

H

B

9

4

STATE OF ALASKA  
FISCAL NOTE

Revision Date May 19, 1983

I. REQUEST

Bill/Resolution No.: CSHB 94 (Judiciary)  
 Title: "...seizure of items..."  
 Sponsor: House Judiciary (orig.-Bettisworth)  
 Requestor: House Finance Committee

II. FISCAL DETAIL

Agency Affected: Department of Law  
 Program Category Affected: Admin. of Justice  
 BRU, Program of Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		118.4	149.8	158.8	168.3	178.4
200 TRAVEL		10.0	12.8	13.6	14.4	15.3
300 CONTRACTUAL		18.0	20.3	21.5	22.8	24.2
400 COMMODITIES		10.0	5.7	6.0	6.4	6.8
500 EQUIPMENT		17.5				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		173.9	188.6	199.9	211.9	224.7
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		173.9	188.6	199.9	211.9	224.7
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		3	3	3	3	3
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

Not specified by sponsor.

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard I. Pegues, Director Phone: 465-3672  
 Division: Administrative Services Division Date: May 19, 1983  
 Approved by Commissioner: Richard I. Pegues/Asst  
 Department: Department of Law Attorney General Date: May 19, 1983

Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
- Copy to Department (for Governor introduced bills)
- Copy to Sponsor
- Copy to Requestor (if different from Sponsor)

CSHB 94  
Fiscal Note  
Analysis

This bill would have a significant negative impact upon the Department of Law's efforts to prosecute violations of the state fish and game laws. It allows seizure of items used in violations of the law only if the seizure is necessary to preserve items of evidence or to prevent the removal of items from the judicial district in which the violation occurred. A defendant who disagrees with this judgment on the officer's part may be expected to seek repossession, and this would have to be litigated. The bill would require the commitment of additional attorney time to attend the hearings which must be held within seven days after charges are filed in order to extend a seizure. All items that the owner establishes are necessary to the owner's livelihood must be returned to the defendant unless the department proves to the court that these items are needed as evidence or they are likely to be removed from the judicial district. This is a change in criminal procedure which is not found in any other area of criminal law; it would significantly impair our ability to prosecute these cases. Also, because there is no floor limit on the value of items, the disposal of objects of even very low monetary value such as tackle boxes would have to be litigated.

The Department of Law is opposed to the bill in its present form. Under current law, items which are used in the violation of fish and game laws may be seized. This seizure is not merely to preserve the items as evidence, but is also a sanction for the commission of the offense, the prevention of the movement of items such as boats and airplanes out of the jurisdiction, or their transfer to an innocent purchaser. In the past, persons who are under investigation for, or who have been charged with offenses have deliberately transferred their interest in items to prevent seizure by the state.

Of significant concern is the provision requiring the return of seized items within seven days after the charges are filed. The state should continue to retain possession of seized items until the conclusion of the criminal case as the court may order forfeiture as part of the criminal sentence. A seven day period is much too short to enable the department to adequately prepare for court hearings in these cases. Many items used in fish and game violations are seized in extremely remote parts of the state; there may be no representative of the Department of Law in the area on a regular basis. Local enforcement officers have the authority to file charges and seize evidence or items in connection with these charges, but will have no attorney available to attend a court hearing within seven days.

This bill would significantly impair the Department of

CSHB 94  
Fiscal Note  
Analysis  
Page 2

Law's ability to successfully investigate and prosecute fish and game violations. In light of the tremendous value to the State of Alaska of our natural resources and wildlife population, it would be inadvisable to decrease the protection of resources by the liberalization of the laws designed to deter violations of the fish and game laws and to facilitate the apprehension of offenders.

FISCAL ANALYSIS CSHB 94 (Judiciary)

The impact of CSHB 94 (Judiciary) is expected to result in the addition of two Attorney III positions (SR22) and one Legal Secretary I position (SR10) at Anchorage.

The first year of the analysis will be FY 84 and costs have been calculated on a 10 month basis to account for the time required to establish new positions and the time it takes to get a new program underway. The costs beyond FY 84 are over a 12 month basis and include a 6% annual inflation factor.

1st Year (10 months)

	<u>Atty III</u>	<u>Atty III</u>	<u>Leg Sec I</u>	<u>Total</u>
Personal Services	47.5	47.5	23.4	118.4
Travel	5.0	5.0	-0-	10.0
Contractual	8.0	8.0	2.0	18.0
Commod. - ongoing	1.5	1.5	1.5	4.5
Commod. - single time	2.0	2.0	1.5	5.5
Equipment - single time	1.5	1.5	14.5	17.5
				<hr/>
				173.9

2nd Year (12 months + 6% annual inflation)

Personal Services	60.0	60.0	29.8	149.8
Travel	6.4	6.4	-0-	12.8
Contractual	9.1	9.1	2.1	20.3
Commodities	1.9	1.9	1.9	5.7
				<hr/>
				188.6

1.	POSITION TITLE Attorney III				RANGE/STEP 22A	BARG. UNIT X	FORM 12 PAGE/LINE	COV.	APPROV.	DISAPP.						
2.	TYPE OF POSITION PPT	STAFF MONTHS 10	RP NUMBER	PCN NUMBER	DRU PRIORITY	LOCATION Anchorage	ELECTION DISTRICT	LEG.								
3.	CONTINUATION LEVEL				JUSTIFICATION											
4.	TYPE OF EXPENDITURE				<p>This is the first of two attorney positions required by the Department of Law in order to absorb the significant increase in workload which will result from new legislation authorizing the return, within seven days, of items seized during arrests for fish and wildlife violations. Significant amounts of attorney time will be needed to extend seizures to protect evidence and to protect items that would otherwise be removed from the judicial district where the violation occurred.</p>											
	1	2	3													
	PERSONAL SERVICES															
5.	Salary	3.714/month	37,140													
6.	Benefits		5,727													
7.	Supplemental Benefits		2,240													
8.	Fixed Benefits		2,400													
9.	TOTAL PERSONAL SERVICES		01	47,507												
10.	Travel		02	5,000												
11.	Contractual		03	8,000												
12.	Commodities		04	3,500												
13.	Equipment		05	1,500												
14.	Other															
15.	TOTAL COST			65,507												
	RECEIPT CODE	FUNDING SOURCE														
16.		Federal Receipts 1002														
17.		G.F. Match 1003														
18.		General Funds 1004		65,507												
19.		I-A Receipts 1005														
20.		Program Receipts 1028														
21.		Other														
FOR B&M USE ONLY																
4A KEY NUMBER																

**13** REQUEST FOR  
NEW POSITION

AGENCY DEPARTMENT OF LAW  
PROGRAM ADMINISTRATION OF JUSTICE  
DRU PROSECUTION  
COMPONENT THIRD JUDICIAL DISTRICT

**FY 84**

Page of

Revised Date

1.	POSITION TITLE Attorney III				RANGE/STEP 22A	BARG. UNIT X	FORM 12 PAGE/LINE	COV.	APPROV.	DISAPP.
2.	TYPE OF POSITION PPT	STAFF MONTHS 10	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION Anchorage	ELECTION DISTRICT	LEG.		

3.	CONTINUATION LEVEL	ADDITION	
4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	3,714/month	37,140
6.	Benefits		5,727
7.	Supplemental Benefits		2,240
8.	Fixed Benefits		2,400
9.	TOTAL PERSONAL SERVICES	01	47,507
10.	Travel	02	5,000
11.	Contractual	03	8,000
12.	Commodities	04	3,500
13.	Equipment	05	1,500
14.	Other		
15.	TOTAL COST		65,507

JUSTIFICATION

This is the second of two attorney positions required by the Department of Law in order to absorb the significant increase in workload which will result from new legislation authorizing the return, within seven days, of items seized during arrests for fish and wildlife violations. Significant amounts of attorney time will be needed to extend seizures to protect evidence and to protect items that would otherwise be removed from the judicial district where the violation occurred.

