

**HB**

**592**

**STATE OF ALASKA**  
**1990 LEGISLATIVE SESSION**

BILL VERSION: HB 592 No. 1  
 PUBLISH DATE: HOUSE 3/30/90

**FISCAL NOTE**

**REQUEST:**

Revision Date: \_\_\_\_\_ Agency Affected: Natural Resources  
 Title: Issuance of State Consistency BRU: Petroleum Management  
           Determinations  
 Sponsor: Rules Committee Components: Petroleum Management  
 Requestor: Governor

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL						
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REVENUE						
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**FUNDING: (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

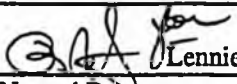
**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS: (Attach a separate page if necessary)**

See Attached

Prepared by: Larry Ostrovsky Phone: 465-2400  
 Division: Commissioner's Office Date: March 29, 1990

Approved by Commissioner:  Lennie Gorsuch Date: March 29, 1990  
 Agency: Department of Natural Resources

Distribution (by preparer) :  
 Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management and Budget  
 Impacted Agency(ies)

STEVE COWPER  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

March 30, 1990

The Honorable Sam Cotten  
Speaker of the House  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting two bills related to oil and gas lease sales and consistency determinations. As part of this package, I am also transmitting to the Senate Finance Committee (where the bill currently resides) a set of amendments to SCS CSHB 128(Res). Collectively, this package confirms existing oil and gas lease sale practices, confirms existing coastal consistency determination practices, and ratifies Oil and Gas Lease Sale 50. This package is necessary to avoid the serious adverse consequences of the Alaska Supreme Court's decision in Trustees for Alaska v. State of Alaska, \_\_\_ P.2d \_\_\_ (Op. No. 3537; March 16, 1990). The three items will be discussed separately below.

Amendments to SCS CSHB 128(Res):

The proposed amendments to SCS CSHB 128(Res) respond to the court's holding that the "best interest finding" for Oil and Gas Lease Sale 50 (Camden Bay), required by AS 38.05.035(e), failed to consider the environmental safety of transportation facilities should the Arctic National Wildlife Refuge (ANWR) remain unavailable for shore-based support facility siting under federal law. The decision overlooks the fact that the best-interest finding did address transportation to the extent feasible at the time of the lease sale, incorporating suggestions from, among others, the Department of Environmental Conservation (DEC) and the Department of Fish and Game (ADF&G). To the extent that the court engrafted a new requirement onto the best-interest statute -- to require the Department of Natural Resources (DNR) to undertake a detailed study of hypothetical development and transportation scenarios and their feasibility -- it is at odds with federal precedent and the court's own reasoning. With regard to federal environmental impact statements for oil and gas lease sales, a federal court of appeals recently observed, quoting an

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earlier federal case:

To require a cumulative EIS at the leasing stage . . . would be tantamount to "demanding that the Department specify the probable route of a highway that may never be built from points as yet unknown to other points as yet unknown over terrain as yet uncharted in conformity with state plans as yet undrafted. A more speculative exercise can hardly be imagined."

The federal court concluded that such an exercise would "result in a gross misallocation of resources." Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609, 624, and 623 (10th Cir. 1987). Moreover, the Alaska Supreme Court's opinion regarding Sale 50 realized that economic feasibility of eventual production need not be assured in advance for the lease sale to be in the best interest of the state. The same is true of the feasibility of any transportation system: the lessee bears the risk of designing and obtaining approval for any future transportation facilities under laws applicable at the time of any production.

This set of amendments expressly identifies the subjects that DNR must discuss in an oil and gas best-interest finding by setting out the complete list of factors that must be addressed. The legislation is intended to preclude a court from determining the "important factors" that must be addressed before the executive decision is made concerning whether an oil and gas lease sale is in the best interest of the state. It is further intended to make clear that speculation concerning future activities that would be subject to independent permitting requirements is not necessary at the time of the lease sale decision. By specifying that only "reasonably foreseeable cumulative effects" be discussed, it is intended that DNR need not speculate concerning the location and size of discoveries, the economic feasibility of ultimate development, the technological feasibility of production or transportation, future environmental or other laws that may apply at the time of any future development, or other such factors that cannot reasonably be foreseen at the time of leasing.

