was provided, yet granted the permit for the remainder of the project. Second, the Commission approved the permit, yet required Echo Bay to provide further information on certain matters. Third, the Commission imposed as a condition that Echo Bay obtain necessary permits from other agencies.

Echo Bay and CBJ argue that this phasing is consistent with the code. CBJ argues "[t]he purpose of the mining ordinance and the Commission is to grant permits, not to deny them." CBJ and Echo Bay argue that "the CBJ mining ordinance does not vest the commission with discretion to disapprove a large mine permit application when the standards for permit issuance have been met," relying on CC&BJ 49.65.130(f), which states that "if the commission determines that the application, with stipulations or conditions as appropriate, satisfies the standards of Sections 49.65.135 and 49.15.330, it shall approve the application." (Emphasis added.)

CBJ and Echo Bay also contend that the mining ordinance can be satisfied by including permit conditions which incorporate the requirements of the ordinance -- it is not necessary to determine in advance whether the plans submitted in the permit application will satisfy those requirements. CBJ argues that the purpose of the ordinance "is to mandate compliance not predict it."

DISCUSSION

This court must determine to what extent the City and Borough of Juneau's code allows phasing when evaluating large mine permit applications. This is a question of statutory interpretation which does not involve agency expertise. Thus, this court will use its independent judgment. See *Marlow v. Municipality of Anchorage*, 389 P.2d 599, 602 n.1 (Alaska 1995) (reviewing zoning commission's and board's constructions of zoning ordinance under independent judgment standard, as issues presented were "pure questions of statutory construction which d[id] not involve agency expertise").

A. Did the Commission Err by Granting a Large Mine Permit Which Excluded the Tailings Dam and Impoundment and Wastewater Discharge?

In this case, CC&BJ 49.65.135(a)(2) requires that "water quality be maintained in accordance with federal, state, and city and borough laws, rules and regulations." In its findings concerning the AJ Mine, the Commission stated that it could not "conclusively determine at this time with current information that the proposed treatment system will maintain water quality in accordance with federal, state and local laws, rules and regulations." The Commission further found that "[t]he available data shows that the federal limit for total suspended solids (TSS) will not be met by the marine water discharge." CC&BJ 49.65.135(a)(4) provides that a mine operator must "conduct all mining operations . . . so as to minimize to the extent reasonably practicable safety hazards." The staff had various concerns about the safety of the AJ Mine's proposed tailings dam.

The Commission responded to these problems by withholding approval of the tailings dam and impoundment and the marine wastewater discharge components of the project. The Commission decided that it would determine whether to approve the tailings dam and impoundment and the marine wastewater discharge after the receipt of further information.

While the Juneau code does have provisions allowing the Commission to put conditions on a permit, see CC&BJ 49.15.330(g), 49.65.130(f), there is nothing in the code to support granting the permit for a project as a whole, while excepting one part of a project. Past decisions of this court make clear that phasing a project by permitting it in stages is disfavored.

Three of our recent cases provide considerable guidance as to what sorts of permit approval "phasing" techniques are appropriate and what kinds are not: Trustees for Alaska v. Gorsuch, 835 P.2d 1239 (Alaska 1992); Trustees for Alaska v. State, Department of Natural Resources, 851 P.2d 1340 (Alaska 1993); and Kuitsarak Corp. v. Swope, 870 P.2d 387 (Alaska 1994). In Gorsuch, we held that in granting mining permits, "[Department of Natural Resources (DNR)] may not ignore cumulative effects of mining and related support facilities . . . by permitting facilities separately." 835 P.2d at 1246. We ruled that when DNR reviews a mining permit application, it must "consider the probable cumulative impact of all anticipated activities which will be a part of a 'surface coal mining operation,' whether or not the activities are part of the permit under review." Id. "If DNR determines that the cumulative impact is problematic," we stated, "the problems must be resolved before the initial permit is approved." Id.

We explained that "[t]his type of 'concept approval' is necessary to avoid a situation where, because of industry investment and reliance upon a past mining permit approval, DNR might feel compelled to approve a subsequent permit for a related but environmentally unsound facility." Id. at 1246 n.6. We added that "[i]n some cases, this may require concurrent, as opposed to serial, review of separate, related permit applications," while "[i]n other cases, anticipated problems resulting from cumulative impacts may require that approval of an initial permit be conditioned upon satisfactory resolution of the problems anticipated in subsequent permits." Id.

This court split in Gorsuch on whether an access/haul road for the mining operation could be permitted under a separate mining permit. The majority determined that a specific regulation

implied that separate permitting was allowed and that cumulative impacts could be adequately considered under separate permitting in that instance. *Id.* at 1245-46. Justice Rabinowitz, joined by Justice Matthews, dissented, arguing that the applicable regulations prohibited separate permitting, and that a single permit was necessary to ensure that the cumulative effects of the mining operation would be adequately considered. *Id.* at 1250-51.

Justice Rabinowitz contended that "[c]ourts have disallowed segmentation of a proposed project . . . to assure that the cumulative effects of the project are adequately considered" *Id.* at 1251. Justice Rabinowitz cited *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985), for the proposition that "allowing consideration of cumulative impacts after a portion of [a] project is already approved" swings the balance in favor of project approval even if the project would have been disapproved had all components of the project been considered in the initial permit application. *Gorsuch*, 835 P.2d at 1251.

In *Trustees for Alaska v. State, Department of Natural Resources*, 851 P.2d 1340, 1341 (Alaska 1993) (Camden Bay II), DNR's approval of a sale of oil and gas leases was challenged. A regulation required DNR to identify known geophysical hazard areas, and prohibited approval of development in such areas until measures to minimize geophysical hazards were provided. *Id.* at 1343. DNR identified the entire sale area as a geophysical hazard area. *Id.* DNR intended to consider particular geophysical hazards on a lease-site-by-lease-site basis, requiring lessees to submit plans to mitigate potential geophysical hazards before approval to develop a specific lease site would be given. *Id.* at 1343-44 & n.7.

We disapproved DNR's approach. We held that DNR was required to identify known or substantially possible hazard areas before approving the lease sale as a whole. *Id.* at 1344-45. We explained that "deferring a careful and detailed look at particularized geophysical hazards to later stages of the development process . . . entails certain practical risks." *Id.* at 1344. Such deferral "may tend to mask appreciation of any cumulative environmental threat that would otherwise be apparent if DNR began with a detailed and comprehensive identification of [the] hazards." *Id.* We again noted that "the more segmented an assessment of environmental hazards [is], the greater the risk that prior permits will compel DNR to approve later, environmentally unsound permits." *Id.*

Another regulation at issue in Camden Bay II required DNR to identify important historic sites. *Id.* at 1345. DNR purportedly attempted to comply with this regulation by requiring the lessees to report on such sites and to try to preserve such sites, arguing that the regulation did not state when historic sites had to be identified. *Id.* at 1345 & n.9. We held that DNR had not complied with the regulation, and that DNR was required to identify known historic sites before approving the initial sale. *Id.* at 1346. We explained that evaluation of historic sites on a lease-site-by-lease-site basis ran "the risk of undervaluing the cumulative cultural significance of the region as a whole," and that the lessees would have an incentive to underreport historic sites. *Id.* We added that our holding that the regulation at issue required identification of historic sites before approval of the initial sale did "not mean that more intensive duties are not required by this regulation at later stages of development." *Id.*

We also ruled in Camden Bay II, however, that DNR did not have to examine transportation routes and utility sites before approving the initial sale because "[u]ntil exploration is proposed and, in all likelihood, until and unless a commercially exploitable

'discovery is made, there will be no occasion for siting, designing or constructing transportation and utility routes." *Id.* We further decided that DNR was not required "to evaluate the effectiveness of [environmental harm mitigation] measures before even receiving detailed development proposals," since DNR would not be able to assess "detailed mitigation measures even before knowing which activities it needs to mitigate." *Id.* at 1347.

In *Kuitsarak Corp. v. Swope*, 870 P.2d 387 (Alaska 1994), DNR approved offshore prospecting permits in a region without conducting an in-depth analysis of the effects of mining in the region. *Id.* at 391 n.13, 394 & n.21. DNR contended that it lacked sufficient information to conduct such an analysis and that it would be easier to do the analysis when specific mining activities were performed. *Id.* at 391 n.13, 394 n.21. We rejected this procedure. We found that DNR had not adequately considered the potential and cumulative impacts of mining in the region. *Id.* at 395-96.

We noted that DNR's argument that it was difficult to obtain the information necessary to perform a proper evaluation of the impacts of mining in the region was undermined by evidence of federal studies similar to the studies which DNR needed to do. *Id.* at 396. We stated that "[o]nce the initial impact of mining on the region has been assessed, any unforeseen occurrences or conditions that are revealed during exploration can be dealt with by DNR through use of stipulations and conditions imposed on mining." *Id.* (emphasis added). We disapproved of DNR's use of conditions to require the development of plans to minimize potential dangers as a substitute for a complete analysis of the potential dangers. See *id.* at 396 n.27.

We can draw three general, guiding principles concerning when and in what manner "phasing" or "segmentation" is permissible from *Gorsuch*, *Camden Bay II*, and *Kuitsarak*. First, unless a specific statute or regulation allows phasing, phasing is disfavored. Compare *Gorsuch*, 835 P.2d at 1245-46 (regulation interpreted as permitting phasing) with *Gorsuch*, 835 P.2d at 1250-51 (Rabinowitz, J., dissenting) (regulation interpreted as prohibiting phasing). Where a statute is silent or ambiguous, phasing should generally not be allowed. See *Camden Bay II*, 851 P.2d at 1345-46 (regulation silent on when historic sites must be identified, but best interpreted as requiring identification of known sites at initial permitting stage).

Second, phasing is prohibited if it can result in disregard of the cumulative potential environmental impacts of a project. See *Kuitsarak*, 870 P.2d at 396 n.30; *Camden Bay II*, 851 P.2d at 1344, 1346; *Gorsuch*, 835 P.2d at 1246. The more interlinked the components of a project are and the greater the danger that phasing will lead to insufficient consideration of cumulative impacts, the greater the need to bar phasing. Compare *Gorsuch*, 835 P.2d at 1245-46 (separate permitting permissible so long as DNR determines that cumulative impacts will not be problematic) with *Gorsuch*, 835 P.2d at 1250-51 (Rabinowitz, J., dissenting) (unified permitting process necessary to ensure adequate consideration of cumulative effects).

