

**HB**

**474**

WALTER J. HICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES**

DIVISION OF OIL AND GAS

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
PHONE: (907) 762-2553

(907)762-2547

March 3, 1994

Clement Lewsey, Acting Chief  
Coastal Programs Division  
United States Department of Commerce  
National Oceanic and Atmospheric Administration  
National Ocean Service  
Office of Ocean and Coastal Resource Management  
Washington, D.C. 20235

Dear Mr. Lewsey:

I am writing to you in my capacity as Director of the State of Alaska's Division of Oil and Gas, an agency both interested in and affected by the proposed statutory amendments contained in Alaska Senate Bill 308. I have reviewed a copy of your March 2, 1994 letter responding to a March 1, 1994 letter from Ms. Riki Orr. Your letter raises several questions.

As a preliminary matter, I agree with your statement that it is premature for OCRM to decide whether it would approve the changes resulting from SB 308. The bill is proposed legislation and is still undergoing the committee review process. It may be modified several times as its intent is clarified and public concerns are addressed. I also understand that any changes to an approved state coastal management program must be formally submitted for review by your agency. Since this bill is not yet approved or enacted, such a submittal, obviously, has not yet been made.

Is it a standard procedure for your federal agency to comment on proposed state legislation? Committing to a written statement on legislation which is currently before Alaska's Legislature under the signature and letterhead of agency authority appears unusual, at best, and gives the impression that the federal agency is actively taking a position on the proposed state legislation. If that is indeed your intent, please describe your agency's authority for and policy on commenting on proposed state legislation.

Further, the comments in your letter lead me to believe that your agency does not understand the bill's composition. In the third paragraph of page 1 of your letter, you state that SB 308 would narrow the scope of review for state agency decisions including the disposition of state land, property, and resources. That described effect is not part of the proposed amendment to the Alaska Coastal Management Program ("ACMP"). Only Section 3 of the bill, proposed statute AS 46.40.094, would affect the ACMP. The first two sections

Clement Lewsey, Acting Chief  
Coastal Programs Division  
March 3, 1994  
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of the bill address amendments to the Alaska Land Act (Alaska Statutes Title 38, chapter 5), a set of statutes dating from statehood which is independent of and not part of the ACMP statutory scheme.

Even if a federal agency properly may comment on proposed state legislation, a federal agency cannot possibly have any basis to comment on proposed amendments to state statutes which are not in any way under the control of a federal program. Although some decisions eventually issued under the Alaska Land Act may require a prior independent consistency determination under the ACMP (Alaska Statutes Title 46, Chapter 40), the vast majority do not.

I would ask that you reconsider the accuracy of and appropriateness of your comments presented on page 1, paragraph 3 of your letter. If, after such reconsideration, you still feel that your comments are accurate and appropriate, please clarify and specify how they apply to the particular sections of SB 308 and what conflicts result.

Your second comment (page 2, paragraph 1) also appears to address the portions of the bill proposing amendments to the Alaska Land Act. The last sentence of paragraph 1, page 2 refers to the location of an activity. Nothing in Section 3 of the bill, the only section affecting decisions under the ACMP, refers to location of an activity; the only such reference is in Section 2 of SB 308. Again, such comments appear to arise from a faulty understanding of the bill and, as a result, are inaccurate and inappropriate.

If indeed your second comment does address Section 3 of SB 308, the comment remains unclear as to how the ACMP, if amended pursuant to Section 3 of SB 308, might contradict federal statutes or regulations and cause problems. You refer to CZMA section 307(c)(1) (codified at 16 U.S.C. § 1456(c)(1)) which requires consistency of federal agency activities "to the maximum extent practicable with the enforceable policies of approved State management programs," (emphasis added) and you then provide H.R. Conference Report No. 964 describing the intent of Congress in enacting the 1990 amendment to that section.

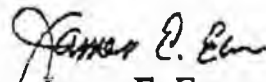
You do not, however, provide any cites to federal statutes or regulations which, in the event that Section 3 of SB 308 is enacted in its current form, could create a conflict between the ACMP and existing federal requirements for state coastal management programs (16 U.S.C. § 1455(d)). What specific statutes or regulations exist (since intent language must be used to construe existing language) that would cause a conflict between the ACMP and the federal requirements for state programs if Section 3 of SB 308 is enacted? What would be the result of any alleged conflict? I request clarification and specifics of how OCRM anticipates that Section 3 of SB 308 would violate state program requirements.

