

Original sponsor: Coghill

1 IN THE SENATE BY THE JUDICIARY COMMITTEE
2 CS FOR SENATE BILL NO. 108 (Judiciary)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FIFTEENTH LEGISLATURE - FIRST SESSION
5 A BILL
6 For an Act entitled: "An Act relating to decisions on right-of-way lease
7 applications; and providing for an effective date."
8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:
9 * Section 1. AS 38.35.100 is amended to read:
10 Sec. 38.35.100. DECISION ON APPLICATION. (a) The commissioner
11 shall promptly determine, on an application filed under AS 38.35.050,
12 whether the applicant is fit, willing and able to perform the trans-
13 portation or other acts proposed in a manner that will be required by
14 the present or future public interest. In making a determination the
15 commissioner shall consider whether or not
16 (1) the proposed use of the right-of-way will unreasonably
17 conflict with existing uses of the land involving a superior public
18 interest;
19 (2) the applicant has the technical and financial capabil-
20 ity to protect state and private property interests;
21 (3) the applicant has the technical and financial capabil-
22 ity to take action to the extent reasonably practical to
23 (A) prevent any significant adverse environmental
24 impact, including but not limited to, erosion of the surface of
25 the land and damage to fish and wildlife and their habitat;
26 (B) undertake any necessary restoration or revegeta-
27 tion; and
28 (C) protect the interests of individuals living in the
29 general area of the right-of-way who rely on fish, wildlife and

1 biotic resources of the area for subsistence purposes;

2 (4) the applicant has the financial capability to pay
3 reasonably foreseeable damages for which the applicant may become
4 liable on claims arising from the construction, operation, maintenance
5 or termination of the pipeline;

6 (5) the applicant has agreed that in the construction and
7 operation of a pipeline within the right-of-way the applicant will
8 comply with and require contractors and their subcontractors to comply
9 with applicable and valid laws and regulations regarding the hiring of
10 residents of the state then in effect or that take effect subsequent-
11 ly.

12 (b) If the commissioner makes the [THESE] determinations under
13 (a) of this section favorably to the applicant, then the commissioner
14 may grant the whole or part of the application. If the commissioner
15 makes the determinations under (a)(1) - (5) of this section favorably
16 to the applicant but determines that the applicant is not then fit,
17 willing, and able to perform under the application, the commissioner
18 may grant the application subject to conditions established by the
19 commissioner that will ensure that the applicant will, within a pre-
20 scribed period of time not exceeding 10 years, establish that the
21 applicant is fit, willing, and able, under (a) of this section, to
22 perform the transportation or other acts that will be required by the
23 present or future public interest. An applicant is not entitled to a
24 notice or authorization to proceed to construction, or its equivalent,
25 under a conditional lease until the commissioner determines in writing
26 that the applicant has satisfactorily established that the applicant
27 is then fit, willing, and able to perform under (a) of this section.
28 Otherwise, the commissioner shall deny the application.

29 (c) The commissioner may offer the applicant a lease under this

1 section. If the applicant does not accept a lease offered under this
2 section within 30 days, the lease offered is withdrawn [IN ORDER TO
3 GRANT THE WHOLE OR PART OF THE APPLICATION THE COMMISSIONER SHALL
4 OFFER A LEASE TO THE APPLICANT FOR ITS ACCEPTANCE THROUGH SIGNING OF
5 THE LEASE AND AGREEING TO COMPLY WITH ITS TERMS, CONDITIONS, AND
6 OBLIGATIONS. ONLY UPON PROPER ACCEPTANCE OF OFFERED LEASE BY THE
7 APPLICANT WITHIN 30 DAYS AFTER ITS HAVING BEEN PRESENTED IS THE GRANT
8 OF THE APPLICATION CONSUMMATED].

9 * Sec. 2. AS 38.35.100 is amended by adding new subsections to read:

10 (d) The commissioner shall include in a conditional lease each
11 requirement and condition of the covenants established under AS 38.-
12 35.120. The commissioner may also require that the lessee agree to
13 additional conditions that the commissioner finds to be in the public
14 interest. In place of the covenant established under AS 38.35.-
15 120(a)(9), the commissioner shall require the lessee to agree that it
16 will not transfer, assign, pledge, or dispose of in any manner, di-
17 rectly or indirectly, its interest in a conditional right-of-way lease
18 or a pipeline subject to the conditional lease, unless the commis-
19 sioner, after considering the public interest, authorizes the trans-
20 fer. The commissioner shall also require the lessee to agree not to
21 allow the transfer of control of the lessee without the approval of
22 the commissioner; as used in this subsection, "transfer of control of
23 the lessee" means the transfer of 30 percent or more, in the aggre-
24 gate, of ownership interest in the lessee in one or more transactions
25 to one or more persons by one or more persons.