Third, conditions and stipulations may be used to address unforeseen occurrences or unforeseen situations that may arise during exploration or development, but permit conditions may not serve as a substitute for an initial pre-permitting analysis that can be conducted with reasonably obtainable information. See *Kuitsarak*, 870 P.2d at 395-96 & n.27 (approving possible use of conditions to deal with unforeseen events but disapproving use of conditions as substitute for feasible, complete analysis).

Thus, phasing through the use of conditions is prohibited where it is feasible to obtain the information necessary to determine whether environmental standards will be satisfied before granting an initial permit, but allowed where it is impractical or impossible to create detailed development plans without conducting additional physical exploration. See Camden Bay II, 851 P.2d at 1343-47 (geophysical hazards and historic sites can be investigated during initial permitting stage but transportation routes and mitigation measures cannot be analyzed without further exploration and planning).

Based on these principles the Commission should not have granted the AJ Mine permit while excepting major portions of the project. The tailings dam and impoundment and the marine wastewater discharge system are integral components of the mining project; they are significantly interlinked to other parts of the project. If extensive redesigns to these components become necessary, the mining project could have a significantly greater environmental impact. Phasing the approval of those components could therefore cause the cumulative impacts of the mining project to be inadequately considered.

After the Commission granted Echo Bay the large mine permit for the project as a whole, the United States Environmental Protection Agency (EPA) disapproved the proposal for the dam at Sheep Creek, and Echo Bay abandoned the plan to build the dam there. The EPA's action will undoubtedly force major redesigns in the mine project. This sequence of events illustrates the dangers of CBJ's improper use of phasing -- the initial approval for most components of the AJ Mine may cause CBJ to fail to take into account the cumulative impacts of the redesigns made necessary by the change in the location of the tailings dam.

For these reasons we conclude that the Commission erred in granting permit approval of the project while deferring consideration of important portions of the project.

B. Did the Commission Err by Granting the Permit, Yet Imposing as a Condition that Echo Bay Provide Further Information?

As noted, the Commission found that it could "not conclusively determine at this time with current information that the proposed treatment system will maintain water quality in accordance with federal, state and local laws, rules and regulations." In addition, the Commission found that "[t]he available data shows that the federal limit for total suspended solids (TSS) will not be met by the marine water discharge." In addition to withholding approval of a portion of the project, the second way the Commission responded to this problem was to place conditions into the permit requiring the project "to comply with federal and state water quality standards." The Commission should not have granted the AJ mine permit without knowing whether the plan that was submitted to it would satisfy water quality standards.

The ordinance requires that an application contain enough information for the Department and the Commission to make determinations as to impacts and compliance. First, CC&BJ 49.65.130(f) requires the Department to conduct an application review, form a recommendation and provide the recommendation to the Commission. CC&BJ 49.65.130(b) provides that the application must contain "sufficient information so that the Department can, after reviewing the application, evaluate, in accordance with the standards of subsection 49.65.135(a), the impacts described in this subsection that the mining operation may have on the city and borough." That subsection includes "a description of other potential environmen-

tal, health, safety and general welfare impacts." Subsection 49.65.135(a)(2) provides that "[a]ir and water quality be maintained in accordance with federal, state, and city and borough laws, rules and regulations." Second, after the Department provides the recommendation, the Commission must determine whether the "application, with stipulations or conditions as appropriate satisfies the standards of Sections 49.65.135 and 49.15.330." CC&BJ 49.65.130(f). CC&BJ 49.65.330(e)(1)(B) in turn provides that the Commission shall determine whether the application is complete. CC&BJ 49.15.130(b) provides that "[a]n application is complete when it contains all of the information necessary to determine if the development will comply with all of the requirements of the permit applied for." Thus the ordinance requires that (1) the application contain sufficient information for the Department to determine the environmental impacts of the mining operation; and (2) the Commission determine whether the application contains the information necessary to determine whether it will comply with water quality rules and regulations. The Commission's statement that it did not have enough information to determine whether the system would adhere to water quality standards makes it clear that the application failed to meet either of these requirements. Without this information, the Department lacked sufficient information to determine the environmental impacts of the project. In addition, without this information the Commission could not have determined that the application was complete.

This interpretation of the code is further supported by *Kuitsarak*, 870 P.2d at 394-96. In *Kuitsarak*, DNR did not gather necessary information regarding environmental impacts before granting an offshore prospecting permit. *Id.* Similarly, in this case, further information on water quality was necessary before the Commission could grant the mining permit, or even consider the application complete. (EN5)

CONCLUSION

The Juneau Planning Commission engaged in impermissible phasing in its approval of the AJ Mine permit. The Commission deferred approval of components of the mine which are interlinked with other components, creating an unacceptable danger that cumulative impacts would not be sufficiently analyzed. The Commission utilized conditions as a substitute for evaluations that could have been conducted with feasibly obtainable information.

The Commission reacted by placing conditions on the permits and deferring approval of mine components when it was faced with data that the proposed mine projects would not comply with Juneau code requirements or when it did not have sufficient information to determine whether the requirements would be met. If allowed to use such phasing in response to defects in mining applications, the Commission could grant approval to any permit application no matter how deficient it is, making the Juneau code virtually meaningless and Commission decisions effectively unreviewable.

For these reasons, we REVERSE the decision of the superior court and REMAND this case to the court with directions to vacate the decisions of the Juneau Assembly and of the Commission granting the mine permits, and to REMAND to the Commission for further proceedings in accordance with this opinion. (EN6)

ENDNOTES:

1. CC&BJ 49.80.120 defines "impact" as used in CC&BJ 49.65 as

"the reasonably foreseeable effects or consequences of a mining operation."

2. These required determinations track the "standards for issuance of permits and conduct of operations" put forth in CC&BJ 49.65.135.

3. CC&BJ 49.15.330(g) allows the Commission to place seventeen kinds of enumerated conditions, as well as "other conditions as may be reasonably necessary," on a conditional use permit.

4. CC&BJ 49.15.330 contains the general standards for obtaining a conditional use permit in Juneau.

5. AFJ and TNA argue that "an applicant simply cannot demonstrate compliance with all applicable requirements unless it first has obtained the necessary permits from other agencies." The code does not necessarily require this level of demonstration of compliance, but at the very least, the application must contain the "information necessary to determine" whether the project will comply. CC&BJ 49.15.130(b)

6. The issues regarding the existence or lack of substantial evidence to support various CBJ findings are mooted by our decision.



ALASKANS FOR JUNEAU

Dedicated to Clean, Healthy Economic Diversity in the Capital City

March 26, 1999

Comments on SCR 7 and HCR 4 Resolutions Regarding Tulsequah Chief Mine, Canada

Alaskans for Juneau, a citizens group formed in 1989, supports International Joint Commission review of the proposed Tulsequah Chief Mine. The mine project with its planned road through the Taku River watershed could have detrimental effects on American and Alaskan resources, particularly fish and water quality. IJC review provides important scrutiny of the international issues raised by our state and federal governments.

We do not support the proposed resolutions to develop the mine without the diligent review necessary to fully evaluate its impacts on the valuable resources shared with our Canadian neighbors. Complete analysis of the mine's impacts must be presented prior to construction of the mine road or any project facilities.

It is clear from the British Columbia government's decision to proceed with issuing a special use permit for mine road construction over the objections of Governor Knowles that Alaskans' concerns are not being given full consideration. The State of Alaska is recommending IJC evaluation to protect transboundary salmon, fisheries, and wildlife. Potential adverse impacts to the lands and people of the Taku River Tlingit First Nation are also being ignored by promoting development of the Tulsequah Chief Mine.

It is untimely and unwise for Alaskans to support a mine project with potentially harmful effects on salmon at a time when Pacific Northwest citizens are facing restrictions on their activities to protect newly listed endangered species of salmon. Residents and businesses throughout our region need to promote healthy salmon habitat and maintain good water quality to ensure the continuing survival of wild salmon.

IJC referral will encourage careful development of the common resources shared by Americans and Canadians.

Submitted by Laurie Ferguson Craig, Issues Coordinator, Alaskans for Juneau. Contact 907.789.2768

Alaska State Legislature

Please enter into the record my testimony to the House & Senate Resource
 committee on HCR #4 + SCR #7 (committee name), dated 3/19 & 3/18/99
 bill/subject:

We've plenty of paved industry lobbyists without
having our elected officials taking on that task.

An 80 mile road is too much watershed to effect.
you're not going to keep people off that road once it's
built. So you're changing that watershed in a big
way not just hunters & trappers but other mines.
That road will have to be maintained long after the
Tulsequah Mine is worked out and used up.

The dirth of answers to my questions about this
development leads me to support the governor's
request for referral to International Joint Commission.

No! to HCR #4 and SCR #7

Signed:

Michael Sellers

Testifier:

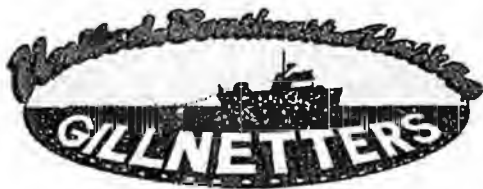
Phone: 247-7603

Representing (Optional)

PO Box 7603 KETCHIKAN, AK. 99901

Address

Fax transmitted from Ketchikan Legislative Information Office
 Phone: 225-9675 Fax: 225-8546



United Southeast Alaska Gillnetters
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(907) 586-5860 Fax (907) 780-6621
E-mail: usag@alaska.net

March 25, 1999

Representative Scott, Ogan, Co-Chair
House Resource Committee
Alaska State Legislature
Juneau, AK 99811

Dear Representative Ogan and Committee Members,

The United Southeast Alaska Gillnetters Association (USAG) is writing to express concern and opposition to HCR 4 and SCR 7, resolutions regarding the Tulsequah Chief Mine. USAG is an organization of approximately 200 members and 35 associated businesses representing Southeast Alaska fishery. Of 485 permits in the Southeast Alaska gillnet fishery, 72.5% are Alaskan residents.