Clement Lewsey, Acting Chief  
Coastal Programs Division  
March 3, 1994  
Page 3

Your third comment (page 2, paragraph 2) does appear to address Section 3 (phasing of consistency determinations). However, it seems to agree that the use of phasing is consistent with the CZMA. Indeed, Section 3 of SB 308 appears to conform with the intent of 15 C.F.R. § 930.37(c) by providing for review "at major decision points for a long-term project and ensur[ing] that the project, taken as a whole, is consistent . . . with the state coastal management program." If there is a conflict, please specify how you believe Section 3 of SB 308 conflicts with the federal CZMA requirements for state programs.

I am impressed by the quick response you provided to Ms. Ott and request that I be accorded the same consideration. As Ms. Ott pointed out, proposed legislation may move quickly and if concerns or potential problems exist, they should be addressed now. I look forward to a written response in the next day or two. Our facsimile number is (907)562-3852. If a prompt written response is not possible, perhaps you will be available to provide comments by telephone to a state legislative committee considering this bill. In that case, please call me at (907)762-2547 so I can arrange for a telephonic conference.

Sincerely,

  
James E. Eason  
Director



444 pm 12/194  
UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL OCEAN SERVICE  
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT  
Washington, D.C. 20235

Riki Ott, Ph.D.  
United Fishermen of Alaska  
211 Fourth Street, Suite 211  
Juneau, Alaska 99801

MAR 2 1994

Dear Dr. Ott:

Thank you for your letter of March 1, 1994, regarding Alaska Senate Bill 308 (SB 308). SB 308 would affect the way the Alaska Coastal Management Program (ACMP) reviews decisions by state agencies regarding the disposition of state land, property and resources. Your letter raises several issues regarding SB 308 and asks for clarification on the federal role in this particular legislation. Because we have not had time to conduct an in-depth review or legal analysis of SB 308, the comments that follow must be viewed as a preliminary programmatic response.

The Office of Ocean and Coastal Resource Management (OCRM) is the federal office responsible for overseeing the implementation of state coastal management programs developed pursuant to the Coastal Zone Management Act of 1972, as amended (CZMA). In addition to initially approving state programs, OCRM is charged with reviewing and approving or denying changes to the state's coastal management program. Thus, if SB 308 were enacted, the resultant changes to the ACMP would have to be submitted to OCRM for approval as a program change pursuant to 15 C.F.R. 923 Subpart I.

As mentioned above, we have completed a preliminary review of SB 308, and it would be premature to decide whether OCRM would approve the changes resulting from SB 308. We can, however, point out several aspects of SB 308 for which OCRM has significant concerns. First, as presented, SB 308 would narrow the scope of review for state agency decisions including disposition of state land, property and resources. In essence, this would create a double standard for review under the ACMP: one standard for federal agency actions, and a narrower, less strict standard for state agency actions. In order to apply state coastal management enforceable policies to federal agencies through the CZMA's federal consistency provisions, the standard of review applicable to the federal agency must be the same standard that applies to all public and private entities under the state's jurisdiction.

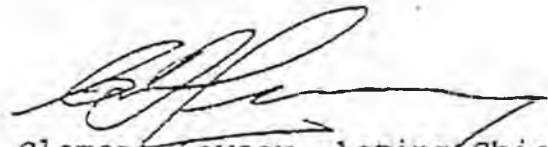


Second, in narrowing the scope of review, SB 308 would be contrary to the direction set by Congress in the 1990 reauthorization of the CZMA regarding state review of direct federal activities under section 307(c)(1) of the CZMA. Specifically, the changes require that each federal agency activity affecting any land or water use or natural resource of the coastal zone be conducted in a manner which is consistent to the maximum extent practicable with the enforceable policies of an approved state coastal management program. Further, Congress intended that in determining the effects of the activity, the federal agency must consider both direct and indirect effects, including reasonably foreseeable cumulative effects of the proposed activity.<sup>1</sup> It is also important to emphasize that the trigger for review of an activity is whether it affects the land or water uses or natural resources of the coastal zone, not the location of the activity.

Finally, you have raised the question of whether the federal program allows for phasing the review of certain activities. Federal regulations at 15 C.F.R. 930.37(c) allow, under certain circumstances, for the phased review of federal activities. This section is not intended to curtail the scope of the review at any particular phase. In fact, this section provides an opportunity for state review at major decision points for a long-term project and ensures that the project, taken as a whole, is consistent to the maximum extent practicable with the state coastal management program.

