

S B

94

SENATE STATE AFFAIRS COMMITTEE

BILL NUMBER SB 94

SPONSOR Governor

BILL TITLE Limiting liability for Nat'l. Guard activities

DATE REFERRED 1-9-89

HEARING SCHEDULED 1-23-89

FISCAL NOTE PREPARED ✓

SPONSOR CONTACTED

[50.0]
✓(DMVA)

INTERESTED PARTIES CONTACTED

✓ Jeff Morrison, DMVA x4600
DMVA "expert" Attorney Gary Bowen (Arch)

← Teleconference
Hark-up
345-3609

OTHER NO record of anyone testifying prior to hearings
except DMVA

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 5-DAY NOTICE 1-19-89
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER JUDICIARY

**FISCAL NOTE(S) MUST BE ATTACHED
IN ACCORDANCE WITH AS 24.08.035

DATE TURNED INTO OFFICE 1-23-89

1/9/89

Mr. President:

STATE AFFAIRS Committee considered SB 94

limiting liability for certain activities of the Alaska National Guard

and recommended:

replace with CS _____ same title

attached amendment(s) and new title

_____ letter of intent adopted

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

FISCAL NOTE(S) attached zero

fiscal impact

appropriation no FN attached

Gov. FN introduced w/ bill

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Col Adams

John Smith

Tim Kelly

Pat [Signature]
Chairman signature and recommendation

Committee backup attached

SB94POOP.TXT

SB 94 LIMITING LIABILITY FOR ACTIVITIES OF THE ALASKA
NATIONAL GUARD

TO TESTIFY:

JEFF MORRISON, DEPT. MILITARY AND VETERANS AFFAIRS

Maj. GARY BOWEN, DEPT. MILITARY AND VETERANS AFFAIRS (TELECONFERENCE)

OTHERS (SEE WITNESS LIST)

FYI:

SAME BILL WAS INTRODUCED LAST YEAR. ACCORDING TO D.M.V.A. NOBODY BUT THEM EVER TESTIFIED ON IT. BILL DIED IN SUND'S JUDICIARY COMMITTEE -- D.M.V.A. IS NOT SURE WHY, BUT SUSPECTS IT GOT CAUGHT UP IN THE TORT REFORM DEBATE.

QUESTION: WILL THIS BILL DISENFRANCHISE CLAIMANTS? WHY, IF FEDERAL REMEDIES ARE AVAILABLE, WOULD ANYONE FILE AGAINST THE STATE?

ANSWER, PER D.M.V.A.: WITHOUT THIS BILL, A CLAIMANT COULD PURSUE BOTH A FEDERAL AND STATE REMEDY AND ACHIEVE A DOUBLE RECOVERY.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 9, 1989

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Kelly:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to liability immunity of the state, its employees and agents, and members of the Alaska National Guard.

While training or on duty under federal mandate, the state national guards are performing a United States Government activity. Nevertheless, there have been occasions in which states, rather than the United States, have been exposed to tort liability for injuries or damage resulting from federally mandated guard activities.

In 1981, Congress amended 28 U.S.C. 2671 by adding to the definition of "employees of the government" members of the National Guard while training or on duty under federal order under 32 U.S.C. The effect of this amendment was to clarify that the United States considers the Guard as a federal function during 32 U.S.C. activities and that claims for injuries resulting from such activities could be pursued under the Federal Tort Claims Act, 28 U.S.C. 2671 et seq. In spite of this change in the law, there are rare occasions when the state remedy is preferred by an injured third party, who consequently will file a claim for damages in state court on the basis of state law. This bill will prevent suits of this nature, and assure that persons injured or property damaged as a result of federally mandated and controlled Guard activities will be required to seek damages from the United States Government. Existing worker's compensation coverage of guardsmen will not be affected by this bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Cowper".

Steve Cowper
Governor

STATE OF ALASKA

DEPARTMENT OF MILITARY AND VETERANS AFFAIRS

OFFICE OF THE ADJUTANT GENERAL

STEVE COWPER, GOVERNOR

FRONTIER BUILDING
SUITE 120
3601 C STREET
ANCHORAGE ALASKA 99503 5989
PHONE (907) 243 0656
AUTOVON 626-1444

Administrative & Support
Services Division
P.O. Box L
Juneau, AK 99811

January 19, 1989

The Honorable Pat Pourchot
Chairman, Senate State Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

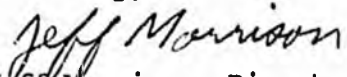
Dear Senator Pourchot,

Thank you for scheduling a hearing for SB 94 in your committee. This bill, introduced by the Governor, protects the State from liability when members of the Alaska National Guard are acting under federally-mandated training.