USAG is not opposed to expansion or development of new industries or other resource uses as long as it is conducted in a manner that protects the interests of those currently dependent on present resources quality and quantity. We have worked with Coeur Alaska in what we believe is a positive working relationship in the development of the Kensington Mine located in Lynn Canal. We are currently working with them as they go through the process of amending their permits for the changes they wish to make to their project following the optimization study performed over the last year. We have attached to our testimony today the Water Quality and Habitat Resolution USAG passed on 11/22/97 by our membership. (Attachment #1)

The Taku gillnet fishery supports approximately 100 boats at the peak of the sockeye run. The gillnet fishery harvests sockeyes, chums, cohos, pinks and kings within the district 11 Taku fishery. The troll fishery in Southeast Alaska also harvests an average catch of 57,400 coho per year. According to information from CFMD in the past 5 years this has provided an ex-vessel value of salmon in the range of \$3.5 to \$5.3 million. The sports fishery in Juneau significantly benefits from the salmon resources of the Taku watershed, in particular from the coho and chinook salmon stocks.

Salmon is of economic, cultural, social and recreational importance on both sides of the border. The Taku watershed is located within the traditional

territory of the Taku River Tlingit First Nation. This area is important for the harvesting of subsistence needs both fish and game. Canada also has a small commercial fleet that significantly utilizes the salmon resources of the Taku. As part of the Pacific Salmon Treaty, Canada and US have been participating in joint transboundary sockeye projects for the benefit of both countries. The success of these transboundary projects has been a bright spot over the past several years when treaty negotiations have not been successful.

While the sockeye salmon is very important to the gillnet fleet, the coho salmon which benefits the sports, charter, troll and gillnet fleet is very important to Southeast Alaska. Cohos have been of particular concern during this process as the largest stock of coho spawns immediately below the project location in the Flannigan Slough. Besides being spawning habitat, this is an area of critical rearing and staging area for juvenile salmon from throughout the watershed. The potential short and long-term impacts to this area have not been thoroughly analyzed.

The mine-tailings site will be located with a low-lying slough within an area subject to periodic flooding. Since the Tulsequah Chief mine is a highly acidic mine, the possible of leaching of acid and heavy metals into the Taku watershed is highly probable. Tailings pond seepage is expected to exceed the guideline for protection of aquatic life with regards to copper and zinc. Mine discharge should be treated prior to placement within the tailings pond. The seepage discharge from the tailings pond will be across several hundred meters of wetland shoreline, and it is anticipated that the metals will precipitate out as sulfides and the dissolved metals will be diluted by water moving through the wetlands. Monitoring is proposed downstream of this site, but it would be difficult to remediate the problem once the tailing pond was in operation.

The proposed road option presented in November of 1997 would have a road being built across 126 streams and tributaries of the Taku. We are concerned about the habitat disturbance in both the short and long term. Generally a road of this length and profile does not end up being decommissioned at the end of a project. USAG has concerns about the amount of spawning and rearing habitat that could be forever harmed.

We have enclosed the attachment to a letter sent to Mr. John Higginbotham at the Embassy of Canada dated August 28, 1998 that lists the outstanding concerns of Alaska on the Tulsequah Chief Mine Project. (Attachment #2)

The State of Alaska is not the only entity that is questioning the process that has been used to issue the mine certificate. The Taku River Tlingit First Nation was also invited to be at the table during the 3-1/2 year review and



United Southeast Alaska Gillnetters
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Resolution
Water Quality & Habitat

Whereas commercial fishing in Alaska is critically dependent on maintaining water quality and healthy fish rearing habitat from both a biological basis and a market perception basis United Southeast Alaska Gillnetters Association will:

1. Participate in the development of government (national, state and local) policy actions that involve setting standards for water quality and habitat usage. The goal should be to maintain our current pristine water conditions and our viable and healthy fish rearing habitat.
2. Participate in public hearings for resource extraction projects or industrial development projects and insist that such projects be carried out according to standards that will insure and maintain present water quality and fish rearing habitat.
3. Strive to make it clear that fishermen are not opposed to economic development. Expansion or development of new industries can be good for everyone if it is conducted in a manner that protects the interests of those currently dependent on present resource quality and quantity. (In simple terms, creating new jobs is a good thing only if it doesn't come at the expense of current jobs!)

Adopted 11/22/97
Annual Membership Meeting

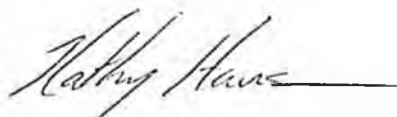
participated in the review during the whole time period. The Taku River Tlingit First Nation has filed suit in the Supreme Court of British Columbia on Feb. 11 (No. A990300 of the Vancouver Registry) in order to voice their concern about the project.

USAG feels that it was very appropriate for the Governor to request an International Joint Commission (IJC) review of this mine proposal. We feel that it is possible to have the Tulsequah Chief Mine be operational in a safe manner that would protect the water quality and fish resources of the Taku Watershed. It is very possible that most of the Alaskan concerns will be met during the remainder of the permitting process but for us to feel that there is not a major risk that cannot be overcome we need some of the details of the project that have not been planned out to date. Therefore to determine the quantity of risk to Alaska it is most appropriate to have an IJC review that will address the differences between the permitting processes and whether this project will have an impact on the habitat necessary for salmon and the water quality aspects of this project.

An IJC review prevents and resolves disputes between the US and Canada under the 1909 Boundary Waters Treaty and pursues the common good of both countries as an independent and objective adviser to the two governments. (Mission Statement of the International Joint Commission) The IJC recommendations are non-binding unless requested by the two Governments for a binding decision. As of September 1998 this provision has not been used even though the IJC review process itself has been used on a variety of issues mostly on the East Coast and around the Great Lakes area. (Attachment 3 is the Mission Statement and Guiding Principles of the IJC.)

We hope that you will consider the importance of the Alaskan Commercial fishing industry as you deliberate on this issue and will agree that an IJC review would be in the best interests of the state.

Sincerely,



Kathy Hansen
Executive Director

Attachment #2

Outstanding U.S. Concerns on the Tuloquah Mine Project**1. Unresolved mine site design issues including long-term site maintenance**

- The placement of a large tailings pond for mine waste on an active flood plain, without either designing it as a permanent facility or securing an adequate data base to estimate the size and frequency of future flood and mass movement events.
 - The short time period for collection of the data from Shazah Creek used to extrapolate a 200-year flood limits confidence in the flood prediction.
 - Evaluation of the erosion potential of the Shazah Creek flood flow may be too limited in scope, given that the valley fill is described as an alluvial fan or flood plain. Additional detail is needed on the age of the fan and all potential sources of debris and erosion.
 - The stability of the launching apron (of the riprap berm/toc) relied on for dam stability during flood events is not clear, as the scour is anticipated to extend beneath the apron.
 - Given the need for perpetual maintenance if the tailings impoundment is located in the floodplain, U.S. agencies believe a feasibility study of long-term access for large equipment that addresses logistical considerations as well as cost is needed. This is particularly important as air transport would be the method to bring in necessary equipment to maintain the impoundment, and it remains unclear whether this is feasible given the limited runway and the fact the airstrip would be in the floodplain as well.
- In sum, U.S. federal agencies and the State of Alaska believe the option of a tailings disposal site at Paddy's Flat appears to have been prematurely eliminated from consideration, given that it appears to be a more environmentally sound option.

- 2 -

2. Long-term cumulative environmental impacts

- Construction of the proposed mine access road is likely to contribute to the development of additional mines in the area, which could dramatically increase environmental risks to the Taku River watershed. Canada's responses to date do not provide adequate information and assurances that water pollution in the Taku River watershed will be prevented or minimized over the long-term. We believe the possibilities of further development need to be addressed before irrevocable changes are approved in the watershed.

3. Water Quality

- Alaska has strict regulatory requirements that must be met before a mixing zone can be granted in Alaskan waters. British Columbia has agreed to address these requirements, but only during the permitting stage. Such a delay leaves other site locations and alternatives off the table for discussion, as the location of major project features will have already been approved by the time an assessment is made.
- Specific concerns about the mixing area relate to the fate of contaminants, principally metals; the concentration of contaminants and chronic toxicity at low flows; and unproven use of a diffuser in a volatile, glacial fed river. In addition, information is needed about the timing of seasonal flows and dilution factors of mine waste in the river in relation to the movement and spawning of fish, given that some life stages have very limited mobility or range and may not move from the mixing zone.
- Absence of discussion in project documents of the impact of untreated water discharge on the river until treatment begins in late 1999, as well as indication of who will be responsible and what the threshold will be for moving the effluent discharge pipe to account for changes in water flow.
- Long-term enforcement of water quality requirements. Past mining activities in the area that are causing water quality problems, including chronic ARD discharge from the current mine site since the 1950s, have yet to be corrected, whereas project documents indicate that

- 3 -

there are no known transboundary water quality or fisheries effects from any mine project in the area. Chronic toxicity at this location is an unknown. It will be influenced by factors such as the long-term exposure to mixtures of metals which may be additive in nature; bioavailability of these metals; bioaccumulation of some metals; physiological effects on reproduction and growth; and effects through dietary routes of exposure. Moreover, there are potential pH issues in the receiving creek waters and at the creek's confluence with the inlet. Although the inlet may have a great enough dilution and mixing to eliminate pH problems, it might be a different story in the freshwater receiving stream.

4. Fisheries

- Potential negative effects on important transboundary fisheries resources. While the proposed risk assessment appears to respond to a number of U.S. concerns, we believe acceptable risks should be identified, and potential impacts fully evaluated, before project certification.
- The potential effects of turbidity, as well as the deposition of fine particulate matter on the stream bottom. This depositional material fills interstitial spaces necessary for quality spawning habitat and productive invertebrate habitat. In addition, fine particulate matter associated with metals-rich tailings may be directly toxic to the invertebrate stream community through their exposure to the whole sediments as well as the interstitial water (pore waters) associated with those depositional sediments.

Attachment #3

IV

MISSION STATEMENT & GUIDING PRINCIPLES

MISSION STATEMENT

The International Joint Commission prevents and resolves disputes between the United States of America and Canada under the 1909 Boundary Waters Treaty and pursues the common good of both countries as an independent and objective adviser to the two governments.