26 (e) The commissioner shall require a conditional lessee to agree
27 that

28 (1) in the absence of the approval of the commissioner, a
29 transfer may not relieve the lessee of an obligation assumed under the

1 lease;

2 (2) a transfer, including the transfer of lessee, that
3 occurs without the approval of the commissioner is ineffective to
4 transfer interests in and obligations under the lease; and

5 (3) a transfer constitutes a default under the lease.

6 (f) In an application for the approval under (d) of this section
7 of a transfer of an interest, the commissioner shall consider whether
8 the proposed transferee will be fit, willing, and able to perform the
9 transportation or other acts proposed under the conditions established
10 in the conditional lease and whether the transfer is in the public
11 interest. In approving the transfer of an interest under (d) of this
12 section and this subsection, the commissioner may impose any condition
13 on the transfer that the commissioner considers in the public inter-
14 est.

15 (g) If the commissioner determines under (a) of this section
16 that the applicant is fit, willing, and able to perform the transpor-
17 tation or other acts proposed in a manner that will be required by the
18 present or future public interest, the commissioner may amend the
19 conditional right-of-way lease to insert the covenant established in
20 AS 38.35.120(a)(9) in place of the covenant against a transfer estab-
21 lished under (d) and (e) of this section.

22 (h) The issuance of a conditional lease does not prevent the
23 commissioner from issuing other conditional or unconditional leases
24 for the same right-of-way. An applicant or conditional lessee accrues
25 no priority rights to a particular right-of-way until the commissioner
26 makes a determination that the applicant or conditional lessee is then
27 fit, willing, and able to perform the transportation or other acts
28 proposed under (a) of this section.

29 (i) The commissioner shall insert a provision implementing the

1 requirements of (a)(5) of this section into each agreement entered
2 into by the commissioner for the construction and operation of a
3 pipeline within the state.

4 * Sec. 3. AS 38 is amended by adding a new chapter to read:

5 CHAPTER 36. RESIDENT EMPLOYMENT PREFERENCE UNDER STATE RIGHTS-OF-WAY.

6 ARTICLE 1. HIRING PREFERENCE.

7 Sec. 38.36.010. STATE POLICY. It is the policy of the state to
8 develop the state to provide the maximum benefit to the people of the
9 state as required by the Constitution of the State of Alaska. The
10 benefits include employment opportunities in projects under AS 38.35
11 for residents qualified for the employment, as well as receipt of
12 state revenue from the development.

13 Sec. 38.36.020. LEGISLATIVE FINDINGS. (a) The legislature
14 finds that

15 (1) because of its unique climate and its distance from the
16 contiguous states, the state has historically suffered from unique
17 social, seasonal, geographic, and economic conditions that result in
18 an unstable economy;

19 (2) the unstable economy is a hardship on the residents of
20 the state and is aggravated by the large numbers of seasonal and
21 transient nonresident workers;

22 (3) the rate of unemployment among residents of the state
23 is one of the highest in the nation;

24 (4) the state has one of the highest ratios of nonresident-
25 to-resident workers in the nation;

26 (5) the state has a compelling interest in reducing the
27 level of unemployment among its residents;

28 (6) the construction industry in the state accounts for a
29 substantial percentage of the available employment;

1 (7) construction workers receive a greater percentage of
2 the unemployment benefits paid by the state than is typical of other
3 states;

4 (8) chronic unemployment can breed severe social problems
5 including alcoholism and domestic violence;

6 (9) the rate of unemployment in the construction industry
7 in the state is historically higher than the rate of unemployment in
8 other industries in the state;

9 (10) the influx of nonresident construction workers contri-
10 butes to or causes the high unemployment rate among resident construc-
11 tion workers because nonresident workers compete with residents for
12 the limited number of available construction jobs;

13 (11) the rights-of-way on state land are owned by the state
14 and belong to the residents of the state;

15 (12) the vast majority of the state's revenue is derived
16 from income resulting from the development of the state rather than
17 from other forms of taxation;

18 (13) because the state has no personal income tax or sales
19 tax, nonresident workers use services provided by the state but do not
20 contribute fairly to the costs of those services; and

21 (14) Alaskans, more than the residents of other states,
22 suffer economically when nonresidents displace qualified residents
23 since resident workers contribute local taxes as well as their share
24 of the royalties from natural resources.