This bill was introduced in the Fifteenth Legislature as SB 91, in virtually the same language as it now reads. Enclosed is a copy of SB 91 as it was introduced two years ago. SB 91 passed the Senate by a vote of 17-2 on April 2, 1987. In the House, it was referred out of the State Affairs Committee on April 17, 1987 with a report of 3 "do pass" and 2 "no recommendation." It remained in the House Judiciary Committee until the end of the Fifteenth Legislature.

The Staff Judge Advocate of the Alaska National Guard, Major Gary Bowen, sent a letter, dated March 18, 1988, to the Chairman of the House Judiciary Committee, concerning SB 91. A copy of that letter is enclosed for your information, as the reasons for our support of this bill have not changed. Please let me know if there is any additional information you need concerning SB 94.

Sincerely,


Jeff Morrison, Director

cc: Major Gary Bowen, Staff Judge Advocate, DMVA
Bob Evans, Deputy Chief of Staff, Governor's Office



DEPARTMENTS OF THE ARMY AND THE AIR FORCE

HEADQUARTERS, ALASKA NATIONAL GUARD
OFFICE OF THE STAFF JUDGE ADVOCATE
3501 "C" STREET, SUITE 626
ANCHORAGE, ALASKA 99503-5089
(907) 249-1375 • (AV) 317-626-1375

18 March 1988

John Sund
House of Representatives
Post Office Box V
Juneau, Alaska 98111

Subject: Senate Bill 91

Dear Representative Sund:

On behalf of the Adjutant General, the Alaska National Guard, and the Department of Military and Veterans Affairs I write to express interest in seeing Senate Bill 91 positively endorsed by the House Judiciary Committee. The bill is the product of the cumulative experience of many states. Alaska is one of the few states that to date has not enacted protective legislation to insure that the state is not held liable in tort for federally mandated training of the National Guard.

In order to appreciate the National Guard perspective on this matter, some background may be in order. In the early 1970s the President and Congress of the United States determined that the National Guard should become a more integral and functioning part of our national defense forces. Therefore, in the last decade, Alaska National Guard units have intensified the complexity and frequency of their military training with active duty units of the Army, the Air Force, as well as the other services.

Then in 1981 Congress amended the Federal Tort Claims Act to permit suits against the United States for injuries or damage resulting from National Guard training. Until that time, persons who were injured because of National Guard activities had no recourse against the federal government and could seek redress only against the state military department concerned or against the individual Guardsperson. Congress so acted because nearly all of the training conducted by National Guard units today is done in accordance with procedures, programs, and direction issued by the United States Department of Defense through both Army and Air Force operational commands. Since the United States funds approximately 95% of all National Guard activities, it is appropriate that the United States should assume financial responsibility for this often hazardous training.

After the 1981 amendment to the Federal Tort Claims Act, a number of states amended their laws to provide that the state would not be liable for National Guard training accidents when the training or duty is being conducted pursuant to federal statutory requirements or authorization. As noted above, Alaska has not responded to this change in federal law.

Often the impetus for such remedial legislation is not provided until a law suit demonstrates the need to respond. A case in point is the recent experience of the State of Washington.

In 1983, while conducting weekend training at Fort Lewis, a Washington National Guard unit was involved in an accident which resulted in the death of 2 soldiers, and the injury of 4 others who were assigned at Fort Lewis. Those individuals or their estates sued the state of Washington alleging negligence. The state moved to dismiss the suit on grounds that the state of Washington ought not to bear the cost and trauma of defending suits arising out of national defense training (Emsley v. State, 106Wn.2d 474).