In particular, the Commission rules upon applications for approval of projects affecting boundary or transboundary waters and may regulate the operation of these projects; it assists the two countries in the protection of the transboundary environment, including the implementation of the Great Lakes Water Quality Agreement and the improvement of transboundary air quality; and it alerts the governments to emerging issues along the boundary that may give rise to bilateral disputes.

GUIDING PRINCIPLES

1. The Commission gives full effect to the spirit and purpose of its mandate as expressed in relevant agreements and references.
2. As a binational institution, the Commission maintains strict impartiality in the performance of its duties.
3. Commissioners represent only the Commission and not the government that has appointed them. Advisers and staff members serve only the Commission and not their respective governments. Members of the Commission's boards or similar bodies serve on such bodies in their personal and professional capacity and not as representatives of the agencies or organizations that employ them.
4. While the Commission comprises two sections and maintains offices in Washington, Ottawa and Windsor, it remains a single integrated body working collegially in a

spirit of openness, mutual trust and confidence, and in the common interest of both countries.

5. The Commission seeks to achieve consensus wherever possible, both in its own deliberations and those of its boards and similar bodies.

6. The Commission employs joint fact-finding as a foundation for building consensus and determining appropriate action.

7. The Commission affords all parties interested in any matter before it a convenient opportunity to be heard. It promotes the engagement of state, provincial and municipal governments and other authorities in the resolution of these matters.

8. While directing its advice and assistance to governments, the Commission takes account of the need to foster public awareness of the issue in question and ensure that the public is able to contribute to the consideration and implementation of its assessments by governments.

9. The Commission's advice must be not only independent and objective but also timely, well-founded, honest, and relevant.

10. In environmental matters, the Commission affirms the concept of sustainable development, the ecosystem approach, and the virtual elimination and zero discharge of persistent toxic substances. While emphasizing the importance of a sound scientific basis for its conclusions and recommendations, the Commission also recognizes that it may sometimes be necessary to adopt a precautionary approach and to act even in the absence of a scientific consensus where prudence is essential to protect the public welfare.

11. The Commission's rules of procedure must be in accordance with justice and equity.

12. The Commission adheres to the highest ethical standards in all its activities.

13. The Commission seeks to ensure the inclusion of appropriate expertise in the membership of its boards, while drawing that expertise from a diversity of sources on a non-discriminatory basis.

Neil MacKinnon

1114 Glacier Ave.
Juneau, Alaska 99801

March 26, 1999

Re: HCR-4 & SCR-7

Dear Legislators

Five generations of my family have used the Taku River for hunting, fishing and access to and from the early gold fields of Fortymile, Circle City and Atlin. My family has had a cabin on the banks of the Taku for over 40 years. I am not concerned by the mine. I am not concerned by the road. I am very concerned by the new attention the environmental industry has taken in the Taku River. Saving the Taku is the next new cause the enviro-elete can use to justify their existence and funding.

This is no pristine area as the environmentalists are trying to portray. I can remember as a youth the operating mine that Redfern Resource is attempting to reopen. This road and mine will not harm the Taku, it's fish and wildlife, or our lifestyle on the river. What will harm the Taku is the environmental lobby and the tactics they will use to "save us".

The "Coordinated Campaign Strategy To Save The Taku River" is quite clear about the aims of the environmental groups. That is "to stop the immediate threats to this area and to establish a plan for the longer term protection of its environmental values and of the people in the region." The campaign's further goal and objective is "To stop the mine in such a way that it ensures a developmental moratorium on the Taku Watershed." They do not want a better project; they want to kill it. They do not want to save the Taku they want to lock it up. They are using the Taku as the next cause to entice funds from large foundations and perpetuate their existence.

I agree with the enviro-eletists that the Taku is unique and its uniqueness deserves to be preserved. But contrary to the environmental view it's uniqueness is because **The Taku is the last river on the border between Alaska and Canada not encumbered by a Park, Wilderness, Wild River or other restrictive designation.** The freedom to use and access the last unencumbered trans-border river must be preserved. I applaud the legislature for taking the initiative to keep the Taku free.

Sincerely,



Neil MacKinnon

Len Peterson
3152 Pioneer Ave. Juneau, Alaska
Alaskan since 1970
Member of United Southeast Alaska Gillnetters
Commercial fishing the Taku River since 1981

Written testimony in support of Governor Knowles request for a IJC hearing concerning development of the Taku River watershed and specifically the Tulsequah Chief mine and road.

I support the Governor's request for a hearing before the International Joint Commission (IJC) concerning the Tulsequah Chief mine project and other potentially devastating projects impacting the Taku River watershed. I ask that Governor Knowles continue to push this request since that request is the only means my interests with the Taku Drainage development might be addressed.

Projects such as the Tulsequah Chief mine which potentially impact resources and economies of both Alaska and British Columbia seem appropriate to bring before the IJC. Indeed, that is precisely why there is an International Joint Commission. The IJC is the proper political arena to address concerns with this project since any mishap at the mine, or the road to the mine, or any mishap in the Taku watershed could affect, in a few short miles, my ability to etch a partial living from the river using my purchased gillnet permit. Loss of spawning area and rearing area directly affects my opportunity to catch and sell product which contributes to the Juneau economy. I have nothing to gain from the Tulsequah Chief mine and road project but could lose all I presently enjoy fishing the Taku River each summer and fall.

I am unwilling to substitute the established arena of the IJC for this hearing process, though I must add that this hearing is more of a hearing than I have had before any Canadian agency or the developers. The one "hearing" held in Juneau concerning the mine and road was, by Mr. Ringstad's admission, merely a courtesy. The impression given was "mind your own business Alaskans." Unfortunately, any development on the Taku River of this magnitude must be my business. Within a short flowing distance any Canadian problem becomes my problem, shared with a fleet of 80 or so Alaskan fishers.

Canadian representatives and developers will testify that they have undertaken an exhaustive study of the project. They will assure you that all is safe and that squads of noted scientists have placed a stamp of approval on the project. They may even show you the volumes of data carefully packaged into thick binders or the hearing schedule and volumes of testimony. But please recognize my interests and ask why other Canadian scientists not on Redfern's dole question the data, question the road impact, question the habitat impacts, and question the environmental protection, or have data in contradiction to that provided. Question how habitat and rearing areas will be protected and how U.S. fishers depending upon the fish bounty provided by the Taku River will be compensated if, contrary to promises, spawning habitat and fish numbers decline dramatically. Please question why Alaskan interests were ignored. The IJC is a proper venue to address these questions, but those of you against that submission, please protect my Alaskan interests now rather than the convenience of a developer already satisfied by a Canadian speedy review process.

Again, I support the Governor's request for an IJC hearing and trust this committee also sees the wisdom of protecting Alaskan interests with the IJC process.

Sincerely,

Len Peterson
3152 Pioneer Ave., Juneau, AK 99801

Edward Hansen
F/V Ocean Gold
5875 Glacier Hwy #21
Juneau, AK 99801
(907) 780-5816

Senate Resources Committee
Senator Halford, Chairman
State Capitol, Juneau AK

I am an Alaskan resident and commercial fisherman in Alaska for the last 14 years. I mainly salmon fish the Taku – Stephens Passage fishery. I am concerned about the effect the Tulsequah Chief Mine will have on my fishery and ultimately my source of income to support my family.

I believe that with careful assessment and adequate planning that mining and fishing can co-exist but it must be done to minimize the risk to the other user. Unfortunately, with mining and fishing within the same area, the mine gets the economic benefits and most of the risks are to the fish habitat and water quality that my livelihood depends on.

At this time, the Tulsequah Chief Mine still has not adequately assessed the risks to the Taku watershed and the Canadian and Alaskan Taku fishery for commercial, sport and personal uses.

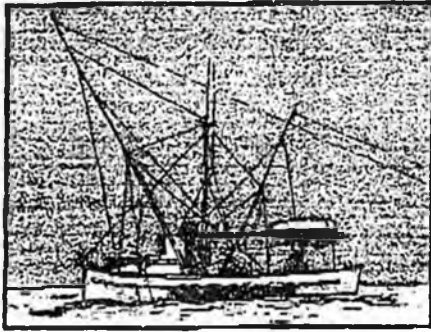
I would like to take this opportunity to thank the Governor for protecting my interests in this situation.

Sincerely,



Edward Hansen
F/V Ocean Gold

3/3/99



Alaska Trollers Association

130 Seward St., No. 505
Juneau, Alaska 99801
(907) 586-9400
(907) 586-4473 Fax

March 25, 1999

Representative Scott Ogan, co-Chair
House Resources Committee
AK State Legislature
Juneau, AK 99811

Dear Representative Ogan:

I am writing to express the Alaska Trollers Association (ATA) concern about language in SCR 7, which asks Governor Knowles to withdraw his request for an evaluation of the Tulsequah Chief Mine project by the International Joint Commission of the Boundary Waters Treaty.

While our association is not generally opposed to mining, ATA is concerned about the implications for water quality and fish habitat posed by large-scale development on any body of water that houses anadromous fish. Considering the state's minimal involvement to date with this project; the fact that Alaska will have little input into the near and long-term policy decisions surrounding this mine; and, given the importance of the Taku River to Alaska residents, a third party review does not seem unreasonable.

The Taku River is one of the largest salmon-producing rivers in the state. Sport, commercial and subsistence fishermen from both sides of the border derive significant benefit from fish originating in this river. In one district alone, Taku River salmon have directly contributed up to \$5.3 million dollars a year to the commercial harvest. This doesn't account for processing and support industry revenue. Canada has established an in-river commercial fishery, which is of great importance to its residents. And, the Canada's Tlingit First Nation is highly reliant on this area for fishing and hunting purposes.

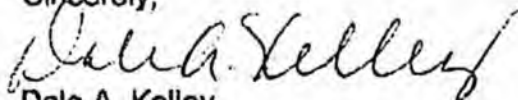
Under the Pacific Salmon Treaty, Alaska has been party to a successful and cooperative transboundary river agreement on the Taku and Stikine Rivers. In the name of conservation and fair sharing, Alaska fishermen have foregone harvest of thousands of Taku River fish since the mid-1970s. The end result has been a rejuvenation of the resource and enhanced goodwill between our nations.

