STATE OF ALASKA

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DEPARTMENT OF LAW

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APPENDIX #2

April 18, 1978

Robert Le Resche, Commissioner
Alaska Department of Natural Resources
Pouch M
Juneau, Alaska 99811

Ronald Skoog, Commissioner
Alaska Department of Fish & Game
Subport Building
Juneau, Alaska 99801

Re: Federal-State Jurisdictional
Ambiguities in H.R. 39

Dear Commissioner Le Resche and Commissioner Skoog:

You have requested that the Attorney General's Office examine H.R. 39, as reported out of the House Interior Committee, from the perspective of existing state and federal law so that any obvious inconsistencies or ambiguities in the legal relationship between the State of Alaska and the federal government might be recognized, and hopefully clarified by amendment, at the earliest opportunity in the legislative process. This letter is a summary of the most obvious statutory conflicts which appear to exist, and is not intended to be an exhaustive analysis nor a legal brief on the subject. However, my review has revealed that some substantial actual or potential conflicts in the state-federal relationship do exist in this legislation, and should be remedied by suggested amendments in order to insure that H.R. 39 is as unambiguous and straightforward as possible. Following is a brief examination of the most significant problem areas in this proposed legislation, most of which relate to the State's existing regulation of water appropriation, ownership of submerged lands, and statutory and constitutional provisions related to resource use.

Title I, Section 103 (Definitions): This section, which in many respects is the key to application of many provisions of H.R. 39, is seriously deficient, and requires comprehensive revision. I have attached a draft of proposed new language for the entire "Definitions" section in order that its recognized shortcomings might be corrected. Of particular concern to you is the inclusion of the item "waters" in the definition of the term "lands", a term which is unequalled in importance throughout the proposed Act.

In my view, including "waters" as an element of the term "lands" raises a very significant potential clash between federal authority and state responsibilities under existing statutes. For example, 43 U.S. Code Section 661 granted the Territory and State of Alaska authority to manage and allocate waters within the State's boundaries, regardless of ownership of the bed of the stream, lake, or river. This authority was confirmed by Section 6 (m) of the Alaska Statehood Act, which extended to the new State of Alaska all of the rights and responsibilities granted other states by the Submerged Lands Act of 1953 (67 Stat. 29). That act at 43 U.S. Code Section 1311(e) states,

> Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

Article VIII of the Alaska Constitution at Sections 3 and 13 implements this affirmation of public water ownership and state management:

> Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use. Alaska Const., Art. VIII, Sec. 3.

> All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to state purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife. Alaska Const., Art. VIII, Sec. 13.

Unlike the constitutions of most other states, Alaska's Constitution was in existence as a formal, official document at the time the Congress debated and approved statehood for Alaska. It must be presumed that Congress was both aware of, and approved of, our Constitution's natural resource provisions prior to extension of statehood to Alaska.

Thus it must be recognized that if the term "land" in H.R. 39 includes the item "waters" as a part of its definition, those "waters" are almost exclusively the subject of state jurisdiction and management. For example, the term "Federal land", which appears extensively in virtually every title and chapter of H.R. 39, cannot be interpreted to include the item "waters" since Congress has previously vested "ownership, control, appropriation, use and distribution" of this resource in the State. Even those few Federal reservations which existed at the time of statehood, and within which it might be claimed that an unquantified Federal reserved water right exists, are subject to state water rights adjudication and management, according to Winters v. United States, 207 U.S. 564 (1908) and 43 U.S. Code Section 666, the McCarren Amendment.

As they now stand, the definition of "land" at section 103(1) and the derivative definitions of "Federal land" at section 103(2) and "public lands" at section 103(3) fail to recognize or clarify the existing state-federal legal relationships set forth above. The simplest remedy would be to eliminate the item "water" from the definition of "land" in section 103(1). If this cannot be achieved, then the State's existing ownership and authority to manage water regardless of ownership of the underlying or adjacent lands must be made explicit by reference to appropriate statutory authority, as I have proposed in my suggested amendment to section 103(1), attached to this letter.