Ultimately, the Washington Supreme Court rejected the appeal and held there was no bar in Washington to the suit. The concurring judges noted that this legislative omission "should be corrected by the Legislature." The Washington legislature at the urging of the Washington National Guard and with the consent of the Washington Trial Lawyers Association followed the judicial suggestion and adopted the following statutory language:

"Neither the state of Washington, its officers, employees, or agents nor any member of the militia may be held liable in any civil action for damages arising out of any of the activities of the military forces of the state of Washington while engaged in activities during which the officers, employees, agents, or members are considered employees of the federal government under the federal tort claims act, 26 U.S.C. Sec. 2671 et seq."

California has also recently addresses this issue. Section 816 of the California Government Code states:

"A public entity is not liable for injury arising out of any activity conducted by a member of the California National Guard pursuant to Section 316, 502, 503, 504, or 505 of Title 32 of the United States Code and compensated pursuant to the Federal Tort Claims Act.

It is the intent of the Legislature, in enacting this section, to conform state law regarding liability for activities of the National Guard to federal law as expressed in Public Law 97-124.

(Added by Stats.1982, c.616,p. 2600, s 1.)"

Idaho has recently adopted a statute similar in language to Senate Bill 91. Although worded somewhat differently, these statutory enactments from sister states reflect their public policy, to wit, to immunize the State in cases where the federal government has agreed to be responsive in damages under the Federal Tort Claims Act (FTCA). By adopting Senate Bill 91 Alaska would be following the lead of other western/northwestern states in asserting immunity from federally mandated training of the National Guard.

The National Guard operates in one of three duty statuses. It may be called to active federal service by the President in which case the Guard is merged with the active forces. The torts committed by active duty soldiers incident to their employment as soldiers of the United States is compensated under the FTCA. Another status is that of state active duty where the Governor calls members of the National Guard to state active duty under AS 26.05.070. Torts which occur incident to this duty status subject the state to tort liability. SB 91 would not affect the liability of the State of Alaska during periods of state active duty. AS 26.05.140 immunizes officers and enlisted members of the militia for acts done in an official capacity. AS 26.05.150 immunizes commander of the militia for exercises in judgement. The most common status of the National Guard is that in which the National Guard participates in reserve component training under Title 32 United States Code (USC). Although this is a federally paid and federally mandated training function, it is often referred to as "state status". The state status refers to the fact that the Adjutant General who is appointed by the Governor, is in command of the National Guard during training under Title 32 USC. It is this concept of state status that potentially exposes the State of Alaska to liability for training mandated by federal authorities. Under the Federal Constitutional scheme the discretionary power to determine the training necessary for the militias of the various states is vested in the Congress. The operational authority has been vested in the states. Article 1, Section 8 of the U.S. Constitution provides that the Congress shall have power...

To provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress...

Congress has mandated that the discipline, including training of the National Guard conform to that of the active components of the Army and Air Force. 32 USC 501 (a). Although the Governor is the commander and chief during these periods of training, the failure to conduct the training as prescribed by federal authorities could result in the loss of federal recognition and the federal funding which goes with that recognition. Since it is unlikely that the Governor would ever refuse to conduct the federally mandated National Guard training during service under Title 32 USC, the potential for exposure is great notwithstanding that the Governor has virtually no discretion over the type and manner of training. Under these circumstances it seems inappropriate that the State of Alaska should be responsible for any personal injury or property damage which occurs incident to this training.

In the 1981 Amendments to the FTCA Congress determined that federal government responsibility for personal injury or property damage incident to National Guard training should be coextensive with that for the Army and the Air Force Reserve. Since there is no state responsibility for Army or Air Force Reserve training, it seems appropriate that the state should assert immunity. The United States has waived sovereign immunity under the FTCA and has consented to be responsible in damages just as

though it were a private citizen. The law to be applied is the law of the situs of the injury. In other words, an Alaskan injured incident to National Guard training would have a remedy against the United States and the applicable tort law is that of Alaska. I understand that there is some apprehension in the House Judiciary Committee that Senate Bill 91 would leave Alaskans without a remedy in the event of personal injury or property damage which incurred incident to National Guard training. This is not so. Alaskans injured incident to National Guard training do have a remedy and that remedy is against the federal authority who has directed the training.

One final matter which should be mentioned. The question has been raised concerning why someone would sue the State of Alaska if the federal government will respond in damages. The answer may be found in Alaska's collateral source rule. As an attorney you understand that the collateral source rule means that settlement by one tortfeasor is not a set off against other tortfeasors. Therefore, assuming that someone were to obtain a settlement from the United States under FTCA or even achieve judgement, there would be no prohibition against then re-litigating those issues vis a vis the State of Alaska. Without passage of Senate Bill 91 it would be possible for anyone injured by National Guard training to pursue both a federal and state remedy and achieve a double recovery!