I hope that this letter answers your questions. Enclosed are some background materials regarding the reauthorization of the CZMA and federal consistency. If you would like to discuss the matter further, please contact John King of my staff at 301/713-3121.

Sincerely,



Clement Lewsey, Acting Chief  
Coastal Programs Division

enclosures

cc: Paul Rusanowski, DGC  
Beth Kerttula, DOL

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<sup>1</sup> H.R. Conference Report No. 964, 101st Congress, 2d Session at 370, 371 (1990)



# UNITED FISHERMEN OF ALASKA

211 Fourth Street, Suite 112  
Juneau, Alaska 99801  
507/586-2820  
Fax: 907/463-2545

John King  
Office of Oceans & Coastal Resource Management  
National Oceanic & Atmospheric Administration  
Rockville, MD

VIA FAX: (301) 713-4367

March 1, 1994

Dear Mr. King:

Several days ago, we provided you with a copy (via fax) of Senate Bill SB303 and background information. From our perspective, SB303 is a radical shift in public policy regarding the public input process under Alaska's coastal management plan of the Coastal Zone Management Act. We have several key concerns.

#1) This bill gives resource agency directors the power to limit the scope of issues addressed during the initial administrative review. Would similar powers be granted to federal resource agency directors on federal land disposals under the consistency determinations? Or would two standards go into effect: one on federal lands and one on state lands?

#2) This bill institutionalizes multi-phasing on state lands by allowing review of "relevant" public concerns during the appropriate project phase. We are concerned that multi-phasing increases the likelihood of erroneous land disposals because the process lacks a thorough cost/benefit analysis and best interest finding during the initial review phase. This seems counter to the entire concept of the CZMA. Does the federal government allow multi-phasing of projects on federal lands as maintained by state officials?

#3) Limiting the range of effects during the review process to "foreseeable, significant and direct" seems to eliminate most effects. Didn't Congress clarify "direct" to include secondary, cumulative and indirect? If so, how can the federal government approve language that they themselves do not use?

#4) Limiting the range of effects on fish and wildlife to "within the scope of the lease sale area" seems extremely arbitrary and unrealistic. This would exclude effects on migratory wildlife, including fish, marine mammals and birds, and also effects on wildlife immediately adjoining the lease sale area.

#### MEMBER ORGANIZATIONS

Alaska Crab Council • Alaska Longline Fishermen's Association • Alaska Trollers Association • Area K Seiners Association  
Bering Sea Fishermen's Association • Bristol Bay Crabbers Association • Concerned Area "M" Fishermen  
Cook Inlet Aquaculture Association • Cordova District Fishermen United • Ketchikan Peninsula Fishermen's Association  
North Pacific Fishermen's Association • Northern Southeast Regional Aquaculture Association • Petersburg Marketing Association  
Petersburg Vessel Owners Association • Prince William Sound Aquaculture Corporation • Seafood Producers Cooperative  
Southeast Alaska Seiners Association • Southern Southeast Regional Aquaculture Association

In summary, could you clarify the role of the federal government in this legislation? Would the federal government have to approve the changes proposed in SB306 should this bill become law? What is the likelihood of federal approval given the legal history of the CZMA?

This bill is on an extremely fast track. Your haste in answering these questions--even a preliminary review--would be greatly appreciated.

Sincerely,

Riki Ott

Riki Ott, Ph.D.  
Chairman of the Habitat Committee

MAR 22 1994



Union Texas Petroleum

1330 Post Oak Boulevard  
P. O. Box 2120  
Houston, Texas 77252-2120  
(713) 968-2758

March 18, 1994

A. Clark Johnson  
Chairman and Chief Executive Officer

The Honorable Gail Phillips  
Alaska State Legislature  
House of Representatives  
State Capitol  
Juneau, Alaska 99801-1182

Dear Ms. Phillips:

Thank you very much for your letter of February 22, 1994, concerning Union Texas Petroleum Alaska's exploration agreement with Cook Inlet Region, Inc. (CIRI). I am enclosing for your information copies of press releases about our transaction with CIRI and a contribution from Union Texas to provide educational support for Alaska Natives of Cook Inlet Region and their families. Also attached is a copy of our company's most recent annual report, which highlights our activities on the Kenai Peninsula.

Union Texas has been involved in a number of exploration ventures in Alaska since the mid-1970s. We believe that Alaska holds excellent potential for significant hydrocarbon reserves and are excited to have the opportunity to work with CIRI. We were discouraged, however, by the enjoining of the Alaska State Lease Sale 78. This injunction has adversely affected our view regarding exploration and development plans in Alaska. We have expressed our concern to Senator Mike Miller and have encouraged his support for SB308/HB474, to be applied retroactively. Enclosed for your information is a copy of our letter to Senator Miller. We also seek your support of this important legislation.