A related and very vital issue has arisen with regard to the definition of "Native land" at section 103(13) of H.R. 39, and involves the question of whether this definition, derived as it is from the term "land" at section 103(1), includes the item "waters". Only by elimination of the item "waters" in section 103(1), or by clarification of the state's existing authority by the amendment I have suggested, will this definitional ambiguity be recognized and easily resolved. Section 4 of the Alaska Native Claims Settlement Act extinguished all aboriginal claims to "public land and water areas" and "submerged land beneath all water areas" in Alaska. In return, the Natives of Alaska were granted the right to select 44 million acres of "public lands" withdrawn by Section 11 of ANCSA. "Public lands" were defined in section 3(e) of ANCSA as "...all Federal lands and interests therein...", with certain specified exceptions. No authority was granted in ANCSA to convey "waters" to Native corporations even if the assumption were first made that "Federal lands and interests therein" somehow included water ownership or water rights, a point which the State could not concede. The question of whether any retained or aboriginal water ownership or rights pass with the land being conveyed to Native corporations under ANCSA is presently being litigated in the case of Paug-vik Inc. Ltd. v. Martin (No. 77-17158 Civil, 3rd District, Alaska Superior Court).

The inclusion of the item "waters" in the definition of "land" in section 103(1) of H.R. 39, and its effect on the derivative definition of "Native land" at section 103(13), has led at least one commentator to conclude that H.R. 39 resolves the Paug-vik case ex post facto in favor of the Native corporations and against the State. Arguing that the expedited conveyance procedures for Native lands contained at Sections 801-804 of H.R. 39 necessarily refers to Native "land" as being "lands, waters, and interests therein", K. Stoebner in pp. 20-21 of the American Indian Journal urges amendments to sections 801 and 802 which would make this presumed intention explicit. Though it may seem somewhat incongruous to argue that the Native conveyance provisions of H.R. 39 enlarge upon the extinguishment of aboriginal title and grant of 44 million acres of public land which were the specific purposes of ANCSA (and from Section 17 of which the necessity for H.R. 39 is derived), the State should argue vigorously that Title VII of H.R. 39 cannot, and is not intended to, enlarge the property interests which vested in Alaskan Natives on December 18, 1971. The issue of what water rights, if any, were granted to Native corporations together with their "public lands" is currently before the courts, and should not be subject to decision by the back-door approach discussed above.

Any interpretation of the Native Conveyance provisions of H.R. 39 which would enlarge the ANCSA "public lands" phrase by reference to "lands, waters, and interests therein" from Section 103(1) of H.R. 39 must be vigorously opposed, either by deletion of the item "waters", or by an amendment clarifying the role of the State in water ownership, management and allocation such as that which I have suggested.

A further problem with the "land" definition contained at Section 103(1) is the correct meaning of "interests therein", from "lands, waters, and interests therein." Does this term refer to legal interests, or instead to physical components of the water column, including water, aquatic mammals, and particularly fishes? In normal statutory usage I believe the term would refer to legal interests, such as leases, permits, licenses, easements, and the like. H.R. 39 seems to contemplate this use of the term "interests therein", since it defines "fish and wildlife" separately at section 103(4). However, if there is any doubt regarding the scope or intention of the term "interests therein" in Section 103(1), I would recommend insertion of the word "legal" immediately preceeding the phrase, i.e.: "The term 'land' means lands, (waters) and legal interests therein."

Ownership of fish in a stream or lake which is not wholly contained in a Federal Conservation System unit should not, and need not, be determined by H.R. 39. Such factors as title to the bed of the water body (involving navigability and application of the Submerged Lands Act), ownership and control of the water column (Submerged Lands Act, 43 U.S. Code Section 661, and Article VIII of the Alaska Constitution), and the transfer of fish and game management to the new State of Alaska upon the cerfitication of certain facts by the Secretary of the Interior (Section 6(e) of the Alaska Statehood Act) all argue for the position that the State has the primary responsibility for fisheries management for commercial, subsistence, and sport purposes, particularly when those fish do not respect artificial jurisdictional boundaries across their traditional waterways. Thus the term "interests therein" should be amended to read, "legal interests therein" so that ambiguities regarding fisheries authority may be avoided.

Title II (National Park System): Section 201 establishes several new National Parks, Preserves, and Monuments. In each of these areas the "Statement of Purpose" contains as one of the specific purposes for creation of the conservation system unit the following concept: "...to maintain natural water quality and quantity;..." or words to that effect. I forsee no problem with the inclusion of this phrase, so long as the primary role of the State as water manager and adjudicator is recognized, as discussed previously. That is, upon the date of creation of the conservation unit, an unquantified federal "Winters doctrine" reserved water right for the purposes stated in the enacting legislation may be created.