Alaska Air National Guard deployments outside the State of Alaska are not unusual. Often these deployments are overseas. As this letter was being composed, elements of the Alaska Air National Guard were in Panama. Personal injury and property damage incident to military operation overseas (outside the United States) are subject to the Military Claims Act. Damage incident to military operations inside the United States or its territories are subject to the FTCA.

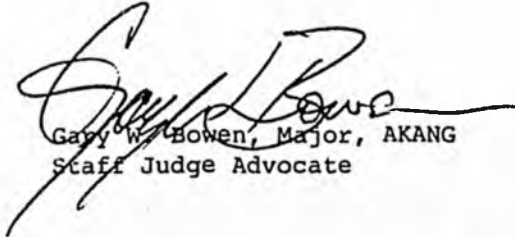
Notwithstanding these federal remedies, without Senate Bill 91, claims could be prosecuted against the U.S. under the FTCA and against the State of Alaska. It is not clear that the public policy of Alaska should be that the whole world has a cause of action against the state for damages occurring incident to training ordered by federal authorities.

I hope the foregoing explains why the National Guard and the Department of Military and Veterans Affairs believes that this bill is in the best interest of the state and in the best interest of the whole body politic of the State of Alaska. The bill would not leave residents of the State of Alaska remediless in the event of torts perpetrated by the Alaska National Guard. The FTCA gives them a remedy under the laws of the State of Alaska.

If this letter raises additional questions or if you would like further explanation about the matters contained herein, please do not hesitate to ask. I would be happy to arrange a meeting with National Guard attorneys if such would be of assistance to you. Additionally, I can arrange for a meeting with the active Army and Air Force Judge Advocates who can explain how the FTCA works to remedy personal injury or

property damage incident to training and operation of the armed forces of the United States. On behalf of the Department of Military and Veterans Affairs I earnestly solicit your support for this bill and request that it be favorably endorsed by the House Judiciary Committee.

FOR THE ADJUTANT GENERAL



Gary W. Bowen, Major, AKANG
Staff Judge Advocate

FISCAL NOTE

REQUEST:

Revision Date: December 22, 1988
Title: An Act limiting liability for activities of the Alaska National Guard
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Military & Veterans Affairs
BRU: Alaska National Guard
Components: Office of the Adjutant General

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
FEDERAL FUNDS						
OTHER						
TOTAL						

GENERAL FUNDS

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Passage of this bill will reduce the civil liability exposure of the State of Alaska. This reduction in exposure will be reflected by a reduction in the insurance costs charged to DMVA by the Division of Risk Management.

Prepared by: Jeff Morrison Phone: 465-4600
Division: Administrative & Support Services, DMVA Date: 12/21/88
Approved by Commissioner: MG John Schaeffer Date: 12/21/88
Agency: Department of Military & Veterans Affairs

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: An act limiting liabilities for activities of the Alaska National Guard
 Sponsor: Rules Committee
 Requestor: Governor

Agency Affected: Dept. of Military & Veterans Affairs
 BRU: Alaska National Guard

Components: Risk Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
TOTAL	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)

OTHER FUNDS
(interagency receipts)

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

The fiscal benefit is difficult to project because the State insurance deductible has varied, also this legislation would apply only to future claims. There could, however, be rather substantial savings in claims defense costs.

Prepared By: Donald J. Hitchcock
 Division: Risk Management

Phone: 465-2180
 Date: 12-19-88

Approved by Commissioner: John M. Andrews
 Agency: Department of Administration

Date: 12-19-88

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



Official Business

Alaska State Legislature

P.O. Box V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

TO: Senate State Affairs Committee Members
FROM: Senator Pat Pourchot, Chairman *Pat*
RE: January 23 Committee Hearing
DATE: January 20, 1989

On Monday, January 23 at 1:30 p.m. in the Beltz Room the Senate State Affairs Committee will hear the following bills:

SCR 10, Relating to the promotion of Colonel Lars L. Johnson to major general in the Alaska National Guard.