It is not clear that Canada's environmental laws and programs for project review are as thorough as Alaska's. The status of its fisheries resource on both coasts does little to allay our fears. It is not clear whose science is being utilized in Canada's review process. Given some of the concerns raised about the validity of Canadian data, in this and other forums, by Alaska and Canada's own citizen's and scientific community, it seems even more prudent to consult a third party. After all, the Tulsequah Chief Mine could affect more than just Canada. Degradation of this watershed could mean the loss of millions of dollars to Alaska's fishing industry and the state. If there is another mechanism for working with Canada on this issue without an IJC review, which is supported by ADFG, it may be easier for the fishing industry to trust the end result.

SCR 7 suggests that Alaska cooperate with the Canadian government toward development of this mine. While it makes sense that Alaska would want input into any project that affects a shared waterway, the intent of this provision is unclear.

Thanks in advance for your consideration of ATA's concerns.

Sincerely,



Dale A. Kelley
Executive Director

By Charles Enman The Ottawa Citizen Friday 4 July 1997

**36 scientists: End the Suppression
Manifesto calls for the restoration of integrity within DFO**

Thirty-six prominent scientists from across the country have called for an end to suppression and control of government-supported fisheries scientists. They speak of a "long-overdue debate on how to ensure the integrity of government-administered science."

This issue, they say, is important to all Canadians, and not just those in government departments. They say concerns about bureaucratic interference in scientific work are widely held in the academic community and must be discussed "without filtration by senior bureaucrats with a vested interest in suppressing criticism."

These scientists are joint signatories of a letter sent to Dr. Arthur Carty, President of the National Research Council. The council publishes the Canadian Journal of Fisheries and Aquatic Sciences, which two weeks ago published an article and an editorial that were highly critical of the Department of Fisheries and Oceans' (DFO's) use of science in support of bureaucratic decisions.

The journal and the publisher soon came under the guns of a top DFO bureaucrat. "As scientists reliant on the objectivity and fairness of publications such as the Canadian Journal of Fisheries and Aquatic Sciences, we wish to take strong exception to the views expressed by W.A. Rowat, Canadian Deputy Minister of Fisheries and Oceans, in a letter sent to you and posted on the DFO web page," the scientists' letter says.

The scientists accuse Mr. Rowat of misrepresenting the nature of both the article and the editorial.

The article, entitled "Is Scientific Inquiry Incompatible with Government Information Control?" was authored by three biologists -- Jeffrey Hutchings of Dalhousie University, Carl Walters of the University of British Columbia, and Richard Haedrich of Memorial University in St. John's, Nfld.

The editorial, by retiring journal editor David Cook, summarized the article by saying: "They demonstrate a tendency for DFO to suppress scientific facts and opinions that do not conform either to current departmental orthodoxy or to political expediency."

Mr. Cook goes further: "This disturbing pattern lends great strength to their argument that a politically independent organization (reminiscent of the late, lamented Fisheries Research Board of Canada) is required to provide the difficult, vital link between scientific research and resource management."

That, of course, would tear apart the DFO, which since its creation in 1979 has had a scientific branch under the wing of departmental bureaucrats.

In recent days, the Citizen has published comments from a number of scientists who have been critical of DFO's treatment of science.

David Schindler, a University of Alberta biologist, worked for the DFO for 22 years until 1989. He said he was reprimanded several times for publicly criticizing policy decisions.

"There has to be something to buffer the politicians interested in being elected and the bureaucrats interested in being promoted from the scientists who are interested in helping the environment and know what they're doing," he said.

Andrew Read, an expatriate Canadian who works at Duke University in North Carolina, said: "I have colleagues in DFO who feel they can't speak out openly. But for good science, they have to be able to speak out without worrying about political pressures being brought to bear on them."

David Lavigne of the International Marine Mammal Association in Guelph was reported saying: "The general principle that the DFO abuses science is not new. The department does not accurately convey accepted scientific views to the people of Canada, a problem that has been going on for a long time."

Ransom Myers, who holds the Killam Chair of Ocean Studies at Dalhousie University, accused the DFO of suppressing scientific papers and scientific discussion. He said that bureaucrats have been responsible for disastrous decisions that have cost tens of thousands of jobs and billions of dollars.

Two DFO bureaucrats have since threatened Mr. Myers with a lawsuit if he does not issue an apology for remarks he made in a June 27 article in the Citizen. The Citizen itself has been threatened with a lawsuit if no retraction and apology for the article are published.

Messrs. Schindler, Read, Lavigne and Myers are among the 36 signatories of the letter sent to Mr. Carty of the National Research Council.

The article and editorial in the Canadian Journal of Fisheries and Aquatic Sciences were unexceptionable parts of a scientific journal addressed to fisheries issues, the letter of the 36 scientists said.

"The Perspectives section of the journal, in which the piece by Hutchings, et al appeared, is clearly intended as a forum for opinion and has a history of lively debate," the scientists' letter says.

As for the editorial, "the opinions of the editor are his own business, and any journal requiring editorial clearance from government bureaucrats would not be worth publishing in."

The letter of DFO Deputy Minister W.A. Rowat to Dr. Carty complaining about the article and editorial was withering in tone and assertion.

"I am appalled at the unprofessional and unsubstantiated nature of their attacks on DFO, its scientists, and its managers," Mr. Rowat wrote. "These authors have maligned the reputations of hundreds of dedicated, hard-working scientists and managers across the country."

He continued: "These are not scientific papers. They are tabloid journalism of the sort one would not expect to encounter in a scientific journal. They are based on innuendo and misrepresentation which have no place in a scientific journal."

It was in response to these strongly worded sentiments from the department's deputy minister that the 36 scientists chose to append their signatures to the letter to Dr. Carty.

"This letter and this collection of signatures is very much a first when it comes to the question of keeping science at arm's length from management," said David Lavigne, executive director of the International Marine Mammal Association in Guelph, where staff penned the actual text of the letter.

"Those who have signed include some very prominent scientists indeed," Mr. Lavigne said. And more signatures were coming in by the hour, he added.

The primary recipient of the letter will of course be Dr. Carty.

But the letter, which in its own words asks for a debate on "the integrity of government-administered science," will also be sent to the very pinnacle of government - Prime Minister Jean Chretien himself.

Other copies will be sent to Fisheries Minister David Anderson, to Ambassador for the Environment John Fraser, and to the two incoming journal editors, John Roth and Moira Ferguson.

In the article by Jeffrey Hutchings and his colleagues, it is alleged that interference in DFO science by bureaucrats and members of government has been costly to the fishing industry.

Such interference "compromises the DFO's efforts to sustain fish stocks and, thereby, the socioeconomic well-being of fishing people and fishing communities."

Bureaucrats, the paper said, do not deal well with the uncertainties and shadings in scientific work. This tendency may partly have accounted for disastrous decisions affecting the Atlantic cod fishery. The cod population may have been routinely overestimated, the paper says.

But then scientific work on the problems afflicting the cod fishery was compromised by a variety of bureaucratic intrusions, which included government denunciation of independent work, interference in scientific conclusions, and disciplining scientists who spoke publicly of the results of peer-reviewed research.

Many of these problems would be solved if fisheries science operated freely of bureaucracy and government, the paper concluded.

"The formation of a politically independent organization of fisheries scientists, or some such reorganization of the link between scientific research and the management of natural resources, is a timely idea that merits immediate, serious, and open debate."

The Canadian Journal of Fisheries and Aquatic Sciences "had a moral obligation to the community" to publish the article, David Cook wrote in his editorial.

Dr. Cook had his own instances of bureaucratic interference to point out. In 1988, he wrote, the DFO attempted to alter a statement in a paper that had been accepted for publication. In 1994, someone from the DFO attempted to find out the name of one or more referees of a published paper whose conclusions the department didn't like.

The DFO asked to read an advance copy of the Hutchings article to prepare a response for publication in the same issue of the journal. However, Mr. Hutchings preferred that any response to the article appear in a following issue, and no advance copy was given.

In a letter published on the DFO website, the department's assistant deputy minister, Scott Parsons, decried this decision.

"Why did these authors choose to deny the institution and individuals being attacked a timely and fair opportunity to respond?" he asked in a letter published on the department's website.

"DFO's request was consistent with the Journal's common practice."

However, an editorial insert in the journal issue in which the Hutchings article appeared seems to confute Mr. Parson's statement.

"The authors were asked for their permission to provide advance copies of the Perspectives to DFO so that DFO could respond in the same issue. As is their right according to the editorial policy of the journal, the authors declined to do so. A response from the department on the scientific issues raised is anticipated in the June issue of the journal."

David Lavigne of the International Marine Mammal Association said that having the DFO's rejoinder published in a later issue of the journal was normal academic practice. "Usually, until a paper appears, it is essentially embargoed, unless the author chooses to circulate it," he said. "And if you found a point of disagreement after it appears, you would then submit your comments for publication in a subsequent issue."

**Testimony of Don Weir, President of the
TAKU WILDERNESS ASSOCIATION
before the Alaska State Legislature on
Senate Concurrent Resolution No. 7**

3-26-99

I am the president of the Taku Wilderness Association in Atlin, BC. We are a grassroots organization who oppose the reactivation of the Tulsequah Chief mine in the Taku watershed. We have serious reservations about the mine site, the location of the tailings pond, and other technical issues that we feel could lead to problems in the long term. Our main concern, however, is with the creation of a 100-mile road into the Taku. Aside from wilderness values and the closing off of other economic opportunities, the main issue is the lack of proper long-term planning. To put it bluntly, there is NO PLAN.

This is not 1950, and to move into a large tract of essentially untouched land without a clear idea of what is in the best long-term interest of all the stakeholders from both sides of the border is foolhardy and dangerously irresponsible. Efforts are ongoing at the present time by the Taku River Tlingit First Nation to create a long-term management plan for the region, and this proposal by Redfern Resources and the provincial government to open up the area circumvents these local initiatives.

From the point of view of other stakeholders, the key question should be whether the assessment of this process properly addressed the short and long-term impacts of this project. Another question is whether the mitigation measures created by the provincial government to cover up flaws in Redfern's Project Report will adequately deal with long-term impacts. The best way to make this determination is to look at British Columbia's track record on other mining projects. The record does not provide much assurance.

We have been told by numerous government officials that due to severe budgetary cutbacks it will be difficult to properly investigate and remedy the inevitable problems that will come about from this project. Should stakeholders from both sides of the border trust that the BC government will take care of their interests? It's Alaska's call on that one, but to make an informed decision you need to be aware of the BC government's record.