Under Alaska's Water Use Act (A.S. 46.15) this reserved right will be junior to any appropriations previously filed upon the water bodies within the conservation units. The reserved right will, however, be senior to subsequent appropriators, both upstream and downstream from the conservation unit. Due to the mandate to "maintain natural water quantity", this reserved right may

prove most troublesome to junior appropriators upstream from the conservation unit (assuming that if the water is returned to the watercourse after use by the junior appropriator, it meets "natural" water quality standards). It will be the State's task to quantify these Federal reserved rights as soon as possible, in a general water adjudication. Since many of the conservation units are at or near the headwaters of affected rivers, the actual effect on the opportunities of junior appropriators may be minimal.

Title III. (National Wildlife Refuge System): To the extent that boundaries of proposed new or enlarged National Wildlife Refuge System units are depicted to encompass the beds of navigable rivers or lakes, or to extend seaward from Federally-owned uplands which were not in a reserved status at the time of statehood (such status making the tide and submerged lands withdrawn, in fact or by legal implication, from transfer to the State), then to that extent the boundaries depict lands within the refuge units which are not in fact "Federal lands" or "public lands" within the definitions now contained at section 103 of the bill. Under the Submerged Lands Act of 1953 (67 Stat. 29), as made applicable to Alaska by the Statehood Act at section 6(m), on the date of statehood (January 3, 1959) Alaska received title to the beds of all navigable inland rivers and lakes, and title to the tidelands surrounding Alaska to a distance of 3 miles seaward. The only exceptions to this instant vesting of title to formerly federal lands are those navigable river and lake beds within existing federal reservations or withdrawals, tidelands included within federal reservations by the language of the pertinent withdrawal order or necessarily implied by a judicial interpretation of such a withdrawal order, and the beds of non-navigable rivers and lakes.

This ownership of land by the State, when combined with the State's statutory and constitutional responsibilities for water management and allocation of waters overlying these and other lands, place the State in a vital position regarding ultimate jurisdiction and management of the proposed National Wildlife Refuge System lands, if the Federal purposes for management of the federal lands are expected to be achieved. Without recognition of the State's land ownership and water management responsibilities, needless jurisdictional conflicts will undoubtedly arise if the proposed boundaries are adopted, since some of the "Federal lands" depicted as within refuges are in actuality state lands.

Furthermore, the effect of these proposed boundaries on the Fishery Conservation and Management Act of 1976 (90 Stat. 331) remains to be throughly analyzed. This Act extended the territorial limits of the United States for fisheries purposes 200 miles seaward, and in Section 306 recognized primary responsibility for fishery management within State boundaries as resting with the affected State. Thus management of salmon and herring fisheries, for example, which occur primarily within the 3-mile seaward boundary of the State, or in inland waters entirely within the State's boundaries, would appear to be subject to state management despite their inclusion within the boundaries of proposed refuge lands depicted on maps incorporated into the legislation. Certainly it would seem advisable to acknowledge and resolve this jurisdictional conflict prior to creation of refuge units which would perpetuate this ambiguity.

Title V. (National Wild and Scenic Rivers System): The administrative provisions contained at Section 503 amend the Wild and Scenic Rivers Act (82 Stat. 906). Subsection 503(e) purports to authorize the use of snowmobiles on frozen rivers which are designated components of the Wild and Scenic Rivers System, subject to approval and regulation by the Secretary of the Interior. Snowmobiles are permitted to be used only for "...customary travel, transportation, and subsistence purposes by local residents and by authorized subsistence users, as was occurring on or before January 1, 1977."

This provision purports to grant to the Secretary management authority possessed and not relinquished by the State, i.e. management of the publicly-owned water column (including its frozen surface), and management of State-owned water bottoms in the case of navigable waters. The authority purportedly granted the Secretary would, by its terms, prohibit use of the frozen waterway for sport hunting and fishing, or for commercial trapping or fishing, activities which the State may well desire to perpetuate in certain areas. In other areas, the State may need to control or prohibit the use of snowmobiles on frozen rivers within the Wild and Scenic Rivers System, an option purportedly foreclosed by this provision. Furthermore, the limitation of snowmobile use on frozen rivers to "local residents" may be an unconstitutional or unlawful distinction under state law. The term "authorized subsistence user" may be unlawful in this context under state law, and has no meaning in this legislation since the concept of examining and authorizing individual subsistence users has been discarded from H.R. 39.