SCR 10 requests that the Governor appoint Colonel Johnson as a major general in the Alaska National Guard. Johnson is now retired. The promotion would be honorary, in recognition of his service and achievements. Johnson was the first Adjutant General of the Alaska National Guard and organizer of the Alaska Air National Guard. The Guard would like to honor Johnson with this promotion at its annual awards ceremony on February 12. The appointment would be subject to legislative confirmation.

SCR 10 has a zero fiscal note. A biographical sketch of Colonel Johnson is attached.

SB 48, An Act extending the termination date of the Older Alaskans Commission.

SB 48 would continue the Older Alaskans Commission through June 30, 1993.

The Older Americans Act of 1965 (PL 100-175) provides grants to the states for programs for senior citizens, and requires that a state agency be designated to administer the grant programs. The Older Alaskans Commission was established in 1981 to perform this function. In addition, the commission is charged with developing a statewide plan for senior needs and advocating for the elderly within the state.

The commission, located within the Department of Administration, consists of seven senior citizens appointed by the Governor and representatives of DHSS, DOA, DCRA, and the Pioneers Homes Advisory Board.

SB 48 has a zero fiscal note, with funding being continued in the Governor's proposed FY 90 operating budget. A copy of the recently performed sunset audit of the Older Alaskans Commission, which recommends continuation, is attached.

SB 91. Relating to methods of appointment to the Alaska Public Offices Commission.

SB 91 clarifies that all members of APOC shall be appointed by the Governor and confirmed by the legislature.

APOC has five members. Current law provides that four of the members shall be appointed by the Governor from nominees made by political parties, and that these four members shall then appoint one public member. The legality of this provision has been questioned on the grounds that it conflicts with Article III, Section 26 of the State Constitution which requires that the Governor appoint members of boards and commissions.

SB 91 would clear up the legal question by providing for the Governor to appoint the fifth APOC member from nominees made by the other four members. The Alaska Public Offices Commission supports the bill. SB 91 has a zero fiscal note.

SB 94. Limiting liability for activities of the Alaska National Guard.

SB 94 will prevent suits against the State for injuries or damage resulting from federally mandated and controlled National Guard activities. Federal law was amended in 1981 to permit such suits against the United States. Alaska is one of the few states that has not enacted protective legislation to ensure that the state is not held liable in such cases. SB 91 would not affect the liability of the State during periods of state active duty (i.e. duty called by the Governor).

Because SB 94 would reduce the civil liability exposure of the state, the Department estimates an annual savings of \$50,000 in insurance costs charged by the Division of Risk Management.

Sandra

1 IN THE SENATE

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

2

SENATE BILL NO. 94

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act limiting liability for certain activities of
7 the Alaska National Guard."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 26.05 is amended by adding a new section to read:

10 Sec. 26.05.145. IMMUNITY FROM TORT LIABILITY. The state, its
11 employees and representatives, and individual members of the Alaska
12 National Guard, acting in an official capacity, are not civilly liable
13 in tort actions for injuries to persons or property arising from
14 National Guard activities occurring during training or duty under 32
15 U.S.C. 316, 502, 503, 504, or 505.

FISCAL NOTE

REQUEST:

Revision Date: December 22, 1988
Title: An Act limiting liability for activities of the Alaska National Guard
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Military & Veterans Affairs
BRU: Alaska National Guard
Components: Office of the Adjutant General

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
FEDERAL FUNDS						
OTHER						
TOTAL		(50.0)	(50.0)	(50.0)	(50.0)	(50.0)

GENERAL FUNDS

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Passage of this bill will reduce the civil liability exposure of the State of Alaska. This reduction in exposure will be reflected by a reduction in the insurance costs charged to DMVA by the Division of Risk Management.

Prepared by: Jeff Morrison Phone: 465-4600
Division: Administrative & Support Services DMVA Date: 12/21/88
Approved by: Commissioner: MG John Schaeffer Date: 12/21/88
Agency: Department of Military & Veterans Affairs

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

FISCAL NOTE

REQUEST:

Revision Date:
Title: An act limiting liabilities for activities of the Alaska National Guard
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Dept. of Military & Veterans Affairs
BRU: Alaska National Guard
Components: Risk Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
TOTAL	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)

OTHER FUNDS (interagency receipts)

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

The fiscal benefit is difficult to project because the State insurance deductible has varied, also this legislation would apply only to future claims. There could, however, be rather substantial savings in claims defense costs.