We appreciate your interest in Union Texas and look forward to participating in successful exploration ventures in Alaska.

Sincerely,

Enclosures



**Union Texas Petroleum**

1330 Post Oak Blvd.  
P.O. Box 2120  
Houston, Texas 77252-2120  
(713) 623-6544

Contact: Carol L. Cox  
(713) 968-2714

### **UNION TEXAS PETROLEUM SIGNS AGREEMENT TO EXPLORE FOR OIL AND GAS ON ALASKA'S KENAI PENINSULA**

Houston, February 2, 1994 -- Union Texas Petroleum Holdings, Inc. today announced that its subsidiary, Union Texas Petroleum Alaska Corporation, has signed an agreement with Cook Inlet Region, Inc. (CIRI), an Alaska Native Regional Corporation, to explore for oil and gas on Alaska's Kenai peninsula.

The agreement calls for a phased three-year exploration program on more than 340,000 acres situated in south central Alaska on the Kenai peninsula about 50 miles southwest of Anchorage on the eastern shore of the Cook Inlet. Union Texas Petroleum Alaska, as operator, will initially have a 100% working interest and conduct the exploration program. Union Texas has the option to acquire oil and gas leases on prospects and CIRI will have the option to participate in exploratory drilling and development programs.

"We are very excited to have this opportunity to work with CIRI in the search for oil and gas on the Kenai peninsula," said Union Texas Vice President-Exploration Joel S. Empie. "During 1994, we will undertake an extensive study to process and interpret approximately 1,100 miles of existing seismic data. After a review of this seismic and other technical data, we may conduct a new seismic program later in 1994 or 1995. Given encouragement, we would expect to drill as early as 1995-96."

In addition to its interests in the Kenai peninsula acreage, Union Texas Petroleum Alaska has actively participated in exploring for hydrocarbons in the Colville River Delta area, which is located six miles west of the Kuparuk River field on the North Slope, and in the Beaufort Sea offshore northern Alaska. During 1994, Union Texas plans to participate in two exploration wells in the Colville area, where the company's working interest averages approximately 14%.

One of the largest independent producers located in the U.S., Houston-based Union Texas Petroleum Holdings, Inc. (NYSE: UTH) explores for and produces oil and gas overseas primarily in the U.K. North Sea, Indonesia and other strategic areas. The company also has petrochemicals interests in the U.S.

# # #



**Union Texas Petroleum**

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(713) 623-6544

Contact: Carol L. Cox  
(713) 968-2714

**CIRI FOUNDATION RECEIVES CONTRIBUTION FROM  
UNION TEXAS PETROLEUM ALASKA**

Houston, February 9, 1994 -- Cook Inlet Region Inc., (CIRI), an Alaska Native Regional Corporation, today announced that Houston-based Union Texas Petroleum Alaska, a subsidiary of Union Texas Petroleum Holdings, Inc., has made a contribution of \$100,000 to the CIRI Foundation.

"On behalf of the employees of Union Texas, we are very pleased to make this contribution to the CIRI Foundation to assist in its outstanding efforts to meet the educational needs of Alaska Natives of Cook Inlet Region and their families," said Union Texas Senior Vice President-Exploration and Production William M. Krips.

Union Texas Petroleum Alaska has oil and gas interests in southern and northern Alaska.

One of the largest independent producers located in the U.S., Houston-based Union Texas Petroleum Holdings, Inc. (NYSE: UTH) explores for and produces oil and gas overseas primarily in the U.K. North Sea, Indonesia and other strategic areas. The company also has petrochemicals interests in the U.S.

# # #



Union Texas Petroleum

February 22, 1994

1530 Post Office Building  
P. O. Box 2120  
Houston, Texas 77252-0120  
Telephone (713) 693-2120

The Honorable Mike Miller  
Chairman  
Senate Resources Committee  
Capitol Building, Room 423  
Juneau, AK 99811

Joel S. Empe  
S. J. Empe  
S. J. Empe

VIA FAX AND FEDERAL EXPRESS

RE: STAY OF STATE OF ALASKA LEASE SALE 78  
PROPOSED LEGISLATION SB308 / HB474  
LAWSUITS REGARDING STATE OF ALASKA LEASE SALES 50, 55, & 78

Dear Senator Miller:

Union Texas Petroleum Alaska is an indirect wholly owned subsidiary of Union Texas Petroleum Holdings, Inc., one of the largest independent producers located in the United States. Union Texas explores for and produces oil and gas overseas primarily in the U.K. North Sea, Indonesia and other strategic areas.