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		G.F. Match 1003	
18.		General Funds 1004	65,507
19.		I-A Receipts 1005	
20.		Program Receipts 1028	
21.		Other	

FOR B&M USE ONLY  
4A KEY NUMBER \_\_\_\_\_

**13** REQUEST FOR  
NEW POSITION

AGENCY DEPARTMENT OF LAW  
PROGRAM ADMINISTRATION OF JUSTICE  
BRU PROSECUTION  
COMPONENT THIRD JUDICIAL DISTRICT

**FY 34**

Page \_\_\_\_\_ of \_\_\_\_\_  
Revised Date \_\_\_\_\_

1.	POSITION TITLE Legal Secretary I				RANGE/STEP 10B	BARG. UNIT GGU	FORM 12 PAGE/LINE	COL.	APPROV.	DISAPP.
2.	TYPE OF POSITION PFT	STAFF MONTHS 10	RF NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION Anchorage	ELECTION DISTRICT 8	LEC.		
3.	CONTINUATION LEVEL				JUSTIFICATION					
4.	TYPE OF EXPENDITURE									
	1		2		3					
	PERSONAL SERVICES									
5.	Salary	1,726/month	17,260							
6.	Benefits		2,660							
7.	Supplemental Benefits		1,058							
8.	Fixed Benefits		2,400							
9.	TOTAL PERSONAL SERVICES		01		23,400					
10.	Travel		02		-0-					
11.	Contractual		03		2,000					
12.	Commodities		04		3,000					
13.	Equipment		05		14,500					
14.	Other									
15.	TOTAL COST				42,900					
	RECEIPT CODE	FUNDING SOURCE								
16.		Federal Receipts 1002								
17.		G.F. Match 1003								
18.		General Funds 1004		42,900						
19.		I-A Receipts 1005								
20.		Program Receipts 1028								
21.		Other								
FOR B&M USE ONLY 4A KEY NUMBER _____										

This position is required to provide support for the two new attorney positions. This secretary will be responsible for the preparation of a large volume of court documents generated by the numerous court filings involving fish and wildlife seizures. The allocation of a single secretary to serve two full time attorneys is the minimum amount of support needed to meet the workload anticipated particularly in view of the long distance, or remote nature of many of the violations.

**13** REQUEST FOR  
NEW POSITION

AGENCY DEPARTMENT OF LAW  
PROGRAM ADMINISTRATION OF JUSTICE  
BRU PROSECUTION  
COMPONENT THIRD JUDICIAL DISTRICT

**FY 84**

Page \_\_\_\_\_ of \_\_\_\_\_

Revised Date \_\_\_\_\_

STATE OF ALASKA  
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: CSHB 94 (RES) Date on Bill: 2-8-83  
 Title: "An Act relating to the seizure of items used in or in aid of fish and game violations."  
 Sponsor: Representative Bettisworth  
 Requestor: Legislative Budget Review Committee

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86
Capital				
Operating	-	173.9	188.6	199.9
Total				

b. Revenues:

Revenue				
---------	--	--	--	--

2. Source of funds to offset fiscal impact of bill:

No information provided

3. ASSUMPTIONS: This bill would have a significant negative impact upon the Department of Law's efforts to prosecute violations of the state fish and game laws. It allows seizure of items used in violations of the law only if the seizure is necessary to preserve items of evidence. A defendant who disagrees with this judgment on the officer's part may be expected to sue to regain possession, and this would have to be litigated. The bill would require the commitment of additional attorney time to attend the hearings which must be held within seven days after charges are filed in order to extend a seizure. All items, even those which are clearly evidentiary in nature, must be returned to the defendant unless the department obtains a court order allowing the police to keep it. This is a change in criminal procedure which is not found in any other area of criminal law; it would significantly impair our ability to prosecute these cases. In situations where there were multiple defendants, one defendant could request and obtain the return of his property, the other defendants could move to dismiss their charges because the state had not retained possession of the evidence.

4. Disclaimer:

This statement has not been reviewed by the OMB in the Office of the Governor. It therefore does not represent the final estimate of fiscal impact.

Prepared By: Daniel W. Hickey, Chief Prosecutor

Division: Department of Law/ Criminal Division

Phone: 465-3428

Date: 3-3-83

Approved by Commissioner: Richard L. Bous / Atty General

Department: Department of Law

Date: 3/3/83

5. Distribution:

Original to Legislative Finance

Copy to OMB

Copy to Sponsor

Copy to Requestor

2/15/83

COMMITTEE REPORT

HOUSE

3/14

(7)

FURTHER: JUDICIARY

1/20/83

Date: February 2, 1983

Mr. Speaker:

The Committee on RESOURCES has had HB 94

"An Act relating to the seizure of items used in or in aid of fish and game violations."

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass [ ] do not pass
- [ ] do pass with attached amendments(s)
- replace with CS for HB 94 (Rev) [ ] same title [ ] new title
- and recommends DO PASS
- [ ] AND attaches a "Letter of Intent" ~~FI~~ Fiscal Note
- [ ] reports it back without recommendation
- [ ] referred to the \_\_\_\_\_ Committee

Sept 24

MEMBERS SIGNING DO PASS

MEMBERS HAVING OTHER RECOMMENDATIONS:

SCHULTZ [Signature]

ARSON [Signature]

ISHA [Signature]

BUNDERY [Signature]

LINGSTAD [Signature]

VASKA [Signature] Do Not Pass

GOLL [Signature]

UBALING [Signature]

[Signature]  
CHAIRMAN

AMENDED TITLE:

AN ACT RELATING TO THE SEIZURE OF ITEMS USED IN OR IN AID OF FISH AND GAME VIOLATIONS

PRIME SPONSOR: BETTISWORTH.

CO-SPONSORS: GROSSENDORF.

CURRENT STATUS: 3/14/83 IN (H) JUDICIARY

HB 94 DATE	HOUSE SEQ	ACTION PAGE
---------------	--------------	----------------

08:28 3/24/83 PAGE 2 OF 2  
LEGISLATIVE ACTION

01/20/83	01	0070
03/14/83	02	0475
03/14/83	03	0475

FIRST READING -- COMMITTEE REPORTS  
 RES -- DNP01, CS05, NR02  
 RES F/NOTE HSE SUPPL #24  
 JUDICIARY  
 RULES

\*\*\*\*\*

# STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

**DEPARTMENT OF PUBLIC SAFETY  
OFFICE OF THE COMMISSIONER**

POUCH N  
JUNEAU, ALASKA 99811  
PHONE:

March 30, 1983

465-4322

The Honorable Charlie Bussell  
Alaska State Legislature  
State Capitol  
Pouch V  
Juneau, Alaska 99811



Dear Representative Bussell:

The Department of Public Safety is opposed to CSHB94 (RES) as written in its present form. The Department expresses particular concern over the provision in this Bill allowing seized property to be returned seven days after charges for the violation has been filed in court. Under current law, items which are used in violation of fish and game laws may be seized and held until final disposition of the case or until the individual has posted a bond for return of the property. The purpose for seizing the property is not merely to preserve items as evidence, but is also a sanction for the commission of the offense, the prevention of the movement of items such as boats and airplanes out of the jurisdiction, or their transfer to an innocent purchaser. In the past, persons who are under investigation for, or who have been charged with, offenses, have deliberately transferred their interest in items to prevent seizure by the State. The Department feels that returning the property within seven days undermines the purpose for seizing the property as noted above. However, in light of the proposal to provide a time frame in which the seized property can be returned, the Department of Public Safety recommends amending the current language in CS HB 94 (RES) (page 2, line 2) and insert the following

" . . . unless forfeited by the order of the court, shall be returned within 60 days or upon completion of litigation, whichever comes first, unless retention is approved by Court order." The Department feels that the 60 days limit would provide sufficient time to hold seized property and accomplish the purposes for seizure as discussed above.