Numerous lawsuits have been filed against the provincial government because of inadequate regulatory standards on past projects. The following will give you an idea of some of the problems with the environmental assessment of the Huckleberry and Kemess mines.

In the past, APPROVALS AND PERMITS have been ISSUED BY THE PROVINCIAL GOVERNMENT DESPITE A DEFICIENCY OF INFORMATION.

During the Kemess environmental assessment, the company's mill site selection was deemed geotechnically acceptable on the basis of three boreholes. Not surprisingly, the

assessment turned out to be erroneous-the bedrock was not competent enough to support the mill. By the time this was revealed, however, the province had already granted a Project Approval Certificate.

- The province issued pre-production construction permits for the mine and mill site with woefully inadequate information. A proper evaluation of the newly proposed mill site had not been conducted by the province; the federal assessment of the project was not yet completed; the Fisheries Act authorization for permission to destroy 17 km of fish-bearing stream had not yet been granted by the federal Department of Fisheries and Oceans; there was no materials handling plan, sediment control plan, or effluent permits ;

- After a series of disastrous sedimentation problems leading to an eventual Pollution Abatement Order in July of 1997, it was acknowledged by provincial government that the problems were due, in part, to the fact that the government did not have guidelines for sedimentation control during the construction phase, nor did they require advanced approval of sedimentation or materials handling plans.

✓ THE KEMESS and HUCKLEBERRY PROJECTS HIGHLIGHT THE INABILITY OF THE GOVERNMENT TO ENSURE COMPLIANCE WITH REGULATIONS and CONDITIONS SET OUT IN THE EA CERTIFICATES, PERMITS AND AUTHORIZATIONS.

The following is a condensed list of violations at the Kemess mine site:

- July 4 1997 - creek diversion is a VIOLATION OF the Water Act; sediment levels were in VIOLATION OF the Project Approval Certificate, Mines Act permit, and the Fisheries Act.

- July 16 1997 - a POLLUTION ABATEMENT ORDER was issued under the Waste Management Act, because construction activities were causing elevated levels of total suspended solids in Kemess Creek and its tributaries.

- as of Sept. 12 1997, the company had still FAILED TO MEET REQUIREMENTS of the July 16 pollution abatement order

- February 9, 1999 - FAILURE TO COMPLY with a January 29, 1999 order to raise the height of the tailings dam. A letter from the Ministry of Energy and Mines told the company that any delay in meeting the schedule would create a hazard, i.e., breaching of the dam and flooding of the valley downstream, would place the dam, workers and downstream environment at serious risk.

There were similar violations at the HUCKLEBERRY mine site:

- August 1996 - FAILURE TO PRODUCE water quality data; LACK OF Sediment Control Plan, even though it was a permit requirement;

· Sept. 1996- the Sediment Control Plan was submitted, but it was NOT ADHERED TO.

· June, 1997 - the company was OUT OF COMPLIANCE with Mines Act Permit because they began excavating East Zone Pit prior to submitting required Acid Rock Drainage information; many of the required monitoring reports were submitted LATE; in VIOLATION OF its Mines Act permit, the company constructed roads and a saddle dam out of potentially acid-generating materials!!

Finally, it appears that the tools used by the province to ensure environmental protection at mines sites are being traded away. Last month, the BC government (Job Protection Commission) waived their right to increase the reclamation bond payments for two years as part of a bailout package for the Huckleberry Mine. In so doing, the province accepted the possibility that public funds would have to be used to fund some of the mine's reclamation costs. This use of environmental securities as an economic and political negotiating tool represents a major breach of the public trust in terms of protection against environmental liability posed by poorly financed junior mining companies.

A more detailed written analysis of the problems with the BC assessment and regulation of Kerness and Huckleberry mines is available. It highlights additional potential problems that may be encountered at the Tulsequah Chief mine if the same lax regulations and monitoring occur with this controversial project.

The final question that I want to put forth is whether or not an IJC will address all of the concerns that residents on both sides of the border have on this project. I don't have the answer to that question. But it's clear that a more thorough analysis of the controversial and flawed BC environmental assessment process that gave approval to the Tulsequah Chief project must come under closer scrutiny.

The judicial review initiated by the Taku River Tlingit First Nation will hopefully elucidate the way the province interfered with a proper assessment on this project. We ask that you reserve judgment on this resolution until the facts come out on this court case. There is too much at stake to do anything less.

Thank you for giving me the opportunity to speak.

Don Weir
Taku Wilderness Association

Lessons from the Environmental Assessment process of the South Kemess Copper/Gold Mining Project

The Kemess South Project is an excellent case study of the consequences of ineffective environmental assessment, certification, permitting, enforcement and monitoring.

1. PROCESS FLAWS

1.1 DECISIONS BASED ON LACK OF ADEQUATE INFORMATION

· During the EA process, the Project Committee accepted the company's selection for a mill site, despite the fact that the geotechnical adequacy of the site was determined on the basis of three boreholes. Not surprisingly, the assessment made on the basis of three boreholes turned out to be erroneous-the bedrock was not competent enough to support the mill. This was not, however, determined until after the company had received their Project Approval Certificate. If more detailed technical information had been provided, the appropriate mill site could have been selected DURING the EA review, and the process would have been far more credible.

1.2 PROVINCIAL AND FEDERAL ASSESSMENTS NOT COORDINATED

· The company then proposed to revert back to a mill site that had been one of the alternatives proposed during the EA process but was rejected early on for environmental and economic reasons.

· When informed of the proposed changes, the Department of Fisheries and Oceans (DFO) immediately asked the Canadian Environmental Assessment Agency to put the federal environmental review on hold pending an assessment of the new mill site. Before the federal environmental assessment of the project had been completed, however, the provincial MEI went ahead and issued permits for pre-production construction to begin, which included the relocated mill and facilities.

· Thorough studies were never properly conducted nor a proper evaluation undertaken of the alternative mill site. Clearly, the provincial government did not have enough information to assess competently the adverse effects of the mill site change, and there was no plan in place detailing how to mitigate or prevent potential adverse effects prior to issuance of the construction permit. The process was not open or accountable, since the MEI did not consider public or even federal input on the mill site change prior to issuing the permits.

1.3 Permits were issued by the provincial government despite a deficiency of information.

At the end of the BC EA process, there were too many information gaps to

have a clear idea of how the project was going to proceed. Yet MEI issued permits for the pre-production construction phase even though:

- there was no Mitigation Plan and Construction Phase Environmental Program
- the Fisheries Act authorization for permission to destroy 17 km of fish-bearing stream had not yet been granted by DFO ;
- the company had not finalized the Independent Supervisor Terms of Reference.
- a materials handling plan,
- a sediment control plan, and
- effluent permits from structures (tailings impoundments, open pits).

After the series of disastrous sedimentation problems leading to an eventual Pollution Abatement Order in July of 1997, it was acknowledged by provincial government representatives that the problems were the due, in part, to the fact that neither MEI nor MELP have guidelines that apply to the construction phase for sedimentation control, nor do they require advanced approval of a sedimentation or materials handling plans.

2. IMPLEMENTATION FAILURES

2.1 Changes to the Certificate led to a failure of the independent environmental monitoring program, with subsequent adverse environmental impacts.

- The Project Approval Certificate required Royal Oak to cover the cost of the environmental supervision program. However, MEI and Royal Oak later negotiated a bilateral agreement that the amount the company would pay would be capped at \$100 000, after which MEI would cover the costs. Within four months Royal Oak's budget was spent, and so MEI assigned one of its employees to take on monitoring. During the second summer of construction, severe sedimentation problems were occurring all over the mine site; problems which, according to a DFO official, the Reclamation Inspector (through no fault of his own) lacked the necessary expertise to assess.

2.2 The Kemess project also points out the inability of the government to ensure compliance with conditions set out in the EA certificates, permits and authorizations.

- August 1996 - during construction of the pit no soil salvage was carried out and that fill was placed directly on the topsoil, contrary to the soil salvage requirements of the permit. The report also notes poor maintenance of the Omineca Mine Access Road (OMAR), and resultant impact on the Sustut River
- September 1996 - serious sedimentation occurs in the Upper Sustut River, a valuable salmon spawning tributary of the Skeena, due to careless upgrading of the OMAR

- October - an Environmental Complaint was laid with MELP in by service men working at the mine. They made allegations of illegal burning of oil, improper storage of oil and heavy equipment crossing Kemess Creek, which were later substantiated by the Reclamation Inspector
 - February 1997 - Reclamation Inspector stated that an aggressive program of seeding the disturbed areas along the road must be implemented prior to the growing season in mid-June. Hydro-seeding did not begin until August, by which time the growing season was practically over.
 - March 3 - improper burning of refuse, improper refuse disposal (i.e., non-permitted wastes including solvents), improper storage of oil, illegal burning of oil
 - July 4 - the diversion of a creek was in violation of the Water Act
 - sediment levels were in violation of the Project Approval Certificate, Mines Act permit, and the Fisheries Act.
 - the company failed to follow its mitigation plan, to install sediment control and runoff works; to begin seeding; to have proactive monitoring; to have appropriate expertise; to have appropriate authorizations; to submit plans and manuals for dams, diversion ditches and associated structures, and to make frequent monitoring data submission.
 - July 16 - a Pollution Abatement Order was issued under the Waste Management Act, because construction activities were causing elevated levels of total suspended solids in Kemess Creek and its tributaries.
 - August 9-16 - in blatant disregard of the Order, Kemess began construction work on the foundations of the tailings dam without any effective sediment control works in place.
 - substantial exceedances of water quality objectives noted in Kemess Creek
 - August 19 - lack of compliance with sewage permits
 - Sept. 12 - as of this date, Kemess had still failed to meet almost every condition of the July 16th order: there were no plans on how to prevent and control sediment prior to the tailings pipeline road construction; plans for open pit/waste rock dump area sedimentation had not been received; reseeding efforts were inadequate.
 - Sept. 24 - Kemess finally shuts down ongoing construction at the tailings pump house until runoff and seepage could be collected and pumped into a drainage ditch on the north side of the tailings pond
 - Oct. 14-21 - less than one month after agreeing to remedy the situation, Kemess violates the agreement with MELP by pumping into the south drainage
- MOST RECENTLY...**
- February 9, 1999 - Royal Oak received a letter from MEM stating that the company had failed to comply with a January 29, 1999 order to raise the dam core crest in adherence to a minimum elevation schedule. The letter stated that any delay in meeting the schedule would create a hazard, i.e., breaching of the dam and flooding of the valley downstream, would place the dam, workers and downstream environment at serious risk.
 - DFO expressed their own concerns in letters to the company and MEM. A

DFO official wrote to MEM: "you will recall that all federal and provincial agencies approval of this mine were contingent upon a zero release tailings system. We believe that a discharge from the tailings impoundment could have significant impacts on the environmental, and be a serious violation of the Fisheries Act. . . we are putting your Ministry on notice, and are considering issuing an Inspectors Direction to your Ministry, as a party who has contributed to the potential release of tailings water from the tailings impoundment as a result of relaxing freeboard requirements of the tailings dam from July 7, 1998 to Jan. 28, 1999."