Union Texas Petroleum Alaska pursues exploration activities in Alaska. At year-end 1993, it held approximately 88,000 net acres in Alaska, primarily in the Colville Delta, Cook Inlet and offshore Beaufort Sea. During the past several years, Union Texas Petroleum Alaska has increased its exploration activity in Alaska. This activity included participation in three additional wells in the Kuukpik State Exploration Unit, four wells in the adjacent Colville River Delta area, one well in the Jones Island State Exploration Unit, three wells in the Kuvlum Federal Unit in the Beaufort Sea, and the Diamond #1 Well in the Chukchi Sea.

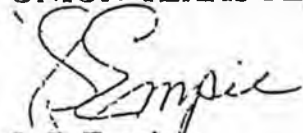
The stay of the State of Alaska Lease Sale 78 has significantly affected the view of Union Texas Petroleum Alaska regarding our ability to implement a sound exploration and development plan in Alaska. Current statutes and regulations governing leasing activities as interpreted by the Alaska courts in lawsuits concerning State Lease Sales 50, 55, and 78, discourage bidding as well as exploration and production activities on state lands. In addition, we believe these interpretations are inconsistent with the legislative intent of these statutes and regulations. The delay in arriving at a settlement and the impact of the settlement of the Mental Health Lands further discourages activities on state lands. Because of the long lead time and high exploration costs involved in arctic projects, independent operators such as Union Texas Petroleum can ill afford to continue to expend significant sums of money on exploration activities into areas where the return on the investment is becoming more uncertain due to the of lack of leasing opportunities on state lands.

Letter to Senator Mike Miller  
February 22, 1994  
Page Two

Alaska is in direct competition with alternative international opportunities for funding. We believe that Alaska compares favorably with other international projects on a technical basis but we are concerned that increasing regulation and the inability to plan and budget programs with reasonable assurance that leases will be available places Alaska at a distinct disadvantage. Union Texas Petroleum would prefer to keep the dollars and jobs at home as much as possible. The passage of SB308/HB474, to be applied retroactively, would be a significant step in accomplishing our common objectives.

Sincerely,

UNION TEXAS PETROLEUM ALASKA CORPORATION



J. S. Empie  
Senior Vice President

**DIVISION OF LEGAL SERVICES**

**LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

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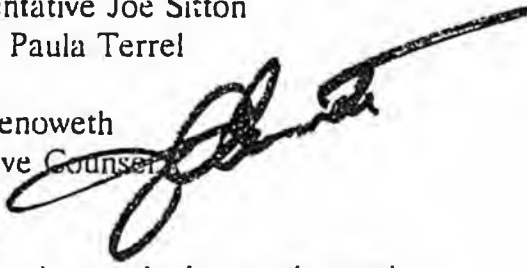
MEMORANDUM

March 1, 1994

**SUBJECT:** Questions concerning House Bill 474 (Work Order No. 8-LS1692V)

**TO:** Representative Joe Sitton  
ATTN: Paula Terrel

**FROM:** Jack Chenoweth  
Legislative Counsel



With reference to HB 474, you have asked several questions.

Your principal question concerns the implications of the provisions of sections 1 and 2 of HB 474 (granting authority to the director of the division of land to modify the procedures for and the dimensions of administrative decisions relating to dispositions of state resources under the Alaska Land Act, AS 38.05).

A key appellate court decision is Trustees for Alaska v. Gorsuch, 835 P.2d 1239 (Alaska 1992). The decision grew out of a challenge to issuance of coal mining permits under the state's Surface Coal Mining Control Act, AS 27.21. The court disposition of one issue in favor of the plaintiffs and against the defendant state agency indicates arguments that are likely yet to come in response to the changes being made by sections 1 and 2 of HB 474. In the Gorsuch decision, the court endorsed plaintiff's arguments, noting that

... statutory language does support Trustees' ... argument that [the department] may not ignore cumulative effects of mining and related support facilities by unreasonably restricting its jurisdiction and disregarding the effects of activities outside that jurisdiction.

835 P.2d at 1246 (emphasis added).<sup>1/</sup> The administration is supporting the

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<sup>1/</sup> And, the court went on to reach this determination:

These purposes cannot be accomplished by ignoring cumulative impacts.

