

LEGAL SERVICES

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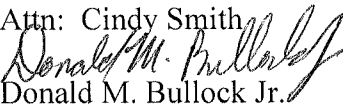
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MEMORANDUM

April 15, 2011

SUBJECT: Review of CSHB 215(FIN) am (Work Order No. 27-LS0741\E.A)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

You asked for a review of CSHB 215(FIN) am (bill) to identify constitutional or statutory conflict. You specifically want to know how *Moore v. State*¹ may apply to the bill.

Local or special legislation.

Sections 1 - 4 of the bill relate to covenants in AS 38.35.120(a) that the Alaska Housing Finance Corporation (AHFC) would not be bound to agree to as a condition of receiving a right-of-way lease. The covenants in AS 38.35.120(a) were enacted by the legislature and the bill would make several of those covenants inapplicable to a lease entered into with AHFC. Carving out an exception to AHFC raises a question under art. II, sec. 19, Constitution of the State of Alaska, as to whether the exclusion unique to AHFC makes the bill a "local or special act" that is contrary to the prohibition. A general Act that excludes the same covenants for any gas pipeline could avoid the "local or special" question. The fact that AHFC is a public corporation and government instrumentality² may be a factor considered by the court if faced with a challenge under art. II, sec. 19.

Another factor that may be considered under a challenge under art. II, sec. 19, is the policy expressed in AS 38.35.010(a) of the Right-of-Way Leasing Act. AS 38.35.010(a) reads as follows:

(a) The natural resources of this state in crude oil and natural gas and in its land for transportation of these resources and their products by pipeline toward markets both in and out of the state are capable of making a significant contribution to the general welfare of the people of this state.

¹ 553 P.2d 8 (Alaska 1976).

² AS 18.56.020.

It is the policy of this state that the development, use, and control of a pipeline transportation system be directed to make the maximum contribution to the development of the human resources of this state, the increase in the standard of living for all of its residents, the advancement of existing and potential sectors of its economy, the strengthening of free competition in its private enterprise system, and the careful protection of its incomparable natural environment.

That policy, considered along with the enactment of ch. 7, SLA 2010, which created the Joint In-State Gasline Development Team in AHFC,³ expresses the state policy to develop an in-state pipeline and have that project developed by AHFC.

In *Baxley v. State*,⁴ the Alaska Supreme Court considered an Act that provided relief to a legislative enactment that gave effect to modifications of four state oil and gas leases in the Northstar Oil Field.⁵ The Court concluded that the Act was not special legislation, "[b]ecause the Act's exclusive focus on the Northstar leases reflects their unique nature, and because the Act fairly and substantially relates to legitimate state purposes[.]"

AHFC would not be required to agree to the covenants from which it is excluded under the bill. Considering the state policy expressed in AS 38.35.010 and the enactment of AS 38.34 (that requires AHFC to develop a gas pipeline project), it is likely that a court would find that the favorable treatment of AHFC in the bill relates to legitimate state purposes. It is reasonable to expect that a court would find that bill does not violate art. II, sec. 19, Constitution of the State of Alaska.

Standing and the limitations on actions relating to the right-of-way lease.

Sections 5 and 6 of the bill amend AS 38.35.200. Currently, AS 38.35.200 limits standing to object to a right-of-way lease, the period in which an objection must be raised, and the issues relating to the issuance of the right-of-way lease that are subject to judicial review.⁶ The period for raising an objection is 60 days after the commissioner of

³ AS 38.34.030.

⁴ 958 P.2d 422 (Alaska 1998).

⁵ 958 P.2d at 424.

⁶ Sec. 38.35.200. Judicial review of decisions of commissioner on application. (a) An applicant or competing applicant or a person who has a direct financial interest affected by the lease who raises objections within 60 days of the publication of notice under AS 38.35.070 are the only persons with standing to seek judicial review of a decision of the commissioner under AS 38.35.100.

(b) The only grounds for judicial review of a decision of the commissioner are

natural resources (commissioner) publishes notice that an application for a right-of-way lease has been received under AS 38.35.070.

In *Moore v. State*, the case you mentioned in your request, the Alaska Supreme Court stated, "Whether a party has standing to obtain judicial resolution of a controversy depends on whether the party has sufficient personal stake in the outcome of the controversy."⁷ The plaintiffs in *Moore*, who for the most part were commercial fishermen, claimed that they would be adversely affected if oil exploration and production were to be allowed in Kachemak Bay. The court concluded that the plaintiffs' interest in the outcome is essentially economic, and, "As such, it clearly meets the injury-in-fact requirement for standing."⁸ Under the decision in *Moore*, the direct financial interest requirement for standing in the present AS 38.35.200 and in the proposed amended version may be satisfied by a person whose livelihood may be affected by a right-of-way lease or an action related to that lease. To secure standing, a person must raise the required objection with 60 days after the notice of an application has been published.

Section 5 of the bill limits standing to the same persons as in current law -- a competing applicant, a person that has a direct financial interest affected by the lease, and the applicant. The bill moves the placement of the naming of the applicant so that the amended AS 38.35.200(a) makes the 60-day period to object applicable to the competing applicant and the person with the directly affected financial interest, but removes the applicant from the requirement to raise an objection during the 60-day limitation period. This is logical because the basis for the applicant's appeal may not arise until the commissioner's decision on the application.