This ambiguity regarding authority for management of Wild and Scenic Rivers, which are comprised of publicly-owned and State-managed waters which sometime overlie State-owned navigable water bottoms, and which concurrently traverse lands owned by the Federal government, the State, and private parties, begs a rational solution in H.R. 39. The authority to execute cooperative agreements for non-federal lands contained at Section 503(a) does not solve the problem, because even in those instances in which the land on both banks of a designated river is in Federal ownership, the water column is under state management and the bed itself may be in state ownership, thus creating potentially debilitating management conflicts.

The management conflicts illustrated above were resolved in the original Wild and Scenic Rivers Act at 43 U.S. Code Section 1284 by recognition of state property and water management authority. While H.R. 39 does not explicitly enlarge the Secretary's authority to manage designated rivers under the Wild and Scenic Rivers Act in derogation of state authority, the inclusion of the item "waters" in the definition of "lands" at Section 103(1) and the purported grant of Secretarial water management authority by Section 503(e) might be interpreted to have that effect, at the expense of the specific protections granted the State by Section 1284 of the Wild and Scenic Rivers Act.

Title VII. (Subsistence): The unresolved questions regarding Secretarial jurisdiction over Federal "lands" (including the item "waters") contained within subsistence management areas parallel the concerns raised earlier regarding the lack of recognition in H.R. 39 of Alaska's ownership of navigable water bottoms

and management authority over public waters. Without clarifying amendment, these issues may be subject to ultimate judicial interpretations which may vitiate the proposed Federal management systems or the State's interests, or both; the one certainty regarding judicial interpretation of conflicting statutory obligations may be that the result is often unexpected or unintended. This result need not occur if the shortcomings addressed here are dealt with.

An area which should be of specific concern to the State is the authority for Secretarial approval and review of the State's subsistence management program contained in Sections 704 and 705 of Title VII. These sections require the State to include certain concepts and specific elements in its subsistence management program if it wishes to "accept" the Federal offer of management of subsistence uses on Federal lands, and to continue to manage these resources after Secretarial review. There is no qualification that the program required by the Secretary be constitutional under state law, as interpreted by final rulings of the Alaska Supreme Court.

It is not difficult to envision a situtation in which the Secretary under Title VII might require the State to adopt or change elements of the State subsistence management program which would be unconstitutional and thus impossible to implement or enforce under state law; the penalty would be involuntary removal of management authority from the State, or a forced amendment of Alaska's Constitution. Particularly troublesome in our Constitution may be Section 3 of Article VIII (Common Use), Section 15 (No Exclusive Right of Fishery), and Section 17 (Uniform Application). Section 15, for example, was amended by Alaska's electorate in 1972 to insure that Alaska's limited entry fishery permit program would be constitutional; however, there was no federal threat that if the voters failed to adopt the amendment, fisheries management authority previously vested in the state as an incident of statehood would be arbitrarily removed.

Direct or indirect control of the content of a state's constitution by the Federal government, or by an appointed Federal official, should be avoided at all costs as a violation of the Federal-state separation of powers and the constitutional equal-footing doctrine. Unlike statutory changes, which may be enacted on a yearly basis by an informed legislature, compelled constitutional amendments would involve arbitrary tinkering with the fundamental document of state government by the whole electorate, under the direct threat that if they failed to act in a manner satisfactory to the Secretary, the State would lose an authority granted to it by its Statehood Act and vested in every other State in the Union. There is something basically offensive to the democratic and federal systems of government in such a possibility.

Without statutory language forbidding the Secretary to require subsistence management provisions which violate the State Constitution, as interpreted by its highest court, this possibility may well arise. At the present time an appeal to the Alaska Supreme Court is pending in Tanana Valley Sportsmen's Assn. vs. Alaska (No. 76-1958 Civil, State Superior Court, 4th District), in which the trial court held an allocation of caribou permits to subsistence hunters in a depressed-population situation to be unconstitutional. Other appeals on similar issues, as a result of H.R. 39 or other state or federal legislation, may be expected to arise from time to time. Unless the State is protected by statute from these conflicts with the Alaska Constitution, the voluntary state administration of the subsistence management program may be irreconcilable with the Secretary's possible extra-constitutional requirements, and thus short-lived.

Additional administrative conflicts between existing state and federal law and an acceptable state subsistence management program under Title VII of H.R. 39 are evident. For example, can fisheries management be considered to be encompassed by Title VII? At the present time the State administers the water column and owns the bed of navigable waters, even within the proposed conservation units (both inland and out to the 3-mile limit). There is arguably no authority for the Secretary to impose subsistence management (either state-administered or federally administered) on the fisheries within these areas, since the subject matter is entirely within the range of present state authority. Furthermore, recent Federal law acknowledges and strengthens this position, and raises doubt whether a subsistence fisheries management program, if otherwise otherwise permissible under Title VII, would accomplish its intended results.

