

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

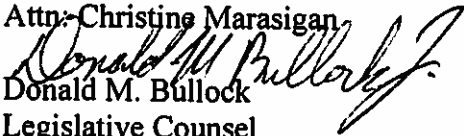
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 12, 2013

SUBJECT: Legislative findings in CSHB 129(FIN); proposed amendment
(Work Order No. 28-GH1970\U)

TO: Senator Kevin Meyer
Attn: Christine Marasigan

FROM: 
Donald M. Bullock
Legislative Counsel

You asked whether the legislative findings misstate the court decision and whether the recommended amendment you provided would satisfy the level of analysis required to be done by the Department of Natural Resources (DNR) in the decision of the Alaska Supreme Court in *Sullivan v. Resisting Environmental Destruction on Indigenous Lands (REDOIL)*, Case No. 3-14216, Decision NO. 6769, ___ P.3d ___ (Alaska, March 29, 2013).

Unfortunately, I do not have the luxury of time to thoroughly review the court's decision in *REDOIL*, so I am unable to advise you concerning the accuracy of the legislative findings in sec. 1 of the bill. There seems to be disagreement concerning the accuracy of the facts set forth in the findings. However, I suggest omitting the findings from the bill under the guidance of the *Manual of Legislative Drafting*.

The *Manual of Legislative Drafting* addresses legislative findings at pages 14 - 15:

Although legislative findings relevant to the need for a bill are presumably contained in the record of committee hearings and debate on the bill, there are some instances in which the findings are deemed necessary and should be set out in the bill and enacted as a part of the bill. This may be particularly true if the bill proposes to enact law that is likely to be challenged on constitutional grounds. The findings enacted as a part of that law may provide justification for upholding the validity of the law. The drafter should work closely with the requester to ensure that the legislative history of the bill, particularly the record of the committee hearings, provides a basis for the findings. In cases where the findings are not necessary for placement in the bill text, the drafter should work closely with the requestor to prepare intent text that can be specifically entered into the legislative history of the bill, particularly the record of the committee hearings.

Findings are often combined with statements of purpose, set out as a separate subsection within the first section of a bill. As mentioned in connection with statements of purpose, it is important that the findings not be used to make up for poor drafting or to close gaps in the substantive provisions of the bill.

The bill referenced above adds a new subsection to AS 38.05.035, the section that describes the powers and duties of the director of the division of lands. AS 38.05.035(o) in sec. 2 of the bill authorizes the director to approve "exploration or development for all or part of an area previously approved for oil and gas or gas only leasing under [AS 38.05.035(e)]." However, the new subsection does not address the court's holding on page 20 of the slip opinion:

DNR argues, citing *Greenpeace, Inc. v. State, Office of Management and Budget, Division of Governmental Coordination and Alaska Coastal Policy*, that we have previously held that a review of cumulative impacts is only a statutory requirement rather than a constitutional one. REDOIL argues the Alaska Constitution requires cumulative impacts of a project to be considered, even after the lease sale stage. DNR's interpretation of our prior case law is incorrect. *We hold that consideration of cumulative impacts is constitutionally required throughout all the phases of a project.*

(Emphasis added; citations omitted.)

The proposed AS 38.05.035(o) does not address the "consideration of cumulative impacts." However, the language offered by Lisa Weissler in the proposed amendment emphasizes the analysis and consideration of cumulative impacts, consistent with the constitutional requirement as stated by the court.

In conclusion, the findings in sec. 1 may be unnecessary. If the language in the substantive law is clear, the findings are unnecessary. The language in the proposed amendment seems to be consistent with the court's finding of a constitutional requirement to consider cumulative impacts in all phases of a project.