Prepared By: Donald J. Hitchcock
Division: Risk Management

Phone: 465-2180

Date: 12-19-88

Approved by Commissioner: John M. Andrews
Agency: Department of Administration

Date: 12-19-88

Distribution (by preparer):

- Legislative Finance
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- Impacted Agency(ies)



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 9, 1989

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Kelly:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to liability immunity of the state, its employees and agents, and members of the Alaska National Guard.

While training or on duty under federal mandate, the state national guards are performing a United States Government activity. Nevertheless, there have been occasions in which states, rather than the United States, have been exposed to tort liability for injuries or damage resulting from federally mandated guard activities.

In 1981, Congress amended 28 U.S.C. 2671 by adding to the definition of "employees of the government" members of the National Guard while training or on duty under federal order under 32 U.S.C. The effect of this amendment was to clarify that the United States considers the Guard as a federal function during 32 U.S.C. activities and that claims for injuries resulting from such activities could be pursued under the Federal Tort Claims Act, 28 U.S.C. 2671 et seq. In spite of this change in the law, there are rare occasions when the state remedy is preferred by an injured third party, who consequently will file a claim for damages in state court on the basis of state law. This bill will prevent suits of this nature, and assure that persons injured or property damaged as a result of federally mandated and controlled Guard activities will be required to seek damages from the United States Government. Existing worker's compensation coverage of guardsmen will not be affected by this bill.

Sincerely,

Steve Cowper
Governor

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF MILITARY AND VETERANS AFFAIRS

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January 19, 1989

The Honorable Pat Pourchot
Chairman, Senate State Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

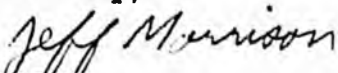
Dear Senator Pourchot,

Thank you for scheduling a hearing for SB 94 in your committee. This bill, introduced by the Governor, protects the State from liability when members of the Alaska National Guard are acting under federally-mandated training.

This bill was introduced in the Fifteenth Legislature as SB 91, in virtually the same language as it now reads. Enclosed is a copy of SB 91 as it was introduced two years ago. SB 91 passed the Senate by a vote of 17-2 on April 2, 1987. In the House, it was referred out of the State Affairs Committee on April 17, 1987 with a report of 3 "do pass" and 2 "no recommendation." It remained in the House Judiciary Committee until the end of the Fifteenth Legislature.

The Staff Judge Advocate of the Alaska National Guard, Major Gary Bowen, sent a letter, dated March 18, 1988, to the Chairman of the House Judiciary Committee, concerning SB 91. A copy of that letter is enclosed for your information, as the reasons for our support of this bill have not changed. Please let me know if there is any additional information you need concerning SB 94.

Sincerely,


Jeff Morrison, Director

cc: Major Gary Bowen, Staff Judge Advocate, DMVA
Bob Evans, Deputy Chief of Staff, Governor's Office



DEPARTMENTS OF THE ARMY AND THE AIR FORCE

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18 March 1988

John Sund
House of Representatives
Post Office Box V
Juneau, Alaska 98111

Subject: Senate Bill 91

Dear Representative Sund:

On behalf of the Adjutant General, the Alaska National Guard, and the Department of Military and Veterans Affairs I write to express interest in seeing Senate Bill 91 positively endorsed by the House Judiciary Committee. The bill is the product of the cumulative experience of many states. Alaska is one of the few states that to date has not enacted protective legislation to insure that the state is not held liable in tort for federally mandated training of the National Guard.

In order to appreciate the National Guard perspective on this matter, some background may be in order. In the early 1970s the President and Congress of the United States determined that the National Guard should become a more integral and functioning part of our national defense forces. Therefore, in the last decade, Alaska National Guard units have intensified the complexity and frequency of their military training with active duty units of the Army, the Air Force, as well as the other services.

Then in 1981 Congress amended the Federal Tort Claims Act to permit suits against the United States for injuries or damage resulting from National Guard training. Until that time, persons who were injured because of National Guard activities had no recourse against the federal government and could seek redress only against the state military department concerned or against the individual Guardsperson. Congress so acted because nearly all of the training conducted by National Guard units today is done in accordance with procedures, programs, and direction issued by the United States Department of Defense through both Army and Air Force operational commands. Since the United States funds approximately 95% of all National Guard activities, it is appropriate that the United States should assume financial responsibility for this often hazardous training.