As mentioned previously, Section 306 of the Fishery Conservation and Management Act of 1976 acknowledges and preserves state fisheries management jurisdiction within its boundaries. In addition, section 301(a) of this act prohibits any state fishery management plan which discriminates between residents of different states, or in the allocation of fishing primileges due to necessity, allocates unfairly or permits any particular "...individual, corporation, or other entity to acquire..." "an excessive share of such privileges." The reconciliation of these existing federal requirements with the apparent purposes and scope of Title VII regarding fisheries is required by Section 713 of H.R. 39.

Brief mention should also be made of the possible conflict between the State of Alaska's Limited Entry Fisheries Permit program, A.S.16.43, and the possible requirements imposed by Title VII, if it is intended to govern subsistence fisheries (and assuming an adequate legal basis for Federal controls over this activity).. Besides finding adequate legal basis in the 1976 federal Fishery Management Act, the State's Limited Entry Permit program has successfully withstood a challenge in the Alaska Supreme Court, (Isakson v. Rickey, 550 P. 2d 359 (1976)), and the State's authority to manage species which migrate beyond the State's 3-mile limit, and even beyond the 12-mile territorial limit, has been upheld by the U.S. Supreme Court in the case of Alaska v. Uri. As presently written, Title VII implies that this state management program would be subject to the priority subsistence management requirements of the bill, in which case it may collapse as unworkable.

A question has also been raised whether the State's subsistence management program under Title VII, if it choses to exercise state fish and game management authority rather than lose it, would be subject to an environmental impact statement (EIS) under the 1969 National Environmental Policy Act (NEPA), 42 U.S. Code Section 1321. The short answer to this question appears to be affirmative. The adoption of a subsistence management program by the State, or the necessary changes and yearly adjustments to that program, might well be a purely state activity, not subject to the qualification of a "major Federal action significantly affecting the human environment" which invokes NEPA jurisdiction. However, the certification by the Secretary of an approved state plan, and the review and required change of existing state plans by the Secretary, would almost certainly be "major federal actions" within the meaning of NEPA. At the least a negative declaration would appear to be necessary, but in most instances a full EIS, with appropriate procedural requirements, would seem to be required before Secretarial action on state subsistence plans could occur. The functions of the local and regional fish and game councils required to be established by

Title VII may also have NEPA implications, since they are established pursuant to federal requirements and have some direct contact with the Secretary in section 705(b). However, their advice is not mandatory, and Secretarial action after receipt of that advice remains discretionary, and itself subject to NEPA requirements.

Conclusion. It is clear from this extensive list of apparent and potential legal entanglements raised by H.R. 39 that two actions are immediately necessary: first, recognition by committee members and staff that problems exist; and second, amendments which clarify and correct these problems. If it is in fact intended that H.R. 39 impose upon Alaska a natural resource role entirely absent (and politically unacceptable) in any other state, and which overrides existing Federal laws which define relative federal-state relationships, then that intention should be both straightforward and publicly-discussed. Likewise, if it is intended that H.R. 39 enlarge the settlement grant made by ANCSA, divest the State of water-management authority, and place previous property grants to the State in question, then that intention should be made explicit.

If it is not the intention of H.R. 39 to accomplish these results (which the existing language and ambiguities of the bill leave entirely possible for future court interpretation), then in addition to the specific changes previously recommended for the Definitions section of Title I, I would recommend adoption of a proposed Section 1307, entitled "Applicability of Existing Laws". I have attached a copy of this proposal. This Section 1307 would act as an interpretive guide to the entirety of H.R. 39, and would direct future court interpretations of the Act. Because H.R. 39 cuts across so many areas embodied in existing federal legislation, and because H.R. 39, viewed in its most expansive light, could alter so many existing Federal-state relationships and property interests, this type of interpretive provision is, in my opinion, essential.

If the ambiguities present in H.R. 39 are to be applied contrary to existing Federal-state relationships, and if there is legal authority to do so, the legislation should make these facts plain. Otherwise, the general interpretations required by the proposed Section 1307 should govern.

I hope that this somewhat lengthy analysis may be of assistance to you. If I may be of further help, please contact me at your convenience.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

Thomas E. Meacham
Assistant Attorney General

cc: Avrum M. Gross

Enclosure