Section 5 further amends AS 38.35.200(a) by adding judicial review of "**an action described in (c) of this section.**" Under the amended language, an applicant is not subject to the limitations in AS 38.35.200(c), which is added by sec. 6 of the bill. However, a competing applicant or a person with the affected direct financial interest must make an objection within the 60-day period described in AS 38.35.200(a) to have standing to seek judicial review. Although other provisions of law may provide for appeals of a state commissioner or agency action described in AS 38.35.200(c), the subsection is, after making an exception for the applicant under AS 38.35.200(a), prefaced with the phrase "notwithstanding any contrary provision of law. . . ." If a

(1) failure to follow the procedures set out in this chapter;

or

(2) abuse of discretion so capricious, arbitrary, or confiscatory as to constitute a denial of due process. (Sec. 1 ch. 72 SLA 1972; am. Sec. 19 ch. 3 FSSLA 1973)

⁷ *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976).

⁸ 553 P.2d at 24.

conflicting law is applicable but does not have a similar "notwithstanding" limitation, the conflict likely would be resolved in favor of the limitations in AS 28.35.200(c).

There may be an access to the courts issue raised if an action that is the basis for a person to seek judicial review is not reasonably foreseen during the 60-day period. The impacted person may still try to access the courts and challenge the 60-day period to acquire standing as barring access to the courts. Whether a court would set aside the 60-day period to acquire standing is difficult to predict; the outcome may depend on the issue that is presented and the alleged risk or harm.

In any case, the amended AS 38.35.200 is an incentive for anyone with even the remotest possibility of being affected by a right-of-way lease or an action related to that lease to raise an objection to preserve standing.

Applicability of art. VIII, sec. 10 of the Alaska constitution.

Article VIII, sec. 10, Constitution of the State of Alaska, prohibits leases of state lands "without prior public notice and other safeguards of the public interest as may be prescribed by law." The Right-of-Way Leasing Act provides for public notice, a hearing, and findings by the commissioner of natural resources before granting a right-of-way lease application, in whole or in part.

AS 38.35.020 authorizes the commissioner to grant a noncompetitive right-of-way lease. The requirements that must be met to be eligible for a right-of-way lease are within AS 38.35, as well as the process for applying. A person seeking a right-of-way lease begins the process by filing an application⁹ that is followed by the publication of a notice stating that an application has been received.¹⁰ It is the publication of this notice that starts the 60-day period for raising an objection and it is during this 60-day period that a person must establish standing to pursue judicial review under AS 38.35.200, as amended by the bill.

Consistent with the requirements in art. VIII, sec. 10 of the constitution, by enacting AS 38.35.070 the legislature required prior public notice before the commissioner may approve a lease application. AS 38.35.080 requires a public hearing and requires the commissioner to prepare an analysis of the application, which is made available at least 30 days before the date set for the hearing.

After the hearing, AS 38.35.100 requires the commissioner to determine and make a written finding on an application as to whether "the applicant is fit, willing, and able to perform the transportation or other acts proposed in a manner that will be required by the

⁹ AS 38.35.050.

¹⁰ AS 38.35.070.

present or future public interest." If the commissioner finds the application may be granted, the commissioner may grant the application in whole or in part. The limitations in AS 38.35.200 in current law limit standing to seek judicial review of a decision made under AS 38.35.100.

Article VIII, sec. 10 of the state constitution requires that no lease of state land "shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." The legislature has prescribed that there be notice of a right-of-way application (AS 38.35.070), analysis and public hearing (AS 38.35.080), and a decision by the commissioner based on written findings (AS 38.35.100). Whether this process satisfies the requirements in art. VIII, sec. 10, is a question of law which thus far has not been addressed by the Alaska Supreme Court. Under AS 38.35.200(c), as added by the bill, a claim alleging the invalidity must be brought within 60 days after the effective date of the Act enacting the subsection, and a claim alleging that an action will deny rights under the state constitution must be brought within 60 days after the date of an action.

The limitations on bringing a claim under AS 38.35.200(c) are set by law; the equitable remedy of laches is not applicable. With regard to the defense of laches, which is discussed in the *Moore* case, the Alaska Supreme Court wrote:¹¹

The defense of laches is inapplicable to an action at law. Although this proposition has never been directly asserted by the court, this was our implicit conclusion in *State v. Alex*, 646 P.2d 203, 215 (Alaska 1982). Moreover, limiting the defense of laches to equitable actions is in accord with the case law of virtually every other jurisdiction. When a party is seeking to enforce a legal right, as opposed to invoking the discretionary equitable relief of the courts, the applicable statute of limitations should serve as the sole line of demarcation for the assertion of the right.

In *Moore v. State*, the defendants raised the defense of laches, and were successful in obtaining summary judgment in their favor on that basis on the lower court.¹² The Supreme Court reversed after reviewing the timing of events in the lease sale, from the call for nominations, through the lease sale, the issuance of the leases, the issuance of the first permits in November 1974, and the filing of the plaintiff's suit in December 1974.¹³ The court found that the plaintiffs were "not guilty of inexcusable delay" and sufficient prejudice had not been established on the record.¹⁴

¹¹ *Lake and Peninsula Borough v. Local Boundary Com'n*, 885 P.2d 1059, 1064 - 1065 (Alaska 1994) (footnotes omitted).

¹² 553 P.2d at 14.

¹³ 553 P.2d at 14 - 16.

¹⁴ 553 P.2d at 16.

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Actions by the Department of Environmental Conservation.

In the course of considering HB 215, concern was expressed over the effect of limiting review of the actions in the proposed AS 38.35.200(c) on the authority delegated to the Department of Environmental Conservation by the United States Environmental Protection Agency. AS 38.35.200(d) was added in the House Judiciary Committee and was adopted in CSHB 215(JUD) to avoid this conflict.

This analysis may not be conclusive or address every issue raised by CSHB 215(JUD) am given the limited time available as the session ends. If you do hear the bill in your committee, you may wish to seek additional comments from the Department of Law, who would defend the enacted provisions of the bill.

If I may be of further assistance, please advise.

DMB:ljw

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