(continued...)

legislation so that it may have authority--to use the words of the court decision--to "restrict . . . jurisdiction" in order to "[disregard] the effects of activities outside that jurisdiction."

The question, as I see it developing in any effort that the director may initiate under the authority being granted by these two bill sections, is whether, for proposed disposals requiring the preparation and publication of written findings when required by AS 38.05.035, the director has acted "reasonably" in establishing the scope of the division's administrative review for the proposed disposal. My guess is that, with adoption of HB 474 in some version approximating the measure as it was introduced, at least for a little while the director's efforts should continue to provide a lively field to litigants interested in the way the state proposes to dispose of its resources. The litigants will, however, have a new target.

In the abstract, one cannot say whether the director may achieve a significantly better measure of success under the proposed statute change. Recall that, in Gorsuch, the Supreme Court defined the following as the applicable standard of judicial review for "best interest determinations" and similar "complex" agency administrative decisions:

We defer to an agency decision which involves complex subject matter or fundamental policy considerations unless the decision is arbitrary, capricious, or without a reasonable basis. Trustees for Alaska v. State, Department of Natural Resources, 795 P.2d 805, 809 (Alaska 1990). "The reasonable basis standard is appropriate for determining whether the agency decision has been undertaken 'in the manner required by law.' One indication whether an agency has proceeded in the manner required by law is compliance with its own regulations." Jager v. State, 537 P.2d 1100, 1107-08 (Alaska 1975).

Trustees for Alaska v. Gorsuch, 835 P.2d 1239, at 1243.

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U(...continued)

Based on the policies inherent in these purposes, we conclude that DNR may not ignore cumulative effects of mining and related support facilities by unreasonably restricting its jurisdiction or by permitting facilities separately. These purposes require that at the time DNR reviews any [Surface Coal Mining Control Act] permit application it consider the probable cumulative impact of all anticipated activities which will be part of a "surface coal mining operation," whether or not the activities are part of the permit under review. If DNR determines that the cumulative effect is problematic, the problems must be resolved before the initial permit is approved.

Proposed AS 38.05.035(e)(1)(B) directs that an administrative review for a proposed disposal that requires a best interest finding may be limited--and, by extension, under AS 38.05.035(e)(1)(C), may be limited to one phase of a proposed disposal for a multiphased development project--to these two elements: first, the

. . . applicable law and the facts . . . that the director finds are material to the determination[,] and that are known [to him] or knowledge of which is made available [to him] during the administrative review,

and second, the

. . . issues that, based on [that law and those facts] and on the nature of the uses sought to be authorized, the director finds are relevant to the determination of whether the proposed disposal will best serve the interests of the state.

As to the first of the two elements, arguably the director's efforts become easier and, hence, the opportunity to successfully challenge that element of his conclusion under the "deferential review" standard of Gorsuch may be tougher. I say that because there is in current law the requirement that the director set out, in the written finding, "the facts and applicable law upon which [his] determination . . . was based." I sense that the Department of Natural Resources ought to find it no tougher than under the current law to identify applicable law and should be able to readily demonstrate that, in the course of the administrative process that attaches to its examination of a proposed disposal of state resources, it has considered all material--by which I take it to mean acts, events, transactions, or circumstances that are necessary or significant to its determination of the outcome of that disposal--facts. <sup>2/</sup>

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<sup>2/</sup> Indeed, the process of identification and discussion of the facts alone may be enough for the department to show that it has satisfied the legal requirement of amended AS 38.05.035(e)(1)(B)(i) for, as the Supreme Court said in Trustees for Alaska v. State Department of Natural Resources, 795 P.2d 805 (Alaska 1990) [Trustees I]:

. . . [O]ur role in this case is to ensure that DNR "has given reasoned discretion to all the material facts and issues." If an agency does not consider an important factor, its decision is regarded as arbitrary, and those important factors which it did consider[ ] must be discussed in the decisional document. . . . Because the [department's] Finding omits any discussion of transportation facilities should ANWR's present status be unchanged, it clearly does not meet this standard of review.

795 P.2d at 811. The implication of the court's treatment of "material" as a modifier of "facts and issues" may be no more than that the agency must show that it took into account, in a rational and objective way, an "important factor"--that is, a significant element bearing on the  
(continued...)