As of Saturday, March 19, 1999, the required dam elevation had not been met (the target was 1437.5 m, the actual elevation was 1436.41 m). On March 22 a new plan was put forth by Royal Oak's engineering consultants, which stated that using a new design plan the tailings impoundment construction requirements could be met.

MEM gave the company until March 29 to get tailings dam elevation on schedule (if not by March 29). If they fail to do so, they will be ordered to stop mining/milling operations.

HUCKLEBERRY

1. PROCESS FLAWS

1.1 Inadequate information from the proponent led to significant delays in the EA process.

During the review of the Project Report submitted by Princeton, Huckleberry Mines Ltd. (HML), the Project Committee determined that the standard of information provided by Huckleberry in its application was not satisfactory.

- At a Project Committee meetings in Smithers, in August, 1995, an MEI official stated that the Huckleberry application was "the worst certificate application I've viewed."
- Project Committee participants in the ARD Working Group agreed that the ARD testwork and related predictions in the Application were "insufficient" or even "useless." Due to the poor quality of information provided in the application, the ARD Working Group was assigned the task of bringing the mine proposal into compliance. The reanalysis of the ARD data caused significant delays to the process.
- Lack of accurate fisheries data to determine Fisheries Compensation Plans and Cumulative Effects also caused delays in the EA process. HML's Project Report stated that "there is no fish habitat in the majority of the reaches of the streams that will be affected by the mine." On the

contrary, a MELP biologist concluded that the streams did contain plenty of fish habitat.

- Not only were delays caused by problems with the original data, but a failure to provide information in a timely manner also created delays. For example, the acid-base accounting (ABA) data in the Project Report, submitted in May, contained numerical errors, but HML did not revise the data until September.
- Delays continued into the permitting phase. Review and approval of ARD prediction/prevention information was held up because the company was late submitting their Permit Application document.

1.2 Information deficiencies may cause potential environmental problems
HML experienced problems due to deficiencies with the initial inventory studies.

- Based on the original inventory studies, it was predicted that there would be sufficient construction materials (i.e., waste rock till) to build the dam. However, it was recently determined that there is a more mineable ore than originally thought, which means that there is less waste rock (one million tonnes less) than estimated. The new design may pose problems (environmental and/or procedural) because HML is proposing to build the impoundment dam from tailings (cyclone) sand.

1.3 Cumulative Effects not adequately assessed.

A true Cumulative Effects package could not be completed for the Huckleberry Project because the company would not commit to a location for their port facility. The location of the port in Stewart, B.C., was not announced until 15 months after Certificate for development was issued.

2. IMPLEMENTATION PROBLEMS

2.1 Non-compliance issues highlight the need for a stronger government commitment to enforcement.

- August 1996 - Effluent Permit for the construction phase was non-existent, and there was no intent to develop any legal permit regulations; water quality data had not been received, despite the Interim Reclamation Permit requirement that water quality monitoring data be reported monthly; as of this date, HML had no Sediment Control Plan, even though it was a permit requirement
- Sept. 1996 - the Sediment Control Plan was submitted, but it was not adhered to.
- June, 1997 - HML began excavating East Zone Pit prior to submitting ARD prediction/prevention information (required in Mines Act Permit Application); many of the required monitoring reports were submitted late; reporting on ARD was inconsistent and late; and monthly construction reports were typically submitted at least three to four weeks following the month of reference, in violation of its Mines Act permit, HML constructed

roads and a saddle dam out of potentially acid-generating materials!!

When there are continuous acts of non-compliance with permits or certificate specifications, governments should step-up their enforcement activities. It is within the provincial government's powers to "halt construction, operation, modification, dismantling or abandonment activities until the proponent obtains a project approval certificate, or complies with conditions of a project approval certificate." Furthermore, "In the event of non-compliance with an order made under the Act, the minister may apply to the Supreme Court for an order to comply.

2.2 Structural problems with tailings impoundment

In the summer of 1998, the company, halted construction of their tailings dam after it recorded unusual movements (as much as 400 mm or 16 inches) in the structure. The safety of the tailings pond dam has been called into question by Glenda Ferris, who notes that water is flowing out of impoundment from between the bedrock and the till - but in the original design the impoundment was not supposed to have any seepage. A report by AGRA Earth and Environmental, released in November, highlighted that the lower fill in the dam appeared to be spreading as construction added more weight to the top. In a newspaper article in early February, 1999, an official with MEM noted that there has not been significant movement in the past couple of months, and that he's satisfied the dam is solid. Work resumed on raising the height of the dam at the beginning of February.

2.3 BC's commitment environmental protection required by certificates further curtailed.

The government recently traded away one of their strongest tools for ensuring long-term environmental protection at the end of the mine's life, i.e., the mine reclamation bonds. In late February, 1999, the government waived reclamation bond payments for two years as part of a bailout package for the Huckleberry Mine.

John Errington of the MEM said in an email to EMCBC that by agreeing to the deferral of the security, the province accepts the possibility that public funds could be used to fund some of the reclamation costs.

The use of environmental securities as an economic and political negotiating tool represents a major breach of the public trust in terms of protection against environmental liability posed by poorly financed junior mining companies such as Huckleberry Mines Ltd (owned by Imperial Metals). This case sets a poor precedent and does not provide the public with much confidence that there will be environmental protection at potentially environmentally hazardous sites such as the Tulsequah Chief mine site, and implies that the public might have to bear the liability for small companies like Redfern.

April 8, 1999

Mr. Bryan Jack
Clan Member
Taku River Tlingit First Nation
Box 54, Five Mile Reserve
ATLIN, BC
CANADA
V0W 1A0

FAX COPY ONLY: 907-465-3265

ATTENTION: REPRESENTATIVE SCOTT OGAN
Co-Chair, House Resources Committee

RE: House Concurrent Resolution 4 (HCR 4)

Dear Representative Ogan

Now that some time has passed and I have had time to reflect on our meeting, I am writing to thank you and your committee members for how we, as members of The Taku River Tlingit First Nation, were treated with the utmost respect.

It was important to us that you and your committee members heard from us that the Taku River, which is the bloodline of our respective peoples, is being seriously threatened by the cumulative effects of the proposed Redfern Resources mine and 160 km road through the heart of our traditional territory. In addition, we were pleased to be able to bring to your attention the fact that we are currently negotiating a treaty with both the provincial and federal governments within Canada. As you are also aware, the provincial environmental assessment process is a stage-by-stage process and, aside from criticisms regarding the environmental soundness of that type of process, it is the assertion of our TRTFN government that the most basic environmental standards have not been met through the BC provincial environmental review. Consequently, the issuance of the project certificate was premature and we have decided that it was in our best interests, and the best interests of the Taku itself, for us to launch a court challenge to the provincial approval of the mining certificate. Our legal challenge will be heard in June and we expect a decision in September or October.

Page 2

Ogan/House Resources Committee

04/08/99

We understand that you and your committee have not yet voted on IICR 4 and continue to believe that it would best serve all peoples and The Taku which feeds us all if the House vote was no. We also understand that SCR 7 will soon be before your committee and we ask you once again to consider our testimony in voting on that matter.

In closing, during my testimony during the Senate Hearings on SCR 7, I urged the Senators to come and see/feel the land they were affecting through their decisions and I now extend the same invitation to you and your committee members. We, through The Nakina C.A.L.L. (Center for Aboriginal Learning & Living) would be pleased to arrange for you to experience The Taku with us anytime between April 19th and the first week of September. We will be on The Nakina by the 19th and welcome you to join us when we food fish for Steelhead during the last week of April! A visit can be arranged by contacting us at 250-651-7557.

GUNALCHEESH

(Thanks, with Respect)



Mr. Bryan Jack

Taku River Tlingit First Nation Clan Member



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March 31, 1999

Cherie Rudolph
President
Taku River Recreation Association
P.O. Box 240295
Douglas, AK 99824
USA

RECEIVED

APR 08 1999

Ans'd.....

Dear Ms. Rudolph:

At the recent hearings held in Juneau Bob Carmichael, our VP of Exploration, met Errol Champion who represented your association at the meetings. Bob obtained a copy of your letter to the Senate and House representatives and a copy of your earlier letter to the BC Environmental Assessment Office (EAO) in October 1997. I can assure you that there has not been any attempt by Redfern to ignore your interests or to avoid dialogue, though it appears that this is the belief held by many in Alaska.

Redfern received a copy of your letter in November of 1997 from the BC EAO along with numerous other individual and group submissions from the public meetings and review period. In discussion with the government regulators we were encouraged to provide official responses to the public concerns for consideration by the Project Committee (including Alaska reps) as a whole rather than sending out individual responses. We did this in December and January as the issues were tabulated. In retrospect, this approach probably worked fine as far as the Committee was concerned but did nothing to give you and your members any knowledge that your concerns were being addressed or even heard. I apologize for this oversight.

Although I believe Bob had an opportunity to provide some answers to Mr. Champion last Friday it may help if I take the time now to give you some specific responses to the questions you posed during the review.