Questions also arise as to what standards or reference will be acceptable or required in establishing to the courts if an item has an individual value of \$2,500 or more. For example, a hunting rifle may be seized with an apparent value of \$100; however, the same rifle may be worth no less than \$3,000 to its owner because it is an heirloom.

The Department of Public Safety's records indicate that of twenty-five (25) aircraft seized since 1977, twenty-four (24) were seized through the use of the seizure warrants issued by the courts. Eleven (11) of the twenty-five (25) aircraft were eventually forfeited to the State. Of these eleven (11) aircraft, eight (8) had been released back to the owners by posting bonds prior to their forfeiture by the courts.

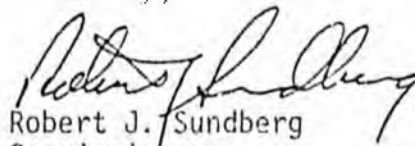
Passage of this Bill, as written, would also have a significant negative impact on the Department of Law's efforts to prosecute violations of the State fish and game laws. Most of the rural bush communities are without any Assistant District Attorneys to provide immediate legal council to Fish & Wildlife Protection officers when needed.

The seizure of evidence or instrumentalities of a violation, and whether it can be used in any case against any defendant is presently regulated quite rigidly by the Constitution of the United States and by the Alaska Rules of Court concerning both criminal and civil procedures. In addition, policies on the seizure of evidence have been established by this Department and are followed by our officers.

As written, this Bill, if passed, would also be in conflict with AS 08.54.210(b) which refers to unlawful acts by big game guides. The conflict would be with a portion of the penalty provision which states "In addition to punishment for a felony, all guns, fishing tackle, boats, aircraft, automobiles or other vehicles, camping gear and other equipment and paraphernalia used in, or in aid of, guiding or transporting activity engaged in during the period of suspension or revocation shall (emphasis added) be confiscated by persons authorized to enforce this chapter."

It has been the priority of the Department of Public Safety to focus its enforcement efforts on violations involving the commercial exploitation of our State's resources. Considering the tremendous value to the State of Alaska of our natural resources and wildlife, the Department of Public Safety strongly believes that any amendments to AS 16.05.190 are not in the State's best interest at this time.

Sincerely,

  
Robert J. Sundberg  
Commissioner

# STATE OF ALASKA

## DEPARTMENT OF LAW

CRIMINAL DIVISION

BILL SHEFFIELD, GOVERNOR

POUCH KC - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3428

March 11, 1983

The Honorable John Ringstad, Chairman  
House Resources Committee  
Pouch V  
Juneau, AK 99811

Dear Representative Ringstad:

I am writing in response to Mr. Dave Stancliff's letter to the chief prosecutor inviting comment on the expected impact of CSHB 94 upon the criminal division and the criminal justice system. After analysis of the bill and consultation with other criminal attorneys within the department, I have concluded that the proposed bill is likely to have a negative impact upon efforts to enforce fish and game laws.

Current law provides redress for a person whose property is seized as a result of an illegal search. AS 16.05.190 requires that property be seized under a "valid search", and Rule 37, Alaska Rules of Criminal Procedure, provides that a person who has been subject to an unlawful search and seizure may petition the court for the return of the property and the suppression of its use as evidence.

Although the current statutes do not specifically deal with notice and the right to a hearing to obtain the return of seized property, case law has established that the constitutional right to due process of law requires that the owner of seized property be given immediate notice of any seizure and the opportunity for meaningful hearing. See, for example, State v. Rice, 626 P.2d 104 (Alaska 1981) and F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980).

The American Eagle case involved the seizure of a crab fishing vessel because of the violation of a regulation prohibiting the taking of crab out of season. The court there held that if the seized property was used by its owner in earning a livelihood, notice and an opportunity to contest the state's reasons for seizing the property must follow "within days, if not hours" of the seizure. 620 P.2d at 667. Fish and Wildlife Protection officers and attorneys are well aware of the due process requirements set out in the American Eagle and related cases, and provide immediate notice and an opportunity

to be heard when property is seized. Thus, a citizen who believes that his property was wrongfully taken, or who has compelling reasons which justify the return of the property, may petition the court for the immediate return of his property. This is commonly done, generally through the posting of a bond in lieu of the seized property.

As compared to the number of criminal actions filed for the violation of fish and game laws, the seizure of large items of property such as boats and airplanes is used infrequently, and generally for only the most serious violations. The vast majority of seizures of vessels are made pursuant to search and seizure warrants issued by neutral magistrates or judges following a determination of sufficient probable cause. Probably the most common situation in which large items of property are seized without warrants are airplanes seized when an officer observes a violation of a fish and game law such as "same day airborne." The conviction rate on these serious fish and game violations is quite high. Additionally, although the state may request the forfeiture of an item following criminal conviction, this motion is not always granted. Any arguments in mitigation which the defendant wishes to make as to why his property should not be forfeited can be made during his sentencing hearing.

The proposed amendments to AS 16.05.190 provide that all items, even minor ones such as guns or traps, may not be seized unless they are necessary as evidence of a violation. Often, of course, they will be needed as evidence. But the state may choose to seize items for other reasons besides use as evidence. For example, if the item has been seized it can not be used in violation of the law during the pendency of the case. The Alaska Supreme Court has recognized this as a valid consideration in seizure cases. See the American Eagle case cited above.

Another important consideration is the prevention of the transfer from the jurisdiction or sale to an innocent purchaser of property used in fish and game violations. It is not uncommon for the owner of an airplane or vessel who discovers that he may have been observed violating the law to immediately remove the plane or boat from the jurisdiction. Planes which were the subject of an ongoing investigation have been sold to innocent purchasers within days of the alleged violation. AS 16.05.195(e) specifically provides that an item subsequently sold to an innocent purchaser in good faith may not be forfeited. Thus, if the violator manages to sell his plane, nets, vessel, etc. the state has no way to regain possession of that item for forfeiture as part of the criminal sentence.

Another important reason to seize items, other than to use them as evidence in prosecution, is the deterrence of others. As stated above, forfeiture of large items is generally sought in only most serious fish and game violations. Often these cases involve commercial guides who may violate the law regularly, and who have a commercial motive for their behavior. Only a substantial deterrent will discourage some potential offenders from taking chances and hoping that he will not be caught.

The committee substitute, which adds language requiring an individual item value of \$2,500 or more on line 28 of the bill, is a significant improvement over the original version. Nonetheless, a person who owns a seized item worth over \$2,500 will be able to litigate under CSHB 94, the validity of the decision of the person who seized the item that the seizure was necessary to preserve the item as evidence. This will require the state to attempt to prove the good faith of the person making the seizure, and to present the state's case in advance of the trial in order to convince the court that it is necessary to preserve the item as evidence. As discussed more fully below, this hearing may be held at a time when the state's case is in the early stages of development, when all possible evidence has not yet been obtained.

The proposed language on lines 2 through 4 of page 2 of the bill requires that seized property be returned within seven days after the charges are filed, unless an extension is approved by court order for cause shown. While the language does not explicitly require a hearing for this order, an appellate court will almost certainly interpret the language to require a full hearing on the merits. AS 16.05.190 applies to seizures made without a warrant. If no warrant has been issued, there has not yet been a determination by a neutral judge regarding the existence of probable cause. An ex parte presentation to the court by the state, either through testimony or an affidavit, of the reasons justifying the continued seizure of the item may well violate the due process cause, as an ex parte procedure would deny the defendant a right to be heard on the issue. The American Eagle case makes it clear that the defendant has a right to a hearing on his contention that the state should not continue to hold the seized item.