After the 1981 amendment to the Federal Tort Claims Act, a number of states amended their laws to provide that the state would not be liable for National Guard training accidents when the training or duty is being conducted pursuant to federal statutory requirements or authorization. As noted above, Alaska has not responded to this change in federal law.

Often the impetus for such remedial legislation is not provided until a law suit demonstrates the need to respond. A case in point is the recent experience of the State of Washington.

In 1983, while conducting weekend training at Fort Lewis, a Washington National Guard unit was involved in an accident which resulted in the death of 2 soldiers, and the injury of 4 others who were assigned at Fort Lewis. Those individuals or their estates sued the state of Washington alleging negligence. The state moved to dismiss the suit on grounds that the state of Washington ought not to bear the cost and trauma of defending suits arising out of national defense training (Emsley v. State, 105Wn.2d 474).

Ultimately, the Washington Supreme Court rejected the appeal and held there was no bar in Washington to the suit. The concurring judges noted that this legislative omission "should be corrected by the Legislature." The Washington legislature at the urging of the Washington National Guard and with the consent of the Washington Trial Lawyers Association followed the judicial suggestion and adopted the following statutory language:

"Neither the state of Washington, its officers, employees, or agents nor any member of the militia may be held liable in any civil action for damages arising out of any of the activities of the military forces of the state of Washington while engaged in activities during which the officers, employees, agents, or members are considered employees of the federal government under the federal tort claims act, 26 U.S.C. Sec. 2671 et seq."

California has also recently addresses this issue. Section 816 of the California Government Code states:

"A public entity is not liable for injury arising out of any activity conducted by a member of the California National Guard pursuant to Section 316, 502, 503, 504, or 505 of Title 32 of the United States Code and compensated pursuant to the Federal Tort Claims Act.

It is the intent of the Legislature, in enacting this section, to conform state law regarding liability for activities of the National Guard to federal law as expressed in Public Law 97-124.

(Added by Stats.1982, c.616, p. 2600, s 1.)"

Idaho has recently adopted a statute similar in language to Senate Bill 91. Although worded somewhat differently, these statutory enactments from sister states reflect their public policy, to wit, to immunize the State in cases where the federal government has agreed to be responsive in damages under the Federal Tort Claims Act (FTCA). By adopting Senate Bill 91 Alaska would be following the lead of other western/northwestern states in asserting immunity from federally mandated training of the National Guard.

The National Guard operates in one of three duty statuses. It may be called to active federal service by the President in which case the Guard is merged with the active forces. The torts committed by active duty soldiers incident to their employment as soldiers of the United States is compensated under the FTCA. Another status is that of state active duty where the Governor calls members of the National Guard to state active duty under AS 26.05.070. Torts which occur incident to this duty status subject the state to tort liability. SB 91 would not affect the liability of the State of Alaska during periods of state active duty. AS 26.05.140 immunizes officers and enlisted members of the militia for acts done in an official capacity. AS 26.05.150 immunizes commander of the militia for exercises in judgement. The most common status of the National Guard is that in which the National Guard participates in reserve component training under Title 32 United States Code (USC). Although this is a federally paid and federally mandated training function, it is often referred to as "state status". The state status refers to the fact that the Adjutant General who is appointed by the Governor, is in command of the National Guard during training under Title 32 USC. It is this concept of state status that potentially exposes the State of Alaska to liability for training mandated by federal authorities. Under the Federal Constitutional scheme the discretionary power to determine the training necessary for the militias of the various states is vested in the Congress. The operational authority has been vested in the states. Article 1, Section 8 of the U.S. Constitution provides that the Congress shall have power...

To provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress...

Congress has mandated that the discipline, including training of the National Guard conform to that of the active components of the Army and Air Force. 32 USC 501 (a). Although the Governor is the commander and chief during these periods of training, the failure to conduct the training as prescribed by federal authorities could result in the loss of federal recognition and the federal funding which goes with that recognition. Since it is unlikely that the Governor would ever refuse to conduct the federally mandated National Guard training during service under Title 32 USC, the potential for exposure is great notwithstanding that the Governor has virtually no discretion over the type and manner of training. Under these circumstances it seems inappropriate that the State of Alaska should be responsible for any personal injury or property damage which occurs incident to this training.