In the body of your letter you wondered about a lack of dialogue during the assessment process. Because the project is located in Canada and is being permitted under the Canadian regulatory processes the transboundary and Alaskan public consultation was assumed to be coordinated through the Governor's office which was represented on the Project Committee. During the assessment of the barging alternative there was some dialogue with Alaskan fishing interests and lodge owners (Taku Lodge) as well as Juneau based contractors for water-level surveys of the river and inlet areas. We also had a public and government relations representative in Juneau, Paul Rusanowski, who did meet with some of your members at various stages during the assessment process - the name Rudy Ripley comes to mind - and Paul also attended one of your membership meetings in 1996. However, once the barging alternative was found to be too costly

for the project it was dropped from further assessment and the Company's studies concentrated instead on the road to Atlin. Apart from water quality issues, which were being addressed through on-going studies, the Company felt there was virtually no potential for changes or impact to the Alaskan side of the river. This was substantiated during the review and the ongoing discussions with Alaska state and US regulators - but apparently this was not communicated directly to your association.

With respect to some of your other questions:

Road construction:

The details of road construction timing are still being worked out and, in part, depend on approvals for final designs. Construction is tentatively scheduled for late spring of 2000 and we may have to revert to a two-season approach if logistics require it. Our final plans will depend on a number of factors including the timing of approvals, financing and contractor selection, as well as environmental and seasonal issues which you are well aware of. Currently our plans still call for moving some equipment to the site by barge to the Tulsequah/Taku confluence and then up to the old Polaris-Taku site before it would cross to the Tulsequah mine site. Some fuel would be transported at that time also in double walled storage vessels. This equipment would be used to build the airstrip for the mine which is located north of the minesite. Further fuel and supplies for mine construction operations and for the portion of the road construction north of the mine would be flown in via the airstrip. Storage of these materials would be governed by stringent spill prevention requirements and stable sites above Tulsequah River or storm floodwaters.

The bulk of the road construction headings would be supplied and mobilized from Atlin, BC, under current plans. Equipment and fuel for one heading may be pre-mobilized by a winter road constructed on the approved road right of way to the Sloko River. Details of the requirements for the winter road are still being worked on. Some sections will require the equivalent of full construction guidelines in order to ensure there is no soil erosion in the spring which could cause sedimentation. This and all other construction phases (road and mine) will have an independent environmental supervisor overseeing environmental protection measures and compliance. This requirement is a commitment made by the Company and is a stipulation of the Project Approval Certificate.

Impacts of Floods on Flannigan's Slough and lower Taku River:

I doubt that any Redfern representative would have denied that Tulsequah floods have an impact downstream. This is an undeniable natural phenomenon which occurs regularly and is essentially uncontrollable. On the other hand, Redfern has taken the impacts and extent of the floods into account in the current mine design to ensure that there are no mine-related additional impacts to those related to the natural flood events. Project components are all located above the flood influence. Planned discharges from the mine will occur after full treatment and within the specified permit criteria so that there is no impact downstream. A lot of care and attention has

been placed in design safeguards of supply, fuel and tailings storage to ensure that there are no spillage hazards. The tailings material itself is inert as a further precaution.

Use of Barges:

There are no plans to use barges on an ongoing basis, except for some initial placement of construction material and equipment mentioned above. Redfern would be happy to meet with representatives of your association prior to any planned barge movement to see if there are particular areas of concern or timing problems. I agree with your statement about the attempted designation of the Taku River as 'wild and scenic' and the multiple uses of the area both past and present. The disinformation spread by some of the environmental groups has been extended to other aspects of our project also - particularly on water quality and mine tailings. Both of these areas were the focus of enormous attention in the mine design and the project review and have more than met all of the standards.

Flights:

Construction and operations flights will primarily originate in Whitehorse or Atlin, BC. It is possible that Juneau may be used at certain times during construction if weather conditions are bad but this scheduling is impossible to predict at this time. Since most of the mobilized materials for air transportation will be at the Canadian sites it will likely mean that flights will be delayed if weather is bad rather than diverting to Juneau. Once the road is operational most supplies will arrive by road. Operational flights for crew changes will be converted to bus trips if weather precludes attempting a particular flight.

Controlled access:

The mine closure and decommissioning plan will require that the **entire** road be reclaimed and rendered unusable for access at the end of the mine life. A performance or security bond must be posted by the Company to cover this work prior to start of construction. This work will be comprehensive and will include removal of all bridges, culverts, restoration of slope and drainage profiles where possible and re-vegetation. This will eliminate any potential for use of the road from the mine end.

Water quality and Reclamation Bonding:

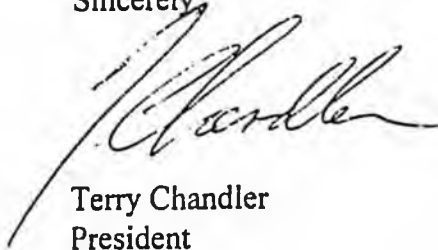
The mine site water quality/discharge permit will have similar provisions to those used to regulate mines in Alaska. In general, the BC and federal Canadian guidelines are more stringent. Redfern has not yet applied for the detailed Mines Act construction permits or the Discharge permit under the Waste Management Act so we still have to go through the detailed evaluation and approval of those permits. However, the work done to date has demonstrated that the proposed technology and designs will be suitable and adequate to meet these requirements. The Company will be required to post a reclamation bond to cover mine-site closure and contingency provisions prior to start of any construction. There will be normal spill response procedures and

reporting/clean-up provisions under the required permits. The nature and volumes of the proposed discharges and potential spillage issues are not of a magnitude to impact US waters. The tailings storage site has been designed to very high standards (1 in 200 year flood as a minimum) and has been estimated to be capable of withstanding twice that level. Based on hydrographic models, that would be equivalent to a 1 in 10,000 year flood.. Accordingly, an event capable of damaging the tailings impoundment would have much larger and incalculable impacts on the whole watershed and downstream areas to the extent that mine-related impacts would be imperceptible, especially since the tailings are non-toxic and inert material similar to the pulverized rock released daily in the thousands of tonnes by the melting glaciers feeding the northern Taku drainage basin. Contrary to some disinformation spread by preservation-minded opponents, the tailings facility is **not** located on the floodplain of the Taku river. It is situated in a side valley approximately 18 km (11 miles) up the Tulsequah valley from its confluence with the Taku. Reclamation plans on closure will re-contour the facility to a low mound in the side valley and revegetate it so that the land is returned to as near as possible original land use capability.

A water quality monitoring station was located at the border during the environmental assessment and will be continued as part of operational monitoring. This is in addition to the monitoring stations established in immediate proximity to the mine and mine infrastructure.

I hope that this letter will assist in re-assuring the TRRA that Redfern is a responsible and progressive mining company. We are intent on ensuring that the mine is a clean and well-regarded operation which will contribute to the economic health of the area without detrimental impact. We fully appreciate your interest in the area and would be happy to provide you with progress updates and answer questions if you need more information.

Sincerely,



Terry Chandler
President

cc: Errol Champion
Senator Drue Pearce
Representative Brian Porter



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April 8, 1999

Representative Scott Ogan, Co-Chair
Representative Jerry Sanders, Co-Chair
Alaska State House of Representatives
Standing Committee on Resources
Room 124, State Capitol
Juneau, Alaska 99801
USA

Dear Sirs:

Re: Tulsequah Chief Project - Senate Resolution No. 7

Redfern Resources Ltd. has followed the progress of this resolution with great interest. We are very grateful of the elected representatives of Alaska who have participated in its development, demonstrating a clear understanding of this issue. Redfern has invested a huge amount of time, effort and money to study and design what we feel is a model mine operation. We are looking forward to the opportunity to deliver economic benefits to the region without harm to the local environment or to Alaskan interests.

The resolution describes succinctly the results of a long and involved evaluation process involving the public, First Nations and the governments of the State of Alaska, province of British Columbia, territory of the Yukon and federal counterparts in the US and Canada. When the project was approved in principle in March of 1998, Redfern was shocked to hear that Governor Knowles believed there were grounds for an International Joint Commission review. In respect to that request, a further 10 months were spent to specifically address stated concerns of Alaska and US agencies.

Redfern participated completely and willingly in providing technical information to the State and to Canadian and US authorities in the bi-lateral discussions between the governments. The results of those discussions have demonstrated two things: 1) there is no factual basis for belief that the project poses a danger to Alaskan resources or interests and 2) there are differences in permitting procedures between the two countries which ultimately arrive at the same level of environmental protection.

Canadian authorities have provided assurances that there will be no impacts on Alaskan resources and, in turn, Redfern has agreed to design, construct and operate the mine to meet these assurances. Additionally, Alaskan officials have been offered the opportunity to review ongoing data and information presented in support of the operating and licensing permits required for construction and operation of the mine and access road. Furthermore, Redfern has committed to a comprehensive suite of independent environmental monitoring measures during construction to

ensure that the project is built to the designed standards.

Redfern has the strong support of the local Canadian community of Atlin and a large base of support within the native community. Residents have recognized that the project can provide benefits and opportunity for year round employment without sacrificing environmental protection. This is sorely needed in this region of Canada. The fact that the mine development will also allow the effects of past mining to be reclaimed permanently to modern high standards is an additional benefit for the long-term preservation and quality of the environment in this area.

The project has suffered from detractors and opponents who have primarily objected to the necessity of building a road to the site. Much of the opposition is oriented towards preservation and setting aside a large area of BC from any resource development. We have determined that this opposition has been instrumental in pushing and lobbying for IJC intervention in due process in order to achieve these goals. It is unfortunate that this kind of special interest activity has interfered with the fair evaluation of the project on its own merits.

Redfern is committed to an open and honest development of this project. We have nothing to hide and a lot of pride in the mine's design. We look forward to continuing the progress that has been made to provide Alaskans and US officials with the technical information and assurances they have sought as the project proceeds through the remaining permits.

We urge you to pass the resolution to demonstrate Alaska's belief in fair treatment and due process for developments on both sides of our borders. Removal of the threatened IJC intervention will assist the Company to obtain the necessary financing to complete the acquisition of permits and demonstrate the soundness of the project to all concerned.

Thank you for your time and attention. I would be pleased to meet with you in person or appear before the House Resources Committee if you feel it would be appropriate and useful in this matter.

Yours sincerely,



Terry Chandler
President

cc: Rep. Beverley Masek
Rep. Ramona Barnes
Rep. John Harris
Rep. Carl Morgan Jr.

Rep. Jim Whitaker
Rep. Reggie Joule
Rep. Mary Kapsner

Sen. Drue Pearce
Rep. Brian Porter