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Recreation rivers timber sales

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This memorandum is in response to your November 15, 1989, request for answers to certain questions regarding timber sales under the Recreation Rivers Act. Your questions concern the circumstances under which timber within recreation river corridors may be disposed of by the Department of Natural Resources ("DNR") before, and after, adoption of a management plan.

To summarize our answers, whether occurring before or after adoption of a management plan, disposal of timber within a recreation river corridor is limited by AS 41.23.470(b). Under this section, timber may be disposed of only by sales negotiated under AS 38.05.115. DNR may sell the timber only for three purposes: personal use, use incident to access construction, or habitat enhancement. Under this personal use provision, timber may be sold only for the purchaser's own use for house logs and firewood, and may not be sold for later use in commercial operations. However, this use limitation for timber sold in a personal use sale does not extend to timber sold coincident with harvesting of timber for access construction or for habitat enhancement; in these two contexts timber that was sold could presumably be used in commercial operations.

This memorandum will first provide an analysis of the Recreation Rivers Act with regard to timber sales, and will then address each of your specific questions.

A. General analysis.

1. Negotiated sales of timber, whether occurring before or after adoption of a management plan, are limited by AS 41.23.470(b).

The Recreation Rivers Act ("Act"), ch. 122, SLA 1988, is codified under Multiple Use Management of Public Resources at AS 41.23.400 -- 41.23.510. Section 3 of the Act directs the commissioner of natural resources to propose a management plan for each recreation river. 1/ Prior to the adoption of the management

1/ Section 3 is codified at Chapter 122, Temporary and Special

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plan, section 3 limits disposals of timber as follows:

Except for negotiated sales under AS 38.05.115, the commissioner of natural resources may not dispose of timber or other resources within a recreation river corridor

It also provides that until a management plan has been adopted "interim management of the recreation river shall be consistent with AS 41.23.400." AS 41.23.400 sets out the purposes of the Act.

2/

Acts (1988).

2/ The purposes are:

(a) The purpose of AS 41.23.200 -- 41.23.310 is to establish as recreation rivers the land and water now owned by the state and the land and water acquired in the future by the state that lies within the recreation rivers and the river corridors described in AS 41.23.300.

(b) The primary purpose for the establishment of the six recreation rivers is the maintenance and enhancement of the land and water described in AS 41.23.300 for recreation.

(c) The primary purposes for the management of the six recreation rivers are

(1) the management, protection, and maintenance of the fish and wildlife populations and habitat on a sustained-yield basis;

(2) continued recreation and economic use, including the uses described in (3) and (4) of this subsection, and enjoyment by the public and individuals of recreational activities that include hunting, fishing, trapping, camping, boating, hiking, snow machining, skiing, dog mushing, and wildlife viewing, while ensuring the scenic and natural integrity of the recreation river;

(3) multiple use management of upland activities within the recreation river corridor to ensure that mitigation measures to alleviate potential adverse effects on water quality and stream flow will take place; and

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Section 3 does not explicitly restrict timber disposals that occur before the adoption of the management plan to personal use sales. There is a presumption, however, that every provision of a statute has force and effect. Alaska Transp. Comm'n v. Airpac, Inc., 685 P.2d 1248, 1253 (Alaska 1984). Further, all sections of a statute are to be construed together so that all have meaning and no section conflicts with another. In re Hutchinson's Estate, 577 P.2d 1074, 1075 (Alaska 1978).

Considering the statute with these rules of construction in mind, it is obvious that the Act as a whole contemplates that, although timber sales are to be allowed within recreation river corridors, they are to be limited. AS 41.23.410 provides for timber sales as follows:

The commissioner shall allow the following activities on a recreation river or within a recreation river corridor when they are compatible with AS 41.23.400 and consistent with a management plan adopted under AS 41.23.440:

. . . .

(2) the sale and harvest of wood products under AS 41.23.470(b)

AS 41.23.470(b) limits the sale of timber for three purposes, as follows:

(b) The commissioner may conduct only a negotiated timber or material sale under AS 38.05.115 to provide for personal use, including house logs and firewood, or for a use incidental to the construction of access, or for habitat enhancement.

The personal use restriction of subsection 470(b) does not, by the plain language of the statute, apply to timber harvested incidental to the construction of access or for habitat enhancement. Neither

(4) accommodation of access for resource uses, including recreation and tourism, within or adjacent to the river corridor.