The proposed language appears to place the burden on the state to demonstrate "cause" in order to justify an extension of the seizure. Thus, the item is automatically returned to the defendant unless the state bears the burden of proof placed upon it. These hearings will ordinarily be taking place during the early stages of the state's case, when all available facts may not yet have been fully developed. Additionally, the standard for "cause" is unclear. Is the only "cause" allowable under the statute the fact that the item will be used as

*The state  
should be the  
one to  
show*

evidence? Or, is a legitimate concern regarding the removal of the item from the court's jurisdiction or its sale to an innocent purchaser sufficient cause to justify the state's retention of the property? If the item's status as evidence is the only permissible reason to continue to hold the item, then the state would be required to release a boat or plane to an owner even if the owner intends to walk out of the courtroom and remove the item from the state.

Finally, the seven day period allowed before a court extension must be obtained is much too short. Many, if not most, seizures of large items used in fish and game violations are made in remote locations of the state. While the officers involved have the authority to file charges immediately, if appropriate, there may well be no prosecutor or assistant attorney general available locally to handle the hearing. Under the language of the statute as currently drawn, the defendant's property is returned to him automatically after seven days, perhaps even if weather precludes the arrival of a judge or district attorney within the seven day period. It should also be noted that, in a felony case, there may be no judicial officer available with a jurisdiction to hear the case. If a defendant has been indicted for the charges, then only a superior court judge has jurisdiction over the case. A local district court judge or a magistrate could not preside over the forfeiture hearing.

Regarding fiscal impact, a preliminary statement of fiscal impact is attached to this letter. Thank you for allowing the opportunity for comment on CSHB 49. Please contact my office if you have any questions.

Sincerely yours,

NORMAN C. GORSUCH  
ATTORNEY GENERAL

DANIEL W. HICKEY  
CHIEF PROSECUTOR

By:

Gayle Horetski  
Gayle Horetski  
Assistant Attorney General

GH/lb

Attachments

# STATE OF ALASKA THE LEGISLATURE

POUCH Y - STATE CAPITOL  
JUNEAU ALASKA 99811  
907-465-3600

## LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

February 10, 1983

SUBJECT: Protection of confiscated property  
(Work Order No. 13-0774)

TO: Susan Brody  
Acting Director  
House Research Agency

FROM: Edward H. Mein  
Legislative Counsel

You have asked what legal protections exist in the constitution and the rules of court for owners of property seized in fish and game violation cases. Specifically, this question is asked in light of HB 94, which amends AS 16.05.190. Under that statute, paraphernalia used in violation of AS 16.05 or regulations of the Department of Fish and Game may be seized without a warrant under a valid search. The paraphernalia is subject to forfeiture by court order upon conviction. Otherwise, the paraphernalia must be returned to the owner after completion of the case and payment of any fine imposed.

Under both the federal and Alaska constitutions, no person may be deprived of property without due process of law. United States Constitution, Amendment XIV; Alaska Constitution, Article I, section 7. The Alaska Supreme Court has spelled out what due process requires in the context of a seizure of property used in a fish and game violation. In F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), the Court said"

The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. Where property allegedly used in an illicit act is confiscated by government officials pending a forfeiture action, no notice or hearing is necessary prior to the seizure. However, when the seized

~~property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent.~~ (Citations omitted)..

The Court also said that while an owner of property seized for a fish and game violation may have a right to obtain release of the property by posing an adequate bond, due process does not require that this be an absolute right. "To permit this," the Court said, "would frustrate one purpose of forfeitures, which is to prevent possible use of the property in further illicit acts." 620 P.2d at 668. The Court indicated, however, that if the property owner can prove he or she was unaware that the property was being used for an illegal purpose, was merely negligent in allowing such use, or had done all that could reasonably be expected to prevent such use, due process probably would require release of the property if adequate bond is posted.

The Court noted that the owners of the F/V American Eagle had raised "a substantial question whether the statutory scheme on its face affords adequate procedural due process". The Court did not decide that question, however, because it said the vessel owners were in fact afforded procedural due process. The seizure in that case was subject to a judicially approved warrant and the owners of the vessel were formally notified of the seizure in a timely manner. It is not clear, however, whether under different circumstances the Court might rule that AS 16.05.190 - 16.05.195 are unconstitutional.

The federal and Alaska constitutions also protect persons from unreasonable searches and seizures of their property. United States Constitution, Amendment IV; Alaska Constitution, Article I, section 14. The primary purpose of these provisions is to protect the privacy of individuals from unreasonable intrusion by the government.

Normally, a search and seizure requires a search warrant. Where the search and seizure is incident to a lawful arrest, a search warrant is not required. Such a search, however, must be limited to the discovery of weapons and evidence within the area of the arrestee's immediate control. A warrantless search of a vehicle used in a crime may be made if there is probable cause to believe that the vehicle

Susan Brody  
Page 3  
February 10, 1983

contains contraband or evidence, and exigent circumstances exist which prevent the vehicle from being seized or otherwise necessitates an immediate search.

AS 16.05.190 specifically requires that a seizure of property used in or in aid of a fish and game violation be pursuant to a valid search. Although the catchline of this section says "Seizure without warrant . . .", the text of the statute is not limited to warrantless searches. The search, with or without a warrant, must be "valid". In this regard the section adds nothing to the constitutional requirements that already exist.

Once property has been seized under AS 16.05.190, the owner has "an immediate and unqualified right to contest the state's justification for the seizure before a judge under Criminal Rule 37(c)". 620 P.2d at 667. Criminal rule 37(c) provides:

(c) A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

I hope this adequately answers your question. If you have any further questions, feel free to contact me at your convenience.

EHH:ljb



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

Pouch Y, State Capitol  
Juneau, Alaska 99811  
(907) 465-3991

February 16, 1983

MEMORANDUM

TO: Representative John Ringstad  
Attn: David Stancliff

FROM: Susan Brody, Director *SB*

RE: Confiscation of Property in Fish and Game Violations  
Research Request 83-66

David Stancliff of your staff asked us to identify the protections which currently exist for owners of property seized in fish and game violation cases. Specifically, we were asked to look at legal protections which exist in the State Constitution, the rules of court procedure, and the policies and procedures of the Department of Public Safety.

We asked Ed Hein of the Legal Services Division to assist us in researching this topic. He prepared the attached memorandum describing relevant provisions in both the federal and State constitutions and in the rules of court. In his memorandum, Mr. Hein discusses a 1980 Alaska Supreme Court case (F/V American Eagle v. State)<sup>1</sup> which directly addresses your concern. To supplement the information provided by Mr. Hein, we contacted Capt. Nutgrass with the Division of Fish and Wildlife Protection in the Department of Public Safety, Bart Rozell, the attorney who represented the owners of the American Eagle in the Supreme Court case mentioned above, and Assistant Attorney General John Gissberg.

Existing Procedures in Fish and Game Violation Cases

When property is seized in conjunction with a fish and game violation, it eventually must be returned to the owner unless forfeited by order of the court. However, the item need only be returned "after completion of the case and payment of the fine, if any" (AS 16.05.195).

When the seized property is used by its owner in earning a livelihood, such as a commercial fishing boat or airplane, the seizure may present a financial hardship for the owner. In these cases, the owner of the seized property has the right to petition the court for an earlier release of the property. However, if the court decides to release the property, the owner often is required to post an adequate bond or to obtain insurance. Property may only be released when it is not essential evidence to the case.