25 (b) The legislature further finds that

26 (1) the findings of the Department of Labor of the State of
27 Alaska in its report entitled "Nonresidents Working in Alaska in 1985"
28 support the need for a resident hiring preference;

29 (2) there is a need for timely, accurate information on the

1 number of nonresident and resident workers in industries in the state;

2 (3) the state has a continuing interest in determining
3 whether indirect benefits, including employment opportunities, from
4 state expenditures, construction projects, and agreements concerning
5 the development of the state's resources accrue to residents of the
6 state or to nonresidents;

7 (4) a major factor in the unemployment problem is the
8 failure of some employers engaged in the development of the state and
9 under leases or other agreements granted or permitted by the state to
10 employ state residents;

11 (5) whereas at an earlier stage of the state's history it
12 was asserted that high unemployment in the state was due to cultural
13 and geographical migration barriers, the state now has many residents
14 who are qualified, trained, and available for employment in the explo-
15 ration, development, production, and extraction of natural resources
16 on state land;

17 (6) the state has made significant investments in training
18 programs and vocational education to help furnish industry with qual-
19 ified residents able to work in the development, exploration, produc-
20 tion, and extraction of natural resource products on state land;

21 (7) the state's investment in training and education pro-
22 grams will be of little avail unless state residents receive employ-
23 ment opportunities in construction projects on state land;

24 (8) employment of nonresidents displaces qualified resi-
25 dents from work in the development of the state; therefore, the number
26 of nonresidents hired for work on the development of state land is a
27 peculiar source of the unemployment problem now besetting the state;

28 (9) the number of state residents who are unable to find
29 work is considerably higher than is reflected by unemployment rates

1 based on nationally accepted measures;

2 (10) many rural state residents who wish to work do not seek
3 employment as frequently as necessary to meet federal definitions of
4 unemployment because of continuing lack of employment opportunities in
5 rural areas of the state.

6 Sec. 38.36.030. UNAVAILABILITY OF PREFERRED WORKERS. (a) An
7 employer subject to hiring requirements under AS 38.35.100 may request
8 the commissioner of labor to assist in the location of qualified,
9 eligible employees under AS 36.10.070. After receiving a request for
10 assistance, the commissioner of labor shall refer qualified, eligible,
11 and available residents to the employer to fill the employer's hiring
12 needs.

13 (b) If the commissioner of labor is unable to refer a sufficient
14 number of qualified, eligible, and available residents able to perform
15 the work, the commissioner of labor may approve the hiring of resi-
16 dents who are not eligible for preference and nonresidents for the
17 balance of the request.

18 Sec. 38.36.040. REGULATIONS. The commissioner of labor shall
19 adopt regulations under the Administrative Procedure Act (AS 44.62) to
20 implement this chapter and encourage and require the hiring of resi-
21 dents to the maximum extent permitted by law.

22 Sec. 38.36.050. PREFERENCE IN ZONE OF UNDEREMPLOYMENT. (a) For
23 the full two fiscal years following a determination by the commis-
24 sioner of labor that a zone of underemployment exists, qualified
25 residents who are eligible for an employment preference under AS 36.-
26 10.140 shall be given preference in hiring for work on each right-
27 of-way project on state land under AS 38.35 that is wholly or partial-
28 ly sited within the zone of underemployment. The preference applies
29 on a craft-by-craft or occupational basis.

1 (b) The commissioner of labor shall determine the amount of work
2 that must be performed under this section by qualified residents who
3 are eligible for an employment preference under AS 36.10.140. In
4 making this determination, the commissioner shall consider the nature
5 of the work, the classification of workers, availability of eligible
6 residents, and the willingness of eligible residents to perform the
7 work.

8 (c) The commissioner of labor shall determine that a zone of
9 underemployment exists on a determination that

10 (1) the rate of unemployment within the zone is substan-
11 tially higher than the national rate of unemployment;

12 (2) a substantial number of residents in the zone have
13 experience or training in occupations that would be employed on a
14 project;

15 (3) the lack of employment opportunities in the zone has
16 substantially contributed to serious social or economic problems in
17 the zone; and

18 (4) employment of workers who are not residents is a pecu-
19 liar source of the unemployment of residents of the zone.