The second element involves deciding whether an "issue" <sup>3/</sup> is "relevant" <sup>4/</sup> to the determination of whether the proposed disposal will best serve the interests of the state." This provision has no expressly comparable antecedent in current statute law. However, early state case law defined the test of "relevancy" as "evidence [that has] some tendency in reason to establish a proposition material to the case," Hutchings v. State, 518 P.2d 767, 769 (Alaska 1979), quoted in Poulin v. Zartman, 542 P.2d 251 (Alaska 1975), at 260, and the applicable language of the pertinent provision of the state's Administrative Procedure Act, AS 44.62.460(d), is not inconsistent with that requirement.

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<sup>2/</sup>(...continued)

administrative question or decision--as evidenced by the agency's treatment and disposition of it in its written best interest findings decision. The court is apparently not prepared to say that, in its treatment and disposition of the element, the agency reached a "proper" outcome, but confines itself to ascertaining whether or not that element was not altogether ignored.

<sup>3/</sup> In the context of AS 38.05.035(e), "issue" has no antecedent. I take it to relate to an "issue" that, under AS 38.05.035(g)--both in current law and as amended in this measure--looks to point of debate or dispute that "[was] raised during the period allowed for receipt of public comment." presumably by an interested citizen.

<sup>4/</sup> Evidence is "relevant" under the Evidence Rules of the Alaska Court System when it

... has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Alaska Rules of Evidence, Rule 401. However, the Evidence Rules are not necessarily applicable to administrative adjudications made under the Alaska Administrative Procedure Act. The Act provides, at AS 44.62.460(d), its own rule as to admissibility of evidence in an agency adjudicatory hearing:

(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action. Irrelevant and unduly repetitious evidence shall be excluded.

As with the treatment of evidence, then, I take it that the matter of deciding whether, for purposes of conducting an administrative review in conjunction with preparation of a best interest finding, an "issue" meets the test of "relevant" if the "issue" relates in some manner that is probative--that it has a relationship in reason--to the proposed resource disposal, and that the relationship in reason between the issue and the point to be determined has not been diminished by the issue's uncertainty, the remoteness of the issue from the proposed resource disposal, or the speculative or conjectural quality of the issue's effect on the proposed disposal.

In administrative adjudications, state law favors the admissibility of relevant evidence. AS 44.62.460(d). Questions of admissibility of evidence in administrative matters are typically reserved to the party responsible for the administrative adjudication, AS 44.62.330(a). I assume that, in any challenge on this point, the department would argue that its framing of the scope of the administrative review and its decision as to the relevance of the issues to the proposed disposal are matters uniquely involving the agency's expertise. To the extent the department prevails in that argument, any judicial review of the decision to admit or exclude relevant issues would be examinable under a "reasonable basis" standard, the same standard that had been applied in the several appellate decisions recently litigated by Trustees for Alaska, the Alaska court determinations earlier cited. In instances in which the reviewing court found that the department had neglected to consider relevant evidence, a remand of the matter for further proceedings would be in order.

\*

To answer other points you raise, not necessarily in the order presented:

(1) I am not the person to ask about the additional burden the proposed changes place on the respective decision makers. I couldn't hazard a guess. However, given that both sets of changes--AS 38.05 and AS 46.40--involve establishing limitations on a process that the court has come to view as somewhat open-ended, the ability of the appropriate agency to circumscribe the administrative review would appear to me to be a significant enlargement of administrative requirements.

(2) Does language in this measure that revises an administrative review process applicable to a written best interest finding in conjunction with a proposed disposition of state resources so that the parameters of the administrative review may vary from one proposed disposal to another invite an equal protection challenge? Probably. Would that equal protection challenge be successful? Depending upon the manner of its handling by the Division of Land, it very well could.

I take your question to be one that is concerned with distinctions that, under the proposed amendments to AS 38.05.035(e) and (g), may be drawn in the administration of the agency's handling of its "written best interest" obligation wherein different

distinctions may impose limitations on parties having an interest in the proposed disposition of the state's resources. <sup>5/</sup>

This question can best be answered by reference to a handful of basic principles that guide administrative law and the constitutional requirements of equal protection. In an early Alaska decision, the Supreme Court observed that

. . . [T]he guarantee of equality of treatment prohibits legislation which denies to one group of persons the enjoyment of certain rights which are afforded to another group when, considering the purpose of the legislation, there is no reasonable basis for not treating both groups the same.