<sup>1</sup> F/V American Eagle v. State, 620 P. 2d 657 (Alaska 1980)

Representative Ringstad

February 16, 1983

Page 2

As an example of this procedure, Capt. Nutgrass described a 1982 violation in which an airplane involved in an illegal hunting operation was seized under a search and seizure warrant obtained by the Division of Fish and Wildlife Protection. In that case, the owner's request for release of the plane was granted by the court, subject to a number of stipulations. These stipulations required the owner to return the aircraft to the State within a specified time period, required the plane to remain in the state, and specified that the owner must provide security either in the form of insurance or a bond for \$17,000, the estimated value of the plane. In this case, the value of the property was estimated during an inspection by the division's chief mechanic. In some instances, an independent appraisal is also required.

John Gissberg, Assistant Attorney General, stated that many of these cases are settled out of court, especially when commercial fishing boats are involved. The settlement allows the owner to keep the boat on the fishing grounds; without settlement, the boat would be transported to a community such as Kodiak for appraisal and storage prior to a court hearing.

Bart Rozell, an attorney with the firm of Faulkner, Banfield, Doogan and Holmes, gave the example of a commercial crab boat seized on the fishing grounds in the Aleutians. The appraisal would have been conducted in Kodiak, thus removing the vessel from the fishing grounds at the height of the season and resulting in a substantial loss of income to the vessel owner. To avoid this income loss, Mr. Rozell emphasized that owners of vessels have no alternative but to settle out of court by paying a large fine.

The dollar amount required for an out-of-court settlement varies from case to case and is established by the Attorney General's Office in consultation with the Division of Fish and Wildlife Protection. Mr. Gissberg noted that they try to require an amount sufficient to discourage the illegal activity from occurring again in the future. He said that the amount is sometimes based on the dollar value of the illegal catch or on some percentage of the boat value. Capt. Nutgrass cited out-of-court settlements for seized crab boats which ranged from \$100,000 to \$350,000.

### Constitutional Protections

As noted in the memorandum from Ed Hein, the Alaska Supreme Court's ruling in F/V Eagle v. State discusses the constitutional due process requirement as it pertains to fish and game violation seizures. The Court noted that the case had raised "a substantial question whether the statutory scheme on its face affords adequate procedural due process." Although it did not decide in the vessel owners' favor, the Court noted that:

...when the seized property is used by its owner in earning a livelihood, notice and an unconditional opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. (see attached memorandum)

Bart Rozell, the attorney who represented the owners of the American Eagle, believes that the existing State statute does not adequately protect the rights of owners of seized property. In his opinion, the right of the property owner to a prompt post-seizure hearing should be clearly specified in statute. John Gissberg agreed that establishing the right to a prompt hearing in statute would be an appropriate action in light of the American Eagle case. Both Mr. Rozell and Mr. Gissberg also mentioned the possibility of having the State conduct vessel appraisals at the site of the violation.

AG's view

State v. Rice<sup>2</sup> is another State Supreme Court case which deals with the question of due process guarantees for owners of seized property; it specifically addresses the rights of innocent owners of seized property. The court ruled that Cessna Finance, an innocent holder of an interest in a seized airplane, had been "deprived of its constitutional rights to substantive due process through the failure of the statutory scheme ... to provide for remission of the interests of innocent non-negligent third parties in the forfeited item." Relevant sections of this decision are attached for your information.

As Mr. Rozell and Mr. Gissberg have dealt extensively with the issue of confiscated property in fish and game violations, you may wish to contact them directly for further information on this problem; Bart Rozell can be reached at 586-2210 and John Gissberg's can be reached through the A.G.'s office, 465-3600. In addition, both Ed Hein and I are available to answer any further questions.

SB/sj

Attachments

---

<sup>2</sup> State of Alaska v. Wilder S. Rice and Cessna Finance Corporation, 626 P.2nd 104 (Alaska 1981).

conducting the search for property which is taken as a result of the search. The enumeration of specific things does not limit the meaning of words of a general nature. (§ 22 art I ch 94 SLA 1959)

This section is constitutional. 1959 Op. Att'y Gen., No. 15.

This section is tailored carefully to art. I, § 14, of the Alaska Constitution and is therefore valid. 1959 Op. Att'y Gen., No. 15.

There is no constitutional requirement that all searches be with warrant. 1961 Op. Att'y Gen., No. 19.

And reasonable searches may be made without warrant. 1961 Op. Att'y Gen., No. 19.

"Reasonable search". — A reasonable search is one made (a) upon probable cause that fruits of a crime or evidence relating to the crime will be found; (b) under circumstances which would make the securing of a warrant impracticable. 1961 Op. Att'y Gen., No. 19.

The mere observation of items which are in plain view or which are open and apparent, is not a search. Consequently, evidence based on such observations is admissible so long as the observing officer was legally in the position where the observations were made. *Klockenbrink v. State*, Sup. Ct. Op. No. 631 (File No. 1149), 472 P.2d-958 (1970).

A search may be made pursuant to a valid arrest, providing that the arrest is made prior to the search. 1961 Op. Att'y Gen., No. 19.

Requirement of written signed statement objectionable but valid. — The amendment requiring a written signed statement of the reason for the search is objectionable but valid. It is objectionable because it unnecessarily ties the hands of the field agents charged with enforcement of the fish and game laws, and is a provision which is quite uncommon, if not unique. 1959 Op. Att'y Gen., No. 15.

**Sec. 16.05.190. Seizure without warrant and confiscation by court.** Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter, or rule or regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter, or rule or regulation of the department shall be seized by any person designated in § 150 of this chapter. Upon conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in

Such requirement will not validate an invalid search. — The statutory requirement that fish and game agents fill out a form stating the objects of search will not make an otherwise invalid search valid. 1961 Op. Att'y Gen., No. 19.

But it may invalidate an otherwise valid search if not complied with. 1961 Op. Att'y Gen., No. 15.

This section requires that notice be given to the person "in control" of crab pots. *Nathanson v. State*, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Failure to notify owner of crab pots was not a violation of this section where officers of the Department of Fish and Game approached the crab pots to conduct a search to check the extent of compliance with a regulation providing that fishermen could place their crab pots in the water up to 72 hours prior to the opening of the season and the owner was not present, attending to his crab pots, since there being no "person in control of the property or object to be searched," the officers were unable to give him the required notice. *Nathanson v. State*, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Notice required for search of vessel, building, etc. — The considerations leading to the conclusion that no notice was required for a search of crab pots would not apply to the search of a vessel, building or other effects in which the owner would have a reasonable expectation of privacy. *Nathanson v. State*, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Area of vessel open to search. — In the case of a vessel, the limits of the area open to search probably include the entire vessel. 1961 Op. Att'y Gen., No. 19.

violation of and game, disposed of be transmit Guns, traps and other p rule or reg court, shall the fine, if

A seizure is under the prov v. State, Sup. ( 391 P.2d 946 (

Forfeiture I In case of forf acts upon the interest of all actually appea the title of changed, and forfeiture tra future prog Pollastrine, 8

It divests th necessarily d whether of th the thing forf it should not lienholder equ It binds the United States (1929).

Section mandatory a — This sec mandatory fo game, birds discretionary (guns, traps, State, Sup. Ct 545 P.2d 629

Not betwee proceedings. legislature contraband a mandatory a not between forfeiture pp Sup. Ct. Op. P.2d 629 (197

Sec. 16.1 fishing ge. paraphern; regulation

violation of this chapter or rule or regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. If sold, the proceeds of the sale shall be transmitted to the proper state officer for deposit in the general fund. Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, and other paraphernalia seized under the provisions of this chapter, or rule or regulation of the department, unless forfeited by order of the court, shall be returned, (after completion of the case and payment of the fine, if any.) (§ 23 art I ch 94 SLA 1959)

A seizure is a prerequisite to forfeiture under the provisions of this section. *Rubino v. State*, Sup. Ct. Op. No. 215 (File No. 395), 391 P.2d 946 (1964).