AS 41.23.400.

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does the language of AS 38.05.115 limit the use of such timber to personal use. ^{3/} Presumably, timber sold in conjunction with access construction or habitat enhancement could be used for commercial purposes.

Although section 3 of the Act does not explicitly limit the negotiated sale of timber to the three use categories as does subsection 470(b), section 3 must be construed together, and so as not to conflict, with the limitations of subsection 470(b). As a result, whether prior to or after the adoption of a management plan, disposals of timber are subject to the limitations of subsection 470(b): to provide for personal use, for a use incidental to construction of access, or for habitat enhancement.

2. Limitation on use of timber from personal use sales.

The Act gives very little direction as to how "personal use" timber may be used. Subsection 470(b) provides that "personal use" includes use of timber as house logs and firewood. No further definition of "personal use" is found in the Act. ^{4/} Regulations implementing AS 38.05.115 may guide our inquiry to the extent they are not inconsistent with the overall purposes of the Act since presumably the legislature was aware of them at the time the Act was passed. Under 11 AAC 71.050, which provides for negotiated personal use sales, "[t]he products acquired by a purchaser in a sale under this section may not be sold, bartered, or used for commercial purposes."

^{3/} Regulations under AS 38.05.115 provide for both "negotiated sales" (11 AAC 71.045) and "negotiated personal use sales" (11 AAC 71.050). "Negotiated sales" under 11 AAC 71.045 are not restricted to personal use. Consequently, timber sold and harvested under subsection 470(b) when incidental to construction of access or for habitat enhancement, could be by negotiated sales under 11 AAC 71.045 for commercial purposes.

^{4/} Nor have we been able to find a definition of "personal use" in the legislative history of the Act. The personal use restriction did not appear in the original House Bill (HB 93) as introduced on January 30, 1987. It was added by the Senate Resources Committee prior to enactment on April 21, 1988. There is no explanation in the legislative history as to why it was added.

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Unfortunately, neither the Act nor AS 38.05.115 provide a definition of "commercial purpose." 5/ The only guidance in the Act as to what is considered commercial is found in subsection 470(d), which refers to lodges, campgrounds, and boat launches as examples of commercial facilities.

Using 11 AAC 71.050 as a guide, it would appear that timber from personal use sales made under AS 38.05.115 may not be "sold, bartered, or used for commercial purposes." Since the Act refers to lodges, campgrounds, and boat launches as commercial facilities, it would also appear that timber and materials disposed of for personal use under subsection 470(b) are not to be used as building material or firewood in the commercial operations of a lodge, campground, or boat launch. Neither may the timber be sold, bartered, or used in exchange for any goods or services incidental to such commercial operations. Obviously, this limitation would extend to other commercial operations, such as guides and outfitters, within recreation river corridors.

Because there is no definition of "personal use" or "commercial purposes" in the Act or the regulations relevant to negotiated timber sales under AS 38.05.115, it would be possible to define the two phrases in regulations adopted after a management plan has been adopted. 6/ "Personal use" could possibly be defined in regulation to include some uses by lodges, outfitters, and other commercial operations so long as the allowed uses, as defined, do not conflict with other provisions of the Act or with AS 38.05.115 and its regulations. For example, "personal use" might be defined to include use of timber for lodge construction or firewood so long as the timber is not sold, bartered, or used in exchange for goods or services or as an inducement to solicit business. "Commercial purposes" could possibly be defined for purposes of the Act to exclude or except use of timber as building materials or firewood by lodges, outfitters, guides, etc. Of course, timber sales allowed pursuant to such regulations would still have to be conducted in a manner and at a level that would be consistent with the purposes and other provisions of the Act.

B. Response to specific questions.

5/ The regulations implementing AS 38.05.115 do not define "commercial purposes."

6/ Regulations may not be adopted under the Act before a management plan takes effect. AS 41.23.440(b).

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1. Is the division's interpretation of the restrictions as outlined [below] accurate?

Question (a) Timber sales inside recreation river corridors must be restricted to personal use only, and all sales must be negotiated under AS 38.05.115.