20 Sec. 38.36.060. PREFERENCE IN ECONOMICALLY DISTRESSED ZONE. The
21 hiring preference established in AS 36.10.160 for residents of an
22 economically distressed zone who qualify under AS 36.10.140 applies to
23 work on each construction project on a state right-of-way under
24 AS 38.35 that is wholly or partially sited within the economically
25 distressed zone.

26 Sec. 38.36.070. GENERAL REQUIREMENTS. (a) If the governor has
27 declared an area to be an area affected by an economic disaster under
28 AS 44.33.285, then the preference for residents of the area estab-
29 lished under AS 44.33.285 - 44.33.310 supersedes a preference under

1 this chapter.

2 (b) The commissioner of labor shall define the boundaries of a
3 zone in which a preference applies. The boundaries may include a
4 portion of the state or the state as a whole.

5 Sec. 38.36.080. DETERMINATION OF QUALIFICATIONS, TRANSFERS, AND
6 CERTIFICATION. (a) An employer shall determine and judge the work
7 qualifications of applicants for employment.

8 (b) An employer may make a bona fide transfer of management
9 employees from one project or business activity to another. A posi-
10 tion filled by a bona fide transfer under this subsection is not
11 considered to have been a vacancy for the purposes of the hiring
12 requirements under AS 38.36.050 - 38.36.060.

13 (c) An employer subject to a resident hiring requirement under
14 this chapter shall certify that individuals employed as residents
15 under a preference were eligible for the preference at the time of
16 hiring.

17 (d) A labor organization that dispatches members for work on a
18 right-of-way project on state land under AS 38.35 under a collective
19 bargaining agreement shall certify that individuals dispatched as
20 residents to meet a preference were eligible for the preference at the
21 time of dispatch.

22 (e) An employer or labor organization may request assistance
23 from the commissioner of labor in verifying the eligibility of an
24 applicant for a hiring preference under this chapter.

25 Sec. 38.36.090. INCORPORATION INTO CONTRACTS. (a) In order to
26 create, protect, and preserve the right of eligible qualified resi-
27 dents to employment on right-of-way projects on state land under
28 AS 38.35, the commissioner shall incorporate into each lease or condi-
29 tional lease a provision requiring compliance with this chapter,

1 regulations adopted under this chapter, and each later amendment to
2 this chapter or the regulations, and authorizing penalties under
3 AS 38.36.210 for failure to comply.

4 (b) The commissioner shall incorporate into each lease or condi-
5 tional lease a requirement that the lessee include in each contract
6 with contractors or subcontractors who will be operating on a state
7 right-of-way project under AS 38.35 a provision requiring compliance
8 with this chapter, regulations adopted under this chapter, and each
9 later amendment to this chapter or the regulations, and authorizing
10 penalties under AS 38.36.210 for failure to comply.

11 Sec. 38.36.100. REPORTING PROVISIONS. An employer obligated to
12 employ residents under this chapter shall comply with the reporting
13 provisions that the commissioner of labor determines are necessary to
14 carry out this chapter. Except for statistical data, information
15 concerning specific employees is confidential and may not be released
16 to the public by the department. The confidential employee informa-
17 tion may be shared between departments for purposes of this chapter.

18 Sec. 38.36.110. RESIDENT CERTIFICATION. (a) The commissioner
19 of labor may implement a certification system for state residents.
20 The commissioner of labor may charge applicants for certification a
21 reasonable fee to cover the costs of the certification system.

22 (b) An employer who reasonably relies on a certification by the
23 commissioner of labor that an applicant or employee is a resident is
24 not liable for penalties under this chapter based on the nonresidence
25 of the applicant or employee.

26 ARTICLE 2. ENFORCEMENT.

27 Sec. 38.36.210. CIVIL PENALTY FOR WILFUL NONCOMPLIANCE. (a)
28 The commissioner of labor may conduct investigations and hearings to
29 enforce compliance with this chapter. After a hearing, if the

1 commissioner of labor finds that an employer has wilfully failed to
2 comply with this chapter, the commissioner of labor may impose a civil
3 penalty in an amount no greater than

4 (1) \$5,000 for the first rejection of a qualified eligible
5 applicant or other violation of this chapter;

6 (2) \$10,000 for the second and each subsequent rejection or
7 other violation of this chapter.