**Forfeiture acts upon the thing itself.** — In case of forfeiture, the decree of the court acts upon the thing itself and binds the interest of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress. *United States v. Pollastrine*, 8 Alas. 104 (1929).

**It divests titles and liens.** — A forfeiture necessarily divests every existing right, whether of title or lien or other interest, in the thing forfeited. There is no reason why it should not extinguish the right of a lienholder equally with that of the owner. It binds the interests of all the world. *United States v. Pollastrine*, 8 Alas. 104 (1929).

**Section distinguishes between mandatory and discretionary forfeiture.** — This section distinguishes between mandatory forfeiture of contraband (fish, game, birds) upon conviction, and discretionary forfeiture of paraphernalia (guns, traps, aircraft, etc.). *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

**Not between criminal or civil forfeiture proceedings.** — The distinction which the legislature sought to draw between contraband and paraphernalia is between mandatory and discretionary forfeiture, not between requiring criminal or civil forfeiture proceedings. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

**Sec. 16.05.195. Forfeiture of equipment.** (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts

Forfeitures, even when civil in form, are basically criminal in nature. *Graybill v. State*, Sup. Ct. Op. No. 134 (File No. 2386), 545 P.2d 629 (1976).

**"Order of the court"** may refer to orders rendered following criminal conviction. — Since the "case" and "fine" referred to in this section concern criminal proceedings, it is reasonable to interpret an "order of the court" as likewise referring to orders rendered subsequent to a criminal conviction, as well as those following a separate civil action. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

**Valid forfeiture where defendant convicted under AS 16.05.920.** — Where defendant was convicted under AS 16.05.920, which makes certain acts unlawful, in order to effect a valid forfeiture of defendant's aircraft, it was not necessary for the state to institute a separate civil in rem proceeding against the aircraft. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

While forfeiture is a civil remedy unless otherwise provided by statute, this section, as it applied to a defendant who was convicted under AS 16.05.920, did so provide. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

**For cases construing seizure and forfeiture under the provision of ACLA 1949, § 39-2-10,** see *United States v. One Fish Trap*, 7 Alas. 215 (1924); *United States v. The Pacific*, 7 Alas. (1924); *United States v. One Floating Fish Trap*, 7 Alas. 334 (1925); *The M. & M.*, 3 Alas. 17 (1923).

Cited in *Wacek v. State*, Sup. Ct. Op. No. 1108 (File No. 2166), 530 P.2d 751 (1975).

be enacted to benefit the state. It is desired that the department participate in the federal aid programs on the same basis as other states. (§ 20 art I ch 94 SLA 1959)

**Sec. 16.05.150. Enforcement authority.** The following persons are peace officers of the state and they shall enforce this chapter:

- (1) an employee of the department authorized by the commissioner;
- (2) a police officer in the state;
- (3) any other person authorized by the commissioner. (§ 21 art I ch 94 SLA 1959)

**Enforcement of fish and game laws on military reservations.** — Where the military does not assign sufficient personnel to enforce fish and game laws on military reservations, state game officials as well might enforce them, possibly by deputizing state game officials as federal marshals, since 10 U.S.C. 2671(c) makes violation of state fish and game laws a federal offense. 1964 Op. Att'y Gen., No. 2

Since state fish and game laws operate

on a federal military reservation, not only as federal law but also as state law, both the federal and state officers may enforce these laws. 1964 Op. Att'y Gen., No. 2

State officers should have full access to military reservations in Alaska, subject to safety and military security requirements, to enforce laws and manage and harvest fish and game resources. 1964 Op. Att'y Gen., No. 2

**Sec. 16.05.160. Duty to arrest.** Each person designated in § 150 of this chapter shall arrest a person violating this chapter, or any rule or regulation made under this chapter, in his presence or view, and shall take the person immediately for examination or trial before an officer or court of competent jurisdiction. (§ 21 art I ch 94 SLA 1959)

Cited in *Schuster v. State*, Sup. Ct. Op. No. 1305 (File No. 2911), 553 P.2d 925 (1976).

**Sec. 16.05.170. Power to execute warrant.** Each person designated in § 150 of this chapter may execute a warrant or other process issued by an officer or court of competent jurisdiction for the enforcement of this chapter, and may, with a search warrant, search any place at any time. The judge of a court having jurisdiction may, upon proper oath or affirmation showing probable cause, issue a warrant in all cases. (§ 21 art I ch 94 SLA 1959)

**Sec. 16.05.180. Power to search without warrant.** Each person designated in § 150 of this chapter may without a warrant search any thing or place if the search is reasonable or is not protected from searches and seizures without warrant within the meaning of § 14, art. I of the state constitution, which specifically enumerates "persons, houses and other property, papers and effects." However, before a search without warrant is made a signed written statement by the person making the search shall be submitted to the person in control of the property or object to be searched, stating the reason the search is being conducted. A written receipt shall be given by the person

# STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY  
OFFICE OF THE COMMISSIONER

POUCH N  
JUNEAU, ALASKA 99811  
PHONE:

March 4, 1983

Mr. Dave Stancliff  
Professional Aide  
House Committee on Resources  
Pouch V  
Juneau, AK 99811


Dear Mr. Stancliff:

In review of the Committee's substitute draft of CS HB 94 (Res) no fiscal or logistical impact is foreseen. The substitute draft would provide, in some cases, a more workable solution with the wording "within seven days after charges are filed with the court." We are not sure what standards or reference will be acceptable or required in establishing to the courts if an item has an individual value of \$2,500.00 or more. An individual king or tanner crab pot could have an estimated value of \$600.00; however, as the bill is worded on line 14, 15, and 16, a seizure of a pot could be argued as being unnecessary to preserve the pot as evidence of the crime. This would include an aircraft, vehicle or vessel exceeding the individual value of \$2,500.00.

It could be logically argued in court that an aircraft seized during a major game violation was not necessary to preserve the aircraft as evidence of a crime. The officer could identify the aircraft by number, physical description and by taking photographs. This would preclude the seizure of items as instruments of the crime and by having the ability to bring that item before the court of jurisdiction.

We are still opposed to any amendments effecting AS 16.05.190 as it provides the necessary protection to the citizen as well as the State.

Sincerely,

  
Robert J. Sundberg  
Commissioner

TESTIMONY ON HB 94

HOUSE RESOURCES COMMITTEE

March 11, 1983

Presented by Gregory F. Cook  
Faulkner, Banfield, Doogan & Holmes  
P.O. Box 1150  
Juneau, Alaska 99802  
(907) 586-2210

HB 94 seeks to amend existing law relating to seizure and forfeiture of items used in fish and game violations. The bill is a good start, but in my opinion, it needs significant amendments before it should be adopted.

Seizure and forfeiture of equipment used to commit violations of fish and game laws are critical enforcement tools. These tools are needed to conserve fishery and wildlife resources. At the same time, however, it is important for the State to recognize the rights of innocent owners. The bill as it now stands does not recognize these basic, constitutional rights known generally as "due process" requirements.

The Alaska Supreme Court and the United States Supreme Court have each addressed the need to protect the rights of innocent (and non-negligent) owners of property used by a "third person" for the commission of a crime. All persons must be presumed innocent until proven guilty. A seizure of nets, a vessel, or an airplane occurs before a trial showing guilt or


innocence. Due process of law guarantees the following rights to everybody whose equipment is seized under AS 16.05.190:

- (1) judicial review of specific facts supporting the seizure before the seizure happens;
- (2) reasonable notice to the owner that a seizure has occurred;
- (3) the right of the owner to a prompt, meaningful, post-seizure judicial hearing;
- (4) the right to petition for "remission" or "mitigation" of the seizure;
- (5) ~~the opportunity to post a bond and secure~~ the opportunity to post a bond and secure release of the item seized.