These changes will have two salutary effects on the state's leasing program. First, they will reduce the uncertainties that now interfere with the efficacy of the state's five-year leasing program. The legislature, DNR, and potential lessees would have more assurance that lease sales would be less subject to judicial interference. Second, because the amendments conform to existing practices, the bill will obviate the need for an increased appropriation to make even more extensive and specialized best-interest findings. (The finding in Lease Sale 50 was 89 pages long,

and was based on a record more than 11,000 pages long.) If hypothetical development and transportation systems and their risk must be analyzed, DNR would need a greatly expanded budget for conducting the best-interest findings, and the Department of Law would need a larger budget to advise and defend against the inevitable challenges based upon contrary speculations.

#### Bill on Coastal Consistency Determination Statutes

The proposed amendments to AS 44.19.145(a)(11) and AS 44.19.152 are necessary to confirm existing procedures for issuance of coastal consistency determinations. In its opinion, the court held that, because Lease Sale 50 involved more than one lease, AS 44.19.145(a)(11) required the Division of Governmental Coordination (DGC) to conduct an independent review and render the coastal zone management consistency determination for the lease sale, notwithstanding the fact that statutory responsibility for holding the lease sales is vested in a single agency (DNR). Given the fact that DEC, ADF&G, and the North Slope Borough all agreed with DNR that the lease sale is consistent with the applicable plan, requiring DGC to render the determination in such a case would add no extra protections, while creating unnecessary bureaucracy.

The opinion also suggests that in those cases where DGC must render a consistency determination, it must conduct an independent review of the substantive issues. This is contrary to the common meaning of the term "render," and inconsistent with existing, long-established administrative practices. Consistent with its basic charge to coordinate the resource agencies to "avoid duplication" (AS 44.19.145(d)(1)), DGC has always viewed itself as a coordinating agency, without the staff or authority to transform itself into a separate permitting agency. Here, DNR, DEC, ADF&G, and the North Slope Borough agreed that the lease sale was consistent with the applicable coastal zone management plan. For DGC to make an independent judgment would require a vastly enlarged appropriation to hire more personnel (especially high-cost employees with specialized technical qualifications) where the resource agencies and their technical staffs have already agreed that a project is consistent. Failure to pass the bill would result in a needless waste of state resources, while creating bureaucratic delay -- results contrary to the fundamental purposes of OMB.

Finally, the bill would avoid delays in making coastal consistency determinations for projects regulated by all of the resource agencies -- DNR, DEC, and ADF&G. Such delays would impair projects under each resource agency's laws pending the creation of sufficient DGC staff to handle DGC's new responsibilities under the court's opinion.

Bill to Ratify Sale 50:

The other bill would ratify Oil and Gas Lease Sale 50. The court did not invalidate the sale, the state has filed a petition for rehearing, and remand proceedings could very well result in the eventual affirmation of the sale. Nevertheless, considerable uncertainty and delay are inevitable without expeditious ratification. Plaintiffs have already asked the Supreme Court to "clarify" its decision by declaring the leases invalid, have sought an injunction against current, ongoing exploration under a lease in the sale area, and are certain to fight any affirmation of the lease sale in both administrative and judicial fora.

This lease sale was planned in accordance with the legislature's prescribed five-year public planning process, starting in 1981. The sale was held almost three years ago. Extended uncertainty would result in diversion of administrative and legal resources from other projects, and exploration within the sale area would be chilled or stopped. If the sale is ultimately canceled or invalidated, the state might have to refund bonus bids (\$6.6 million) and rents, half of which have been deposited in the Permanent Fund, and could possibly be liable for exploration expenditures and the value of any discovery that might be made before cancellation or invalidation. One lessee has already spent about \$50 million exploring a Sale 50 lease.

Therefore, in light of the very serious practical and financial ramifications of the current situation, these bills and the amendments to SCS CSHB 128(Res) are vital to the state's best interests, and I urge your prompt and favorable action on them.

Sincerely,



Steve Cowper  
Governor