In the 1981 Amendments to the FTCA Congress determined that federal government responsibility for personal injury or property damage incident to National Guard training should be coextensive with that for the Army and the Air Force Reserve. Since there is no state responsibility for Army or Air Force Reserve training, it seems appropriate that the state should assert immunity. The United States has waived sovereign immunity under the FTCA and has consented to be responsible in damages just as

though it were a private citizen. The law to be applied is the law of the situs of the injury. In other words, an Alaskan injured incident to National Guard training would have a remedy against the United States and the applicable tort law is that of Alaska. I understand that there is some apprehension in the House Judiciary Committee that Senate Bill 91 would leave Alaskans without a remedy in the event of personal injury or property damage which incurred incident to National Guard training. This is not so. Alaskans injured incident to National Guard training do have a remedy and that remedy is against the federal authority who has directed the training.

One final matter which should be mentioned. The question has been raised concerning why someone would sue the State of Alaska if the federal government will respond in damages. The answer may be found in Alaska's collateral source rule. As an attorney you understand that the collateral source rule means that settlement by one tortfeasor is not a set off against other tortfeasors. Therefore, assuming that someone were to obtain a settlement from the United States under FTCA or even achieve judgement, there would be no prohibition against then re-litigating those issues vis a vis the State of Alaska. Without passage of Senate Bill 91 it would be possible for anyone injured by National Guard Training to pursue both a federal and state remedy and achieve a double recovery!

Alaska Air National Guard deployments outside the State of Alaska are not unusual. Often these deployments are overseas. As this letter was being composed, elements of the Alaska Air National Guard were in Panama. Personal injury and property damage incident to military operation overseas (outside the United States) are subject to the Military Claims Act. Damage incident to military operations inside the United States or its' territories are subject to the FTCA.

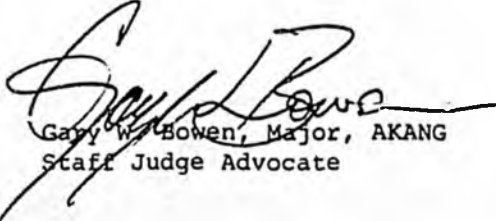
Notwithstanding these federal remedies, without Senate Bill 91, claims could be prosecuted against the U.S. under the FTCA and against the State of Alaska. It is not clear that the public policy of Alaska should be that the whole world has a cause of action against the state for damages occurring incident to training ordered by federal authorities.

I hope the foregoing explains why the National Guard and the Department of Military and Veterans Affairs believes that this bill is in the best interest of the state and in the best interest of the whole body politic of the State of Alaska. The bill would not leave residents of the State of Alaska remediless in the event of torts perpetrated by the Alaska National Guard. The FTCA gives them a remedy under the laws of the State of Alaska.

If this letter raises additional questions or if you would like further explanation about the matters contained herein, please do not hesitate to ask. I would be happy to arrange a meeting with National Guard attorneys if such would be of assistance to you. Additionally, I can arrange for a meeting with the active Army and Air Force Judge Advocates who can explain how the FTCA works to remedy personal injury or

property damage incident to training and operation of the armed forces of the United States. On behalf of the Department of Military and Veterans Affairs I earnestly solicit your support for this bill and request that it be favorably endorsed by the House Judiciary Committee.

FOR THE ADJUTANT GENERAL



Gary W. Bowen, Major, AKANG
Staff Judge Advocate

Introduced: 1/7
Referred: July

wo00167s

1987-88 session

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE SENATE

2

SENATE BILL NO. 91

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act limiting liability for activities of the
7 Alaska National Guard."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 26.05 is amended by adding a new section to read:

10 Sec. 26.05.145. IMMUNITY FROM TORT LIABILITY. The state, its
11 employees and representatives, and individual members of the Alaska
12 National Guard, acting in an official capacity, are not civilly liable
13 in tort actions for injuries to persons or property arising from
14 National Guard activities occurring during training or duty under 32
15 U.S.C. secs. 316, 502, 503, 504, or 505.

roduced: 1/7
erred: July

wo00167s

1987-88 session

THE SENATE

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

SENATE BILL NO. 91

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

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