Seizures and forfeitures are complex areas of law. Drafting a bill that meets the requirements of the Alaska Constitution and the United States Constitution will require significant additional drafting work. I respectfully call the attention of the Resources Committee members to this fact, and suggest that the Judiciary Committee could be the proper forum to make those corrective amendments. I stand ready to assist both committees, and legislative counsel in this matter.

Thank you for your time and attention.

Respectfully submitted,

  
Gregory F. Cook  
March 10, 1983



# Alaska Sportfishing Association

3605 Arctic Blvd., Suite 800 • Anchorage, Alaska 99503

MAR 2 - 1983

February 28, 1983

Representative Dick Shultz  
Co-Chairman, Natural Resources Committee  
Pouch V  
Juneau, AK 99811

Dear Representative Shultz:

The Alaska Sportsfishing Association urgently requests your support in denying confirmation to Governor Sheffield's appointees to the Board of Fisheries until such time as two, true sportsfishing representatives are appointed to the board. Please keep in mind that the Board of Fisheries meets on March 21, 1983, whether these appointees are confirmed or not. Sportsfishing and tourism for 1983 and beyond will be affected by their decisions.

The appointments to the Board of Fisheries by Governor Sheffield has triggered a highly indignant response by sportsfishing enthusiasts throughout Alaska. The lobbying and pressures brought by commercial-fishing interests have decreased the representation to this critical body from three to what we now consider to be effectively zero.

The Board of Fisheries has the power to allocate fish above escapement requirements to the various fishing interests. We feel that the appointments, as they currently exist, are an absolute insult to the 100,000 licensed sportsfishermen in the Anchorage-bowl, and a serious threat to sportsfishing interests from the Matanuska Valley to Homer. The five sportsfishing associations in the Anchorage area asked for an appointment with Governor Sheffield while he was here. He did not even grant time to listen to our grievance.

We do not contend that the appointees are not highly respected and qualified people. We simply insist on true sportsfishermen being placed on the Board of Fisheries to represent sportsfishing and the highly valuable tourist industry when allocating fish resources.

We do question the ability of Mr. Paul Weller, the only appointee with sportsfishing inclinations, to fairly represent the sportsfishing side. The last time a sportsfishing representative was chosen from the Kenai-Soldotna area (Dr. Fair), who truly represented the sportsfishermen and acted on their behalf, was forced to resign after receiving threatening phone calls, attempted boycott of his business, chiding to his children at school, and malicious acts to his private property. Mr. Weller is backed by Lottie Ettelman, a long-time, setnet-fishing operator and commercial-fishing activist (in addition to being a top democrat in that area). In fairness to Mr. Weller, he was considerate enough to attend our general membership meeting on February 8, 1983, which displayed some interest in representing our cause, though there was a feeling he lacked knowledge of fishing issues (after four years of representation on the Kenai-Soldotna Advisory Committee).

Representative Dick Shultz  
February 28, 1983  
Page 2

In my earlier letter to Governor Sheffield before the appointments were made, we recommended Mr. William E. Moulton, Jr., and Ms. Toni Salmeier as two superbly-qualified individuals who have been highly involved in both the sportsfishing and tourist industry. Mr. Moulton is also a Fish and Wildlife graduate.

Additionally, your support in the speedy passage of House Bill 63 is requested. This bill would establish sportsfishing on an equal basis with subsistence fishing and would at least minimize the devisiveness of the priority subsistence issue.

These and many other actions are drawing keen interest by sportsfishers throughout Alaska. I assure you that we intend to track actions taken and to keep the public aware of the responsiveness of their legislators.

Sincerely,



Robert L. Hunter, President  
Alaska Sportsfishing Association

## CSHB 94 ANALYSIS

### Section 1

Authorizes the seizure of items discovered under a valid search if the person making the search determines that the items in question should be held as evidence of a fish and game violation. Parts of fish or game nests or eggs of birds taken, transported, or possessed may also be seized.

Disposal of fish and game, or their parts that have been seized, is left up to the court if the person they have been seized from is convicted. If the court sees fit to sell the fish and game used as evidence proceeds shall, by way of the proper state officer, be deposited in the general fund.

Items seized having an individual value of \$2500 or more cannot be held beyond 7 days after charges are filed in court for the associated violation, unless an extension is approved by court order for cause shown.

### Policy Question

Should citizens who have had items valued at \$2500 or more seized in an alleged fish and game violation be afforded the opportunity to have the court ascertain within 7 days after charges are filed whether or not the items seized should be held as evidence in the case.

### Possible Considerations

- 1) Remedies that are now available without this proposed change in law.
- 2) Costs of implementing this law
- 3) Costs to citizens under present system, should they be found innocent

STATE OF ALASKA  
FINAL\* STATEMENT OF FISCAL IMPACT

Bill No: CSHB 94 Date on Bill: 2/8/83  
 Title: Seizure of items used in or in aid of fish and game violations  
 Sponsor: Bettisworth and Grussendorf  
 Requestor: House Resources Committee

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86
Capital				
Operating				
Total	-0-	-0-	-0-	-0-

b. Revenues:

Revenue				
---------	--	--	--	--

2. Source of funds to offset fiscal impact of bill:

3. Assumptions:

\*This statement has been reviewed by the OMB in the Office of the Governor.

Prepared By: Richard P. Barrier *[Signature]* Phone: 264-0545  
 Division: Alaska Court System Date: 3/8/83

Approved by Commissioner: \_\_\_\_\_ Date: \_\_\_\_\_  
 Department: \_\_\_\_\_

Reviewed by OMB: \_\_\_\_\_ Date: \_\_\_\_\_  
 Phone: \_\_\_\_\_

5. Distribution:

- Original to Legislative Finance
- Copy to Department
- Copy to Sponsor
- Copy to Requestor

2/24/83

HR

FISCAL NOTE

Expenditure Type  
 Revenue Type

I. REQUEST

Bill/Resolution No. HB 94

Title An Act relating to the seizure of items used in or in aid of fish and game violations  
Requested by Bettisworth & Grussendorf Date 1/27/83

II. FISCAL DETAIL

Agency Affected Department of Public Safety

Program Category Affected Fish & Wildlife Protection

BRU, Program, Or Subprogram(s) Affected Fish & Wildlife Protection

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	0	0	0			

FUNDING (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						
	0	0	0			

POSITIONS

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
FULL TIME						
PART TIME						
TEMPORARY						
	0	0	0			

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

RECEIVED

FEB 7 1983

LEGISLATIVE FINANCE

IV. DATE 1/27/83

PREPARED BY Col. R. J. Stickles Phone 269-5532

DIVISION: F&WP Initials

Original: Legislative Finance  
cc: Budget and Management

DEPARTMENT OF PUBLIC SAFETY Initials

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)

AS

2/11/83

5 84

STATE OF ALASKA  
FISCAL NOTE

Revision Date Mar. 11, 1983

I. REQUEST

Bill/Resolution No.: CS HB 94  
 Title: "Seizure of items..F & G violations"  
 Sponsor: Representative Bettisworth  
 Requestor: House Resources Committee

II. FISCAL DETAIL

Agency Affected: FISH AND GAME  
 Program Category Affected: KRMEC  
 BRU, Program of Subprogram(s) Affected:  
Commercial Fisheries, Game & Sport Fish

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Beverly Reaume  
 Division: Administration  
 Approved by Commissioner: Don W. Collinsworth  
 Department: Fish and Game

Phone: 465-4120  
 Date: 03/11/83  
 Date: 3-11-83

Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
- Copy to Department (for Governor introduced bills)
- Copy to Sponsor
- Copy to Requestor (if different from Sponsor)

3/8/83

# STATE OF ALASKA

## DEPARTMENT OF LAW

CRIMINAL DIVISION

*file copy*  
BILL SHEFFIELD, GOVERNOR

FOUCH KC - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3428

March 30, 1983

The Honorable Charlie Bussell, Chairman  
House Judiciary Committee  
Pouch V  
Juneau, Alaska 99811

Dear Representative Bussell:

I am writing on behalf of the Criminal Division of the Department of Law to comment on the expected impact upon the criminal division and the criminal justice system of a bill currently being considered by your committee: CSHB 94. After analysis of the bill and consultation with other criminal attorneys within the department, I have concluded that the proposed bill is likely to have a negative impact upon efforts to enforce fish and game laws.