8 (b) In addition to the imposition of other penalties under this
9 section, if the commissioner of labor finds that an employer has
10 wilfully rejected a qualified eligible applicant or terminated a
11 qualified eligible employee in violation of this chapter, the commis-
12 sioner may require the employer to pay the person the amount of wages
13 the person lost and may require additional amounts to reimburse the
14 person for actual expenses incurred as a result of the wrongful
15 action.

16 (c) The commissioner of labor may impose the penalties under
17 this section on an employer only if the employer itself has failed to
18 comply with this chapter, regulations adopted under this chapter, or
19 later amendments to this chapter or the regulations, or if the em-
20 ployer has failed to incorporate into its contracts the provision
21 required under AS 38.35.100(h) and AS 38.36.090(b).

22 (d) In addition to the imposition of penalties under this sec-
23 tion, the commissioner of labor may seek injunctive relief against a
24 person who is not in compliance with this chapter and the enforcement
25 of penalties imposed under this section.

26 **Sec. 38.36.220. PENALTIES FOR APPLICANTS AND EMPLOYERS.** (a) An
27 individual who makes a false sworn statement in connection with a
28 certification of eligibility for an employment preference under this
29 chapter is subject to criminal prosecution for perjury under

1 AS 11.56.200.

2 (b) An individual who makes an unsworn falsification with the
3 intent to mislead a public servant in the performance of a duty in
4 connection with a certification of eligibility for an employment
5 preference under this chapter is subject to criminal prosecution under
6 AS 11.56.210.

7 (c) In addition to criminal penalties imposed by state law, an
8 individual who is convicted of a crime in connection with a false
9 statement made in a certification required under AS 38.36.080, if the
10 conviction is not reversed, forfeits all future rights to eligibility
11 for an employment preference under this chapter.

12 Sec. 38.36.230. CIVIL PENALTIES FOR FALSE CERTIFICATIONS. (a)
13 In addition to any criminal penalties imposed and to penalties imposed
14 under AS 38.36.210 and 38.36.220, after a hearing the commissioner of
15 labor may impose a civil penalty on an individual who, in connection
16 with certification of eligibility for an employment preference under
17 this chapter,

18 (1) made a false sworn statement; or
19 (2) made an unsworn falsification with intent to mislead a
20 public servant in the performance of a duty.

21 (b) The amount of the civil penalty under (a) of this section
22 for an individual who falsely certifies that the person is eligible
23 for an employment preference under this chapter is not more than \$400
24 for each false certification. The individual also forfeits all future
25 rights to eligibility for an employment preference under this chapter.

26 (c) The amount of the civil penalty under (a) of this section
27 for an employer who falsely certifies that an employee is a resident
28 eligible for a preference under this chapter is not more than \$2,000
29 for each of the first five false certifications. The penalty for the

1 sixth and each succeeding false certification made by an employer is
2 at least \$2,000 and not more than \$4,000.

3 ARTICLE 3. GENERAL PROVISIONS.

4 Sec. 38.36.310. APPLICABILITY OF CHAPTER. This chapter applies
5 to each right-of-way project on state land under AS 38.35. The pref-
6 erence applies only to employment that is performed directly for an
7 employer.

8 Sec. 38.36.390. DEFINITIONS. In this chapter

9 (1) "employer" means a person other than the state who is a
10 party to a lease or conditional lease under AS 38.35.100 on state land
11 and the person's affiliate, principal, subsidiary, contractor, or
12 subcontractor if the activity of the affiliate, principal, subsidiary,
13 contractor, or subcontractor is performed on state land;

14 (2) "qualified" has the meaning given in AS 36.10.990;

15 (3) "resident" has the meaning given in AS 36.95.010;

16 (4) "right-of-way project on state land" means a project
17 authorized by a lease or conditional lease for the construction and
18 operation of an oil and gas pipeline under AS 38.35 if the state is a
19 party to the lease and the project is performed in whole or in part on
20 state land;

21 (5) "state land" means all land, including shore, tide, and
22 submerged land, belonging to or acquired by the state.

23 * Sec. 4. AS 38.36, enacted in sec. 3 of this Act, applies to a lease
24 or conditional lease for the development of state rights-of-way under
25 AS 38.35 entered into on or after the effective date of this Act and to a
26 renegotiation of the lease or conditional lease under AS 38.35. AS 38.36
27 applies to the renegotiation on or after the effective date of this Act of
28 a lease or conditional lease entered into before the effective date of this
29 Act if the renegotiation results in a major change in the duties of a

1 party.

2 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).