Answer: No. While it is true that all timber sales within recreation river corridors must be negotiated under AS 38.05.115, such sales are not restricted to personal use only. As discussed in section A above, AS 41.23.470(b) provides for timber sales for three limited purposes: personal use, including house logs and firewood, use incidental to access construction, or for habitat enhancement. Neither the plain language of the Recreation Rivers Act nor AS 38.05.115, and the regulations promulgated to implement AS 38.05.115, require a personal use restriction on sales of timber for use incident to access construction or for habitat enhancement.

The purchaser of timber from sales made for the purpose of access construction or for habitat enhancement would not be precluded from acquiring the timber for commercial purposes.

Question (b) Lodge owners, guides, and outfitters, could not purchase or otherwise acquire, forest products for use in their commercial operations from within the recreation river corridors.

Answer: This appears to be true for timber sold under the "personal use" provision of AS 41.23.470(b). However, lodge owners, guides, and outfitters would not be precluded from acquiring forest products for use in their commercial operations if the timber was sold incident to access construction or for habitat enhancement and the timber sale was negotiated under 11 AAC 71.045.

Question (c) Section 3 of the Act allows the division to negotiate sales consistent with AS 41.23.470(b) between the adoption of the Act and the adoption of the management plans.

Answer: Yes. Section 3 of the Act allows the commissioner to dispose of timber consistent with AS 41.23.470(b), in a sale negotiated under AS 38.05.115, prior to the adoption of a management plan. Until a management plan has been adopted, the first clause of section 3 requires that interim management of the recreation river corridors shall be consistent with the purposes of the Act, as they are stated in AS 41.23.400. So long as negotiated timber sales are consistent with the purposes of the Act, the commissioner may negotiate sales under AS 38.05.115 prior to the

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adoption of a management plan.

Although neither section 3 nor AS 38.05.115 explicitly prohibit sales of timber for commercial purposes prior to adoption of the management plan, interpretation of section 3 together with subsection 470(b) results in the limitation that prior to adoption of a plan, only timber harvested from sales incidental to access construction or for habitat enhancement may be acquired for commercial purposes.

2. Does section 3 of the Act provide for the opportunity for commercial sales after the adoption of the plan?

Answer: No. By its terms, section 3 has effect only until a management plan is adopted. After adoption, the management plan provisions of AS 41.23.440 govern.

Although subsection 440 does not address whether the plan may provide for "commercial" sales of timber, it should not be interpreted so as to authorize a management plan that is inconsistent with the limitations on timber disposals imposed by subsection 470(b). Consequently, a plan may authorize timber sales in recreation river corridors only in three contexts: for personal use, for use incidental to access construction or for habitat enhancement. Commercial sales would be possible incidental to access construction or habitat enhancement.

3. Does AS 41.23.470(b) require all timber sales to be for personal use only, thus restricting the planners and the public from making any other decision in the planning process?

Answer: As discussed above in section A, and below in answer 4, AS 41.23.470(b) does not limit timber sales to personal use only. The planners must, however, consider the limitations of subsection 470(b) in the planning process. For example, the planners could not decide to disregard the personal use limitation and allow commercial sales of timber within recreation river corridors when the timber harvest was not necessary for access construction or for habitat enhancement.

4. What is the definition of "commercial purposes" as used in 11 AAC 71.050? Is there a clear definition in law elsewhere that would apply to our situation?

Answer: As discussed above in section A, there is no definition of "commercial purposes" in Title 41.23, in AS 38.05.115, or in the

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relevant regulations.

5. Under what conditions and for what purposes could a lodge owner, guide, or outfitter obtain forest products from within the corridor?

Answer: A lodge owner, guide, or outfitter could obtain forest products from within a recreation river corridor for use in commercial operations if the forest products were harvested under negotiated sales for use incident to construction of access or for habitat enhancement. For the "personal use" of lodge owners, guides, or outfitters, forest products could be harvested under any or all three provisions of subsection 470(b). As discussed above in section A, timber taken under the "personal use" provision could not be used for building lodges or other building related to commercial operations or for firewood in commercial operations.

A caretaker of a lodge could presumably acquire forest products for his or her personal use under the personal use provision as well as under the incident to access construction or habitat enhancement provisions. As analyzed in section A, forest products provided to a caretaker by a commercial operator, such as a lodge owner, as partial payment or inducement for services would probably be considered a commercial purpose.

Please call if we can be of additional assistance in this matter.

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