Current law provides redress for a person whose property is seized as a result of an illegal search. AS 16.05.190 requires that property be seized under a "valid search", and Rule 37, Alaska Rules of Criminal Procedure, provides that a person who has been subject to an unlawful search and seizure may petition the court for the return of the property and the suppression of its use as evidence.

Although the current statutes do not specifically deal with notice and the right to a hearing to obtain the return of seized property, case law has established that the constitutional right to due process of law requires that the owner of seized property be given immediate notice of any seizure and the opportunity for meaningful hearing. See, for example, State v. Rice, 626 P.2d 104 (Alaska 1981) and F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980).

The American Eagle case involved the seizure of a crab fishing vessel because of the violation of a regulation prohibiting the taking of crab out of season. The court there held that if the seized property was used by its owner in earning a livelihood, notice and an opportunity to contest the state's reasons for seizing the property must follow "within days, if not hours" of the seizure. 620 P.2d at 667. Fish and Wildlife Protection officers and attorneys are well aware of the due process requirements set out in the American Eagle and related cases, and provide immediate notice and an opportunity

to be heard when property is seized. Thus, a citizen who believes that his property was wrongfully taken, or who has compelling reasons which justify the return of the property, may petition the court for the immediate return of his property. This is commonly done, generally through the posting of a bond in lieu of the seized property.

As compared to the number of criminal actions filed for the violation of fish and game laws, the seizure of large items of property such as boats and airplanes is used infrequently, and generally for only the most serious violations. The vast majority of seizures of vessels are made pursuant to search and seizure warrants issued by neutral magistrates or judges following a determination of sufficient probable cause. Probably the most common situation in which large items of property are seized without warrants are airplanes seized when an officer observes a violation of a fish and game law such as "same day airborne." The conviction rate on these serious fish and game violations is quite high. Additionally, although the state may request the forfeiture of an item following criminal conviction, this motion is not always granted. Any arguments in mitigation which the defendant wishes to make as to why his property should not be forfeited can be made during his sentencing hearing.

The proposed amendments to AS 16.05.190 provide that all items, even minor ones such as guns or traps, may not be seized unless they are necessary as evidence of a violation. Often, of course, they will be needed as evidence. But the state may choose to seize items for other reasons besides use as evidence. For example, if the item has been seized it can not be used in violation of the law during the pendency of the case. The Alaska Supreme Court has recognized this as a valid consideration in seizure cases. See the American Eagle case cited above.

Another important consideration is the prevention of the transfer from the jurisdiction or sale to an innocent purchaser of property used in fish and game violations. It is not uncommon for the owner of an airplane or vessel who discovers that he may have been observed violating the law to immediately remove the plane or boat from the jurisdiction. Planes which were the subject of an ongoing investigation have been sold to innocent purchasers within days of the alleged violation. AS 16.05.195(e) specifically provides that an item subsequently sold to an innocent purchaser in good faith may not be forfeited. Thus, if the violator manages to sell his plane, nets, vessel, etc. the state has no way to regain possession of that item for forfeiture as part of the criminal sentence.

Another important reason to seize items, other than to use them as evidence in prosecution, is the deterrence of

others. As stated above, forfeiture of large items is generally sought in only most serious fish and game violations. Often these cases involve commercial guides who may violate the law regularly, and who have a commercial motive for their behavior. Only a substantial deterrent will discourage some potential offenders from taking chances and hoping that he will not be caught.

The committee substitute, which adds language requiring an individual item value of \$2,500 or more on line 28 of the bill, is a significant improvement over the original version. Nonetheless, a person who owns a seized item worth over \$2,500 will be able to litigate, under CSHB 94, the validity of the decision of the person who seized the item that the seizure was necessary to preserve the item as evidence. This will require the state to attempt to prove the good faith of the person making the seizure, and to present the state's case in advance of the trial in order to convince the court that it is necessary to preserve the item as evidence. As discussed more fully below, this hearing may be held at a time when the state's case is in the early stages of development, when all possible evidence has not yet been obtained. Also, the bill does not explain how determination of an item's value is to be made. Should an item's value be based upon its purchase price? Replacement cost? Fair market value? If fair market value is the appropriate criterion, is it the market value at the place and time seized, or at the time of later disposal? If these questions are not resolved, they are likely to provoke future litigation on the issue.

The proposed language on lines 2 through 4 of page 2 of the bill requires that seized property be returned within seven days after the charges are filed, unless an extension is approved by court order for cause shown. While the language does not explicitly require a hearing for this order, an appellate court will almost certainly interpret the language to require a full hearing on the merits. As 16.05.190 applies to seizures made without a warrant. If no warrant has been issued, there has not yet been a determination by a neutral judge regarding the existence of probable cause. An ex parte presentation to the court by the state, either through testimony or an affidavit of the reasons justifying the continued seizure of the item would probably not provide the defendant sufficient due process of law, as an ex parte procedure would deny the defendant a right to be heard on parte procedure would deny the defendant a right to be heard on the issue. The American Eagle case makes it clear that the defendant has a right to a hearing on his contention that the state should not continue to hold the seized item.

The proposed language appears to place the burden on the state to demonstrate "cause" in order to justify an

extension of the seizure. Thus, the item is automatically returned to the defendant unless the state bears the burden of proof placed upon it. These hearings will ordinarily be taking place during the early stages of the state's case, when all available facts may not yet have been fully developed. Additionally, the standard for "cause" is unclear. Is the only "cause" allowable under the statute the fact that the item will be used as evidence? Or, is a legitimate concern regarding the removal of the item from the court's jurisdiction or its sale to an innocent purchaser sufficient cause to justify the state's retention of the property? If the item's status as evidence is the only permissible reason to continue to hold the item, then the state would be required to release a boat or plane to an owner even if the owner intends to walk out of the courtroom and remove the item from the state.

Finally, the seven day period allowed before a court extension must be obtained is much too short. Many, if not most, seizures of large items used in fish and game violations are made in remote locations of the state. While the officers involved have the authority to file charges immediately, if appropriate, there may well be no prosecutor or assistant attorney general available locally to handle the hearing. Under the language of the statute as currently drawn, the defendant's property is returned to him automatically after seven days, perhaps even if weather precludes the arrival of a judge or district attorney within the seven day period. It should also be noted that, in a felony case, there may be no judicial officer available within a jurisdiction to hear the case. If a defendant has been indicted for the charges, then only a superior court judge has jurisdiction over the case. A local district court judge or a magistrate could not preside over the forfeiture hearing.

Thank you for allowing the opportunity for comment on CSHB 49. Please contact me if you have any questions.

Very truly yours,

NORMAN C. GORSUCH  
ATTORNEY GENERAL

DANIEL W. HICKEY  
CHIEF PROSECUTOR

By: 

Gayle A. Horetzki  
Assistant Attorney General

GAH/gb-85

Attachments