Leege v. Martin, 379 P.2d 447 (Alaska 1963), at 452. See also, Application of Brewer, 430 P.2d 150 (Alaska 1967), Alex v. State, 484 P.2d 677 (Alaska 1971). This principle, applicable to measures considered by a legislature, also guides administrative actions. Agency determinations necessarily must include like treatment unless there is some reasonable basis for allowing a different outcome. Even where, as proposed here, discretionary authority is broadly granted, state agencies are not free to apply the law differentially or make unjust distinctions between persons or groups in the application of the law they administer. <sup>6/</sup> Thus, if the director can assert no reason to justify the shaping of the direction and dimensions of the administrative review underlying the written best interest finding effort than to restrict

---

<sup>5/</sup> In doing so, I distinguish the situation of classifications in application from (1) those in which the statute itself establishes its own classifications, and the statutory classifications compel evaluation--the amendment to AS 38.05.035 does not do this--and (2) those in which the statute makes no classification, or makes a "neutral" classification that can be applied evenhandedly but that the statute is so designed as to impose different burdens on different classes of people--a proposition that your memo does not assert.

<sup>6/</sup> In Aicx, the court supplies this expanded explanation of the requirement of the basic equal protection principle:

The requirements of equal protection amount to a prohibition of laws which, in their application, make unjust distinctions between persons. If a rational basis for a classification is reasonably apparent, there is no denial of equal protection. . . . We cannot say that a legislative judgment was unreasonable if it bears a rational connection to a legitimate public purpose. So long as a legislative classification is not based upon an arbitrary or unjustifiable distinction and does not invidiously discriminate between two groups, there is no denial of equal protection.

Alex, 484 P.2d at 684.

• Representative Joe Sitton  
March 1, 1994  
Page 7

opportunity for meaningful public comment, then the effort may be invalidated under an application of this basic equal protection requirement. <sup>2/</sup>

(3) Is there a national or state model? I don't have one to which to refer you. However, as to coastal management matters, regulations applicable to the federal coastal management program authorize phased decisionmaking, and this was specifically mentioned to me in conjunction with an early discussion of a first draft of the Senate companion to the House bill. See, in this regard, 15 CFR §§ 930.37(c) and 930.38(b).

I trust this is sufficient for your purposes.

JBC:pl  
94-169.plm

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<sup>2/</sup> Considerations of due process, then, or at least a due regard for fair treatment of the interested public on a question of significance, would almost certainly require that the director outline the principles that would serve to guide or influence exercise of discretion bearing upon definition of the scope of administrative review in conjunction with preparation of written best interest findings. Since the manner of the exercise of discretion may well constitute, under AS 44.62.640(a)(3), a "standard of general applicability" that "makes specific a law" administered by the agency and that is "used by the agency in dealing with the public," adoption of regulations would seem to be called for.

# FISCAL NOTE

STATE OF ALASKA

BILL NO. HB474

1994 LEGISLATIVE SESSION

Revision Date: Original Dept Affected: Natural Resources  
 Title: "An Act modifying administrative procedures and decisions by state agencies that relate to uses and dispositions..." BRU: Resource Development  
 Sponsor: House Resources Committee Component: All  
 Requestor: House Oil & Gas Committee Component Serial No. All

**Expenditures/Revenues**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY95	FY96	FY97	FY98	FY99	FY00
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>

<b>CAPITAL EXPENDITURES</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>
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<b>CHANGE IN REVENUES ( )</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>
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**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
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>

Estimate of any current year (FY94) cost: \$ None

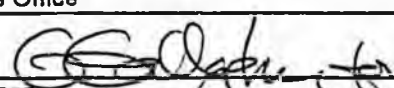
**POSITIONS**

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)

There is no anticipated fiscal impact associated with this bill in the Department of Natural Resources.

Prepared by: Jerry Gallagher, Legislative Liaison Phone: 465-2400  
 Division: Commissioner's Office Date: 15-Feb-94  
 Approved by Commissioner: Harry A. Noah  Date: 15-Feb-94  
 Agency: Natural Resources

**PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE**

WALTER J. HICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES**

DIVISION OF OIL AND GAS

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
PHONE: (907) 762-2553

(907)762-2547

March 1, 1994

The Honorable Bill Williams  
Chairman, House Resources Committee  
Alaska State Legislature  
State Capitol, Room 128  
Juneau, Alaska 99801-1182

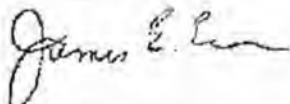
Dear Representative Williams:

HB 474 (O&G) was passed out of the House Special Committee on Oil and Gas on February 28, 1994. On behalf of the administration, I request that the House Resources Committee schedule a hearing on the legislation at the earliest possible date. In addition to the extensive record which will be conveyed to the committee, I want to take this opportunity to address a major concern expressed in prior hearings in both the House and the Senate. That concern has to do with the granting of limited discretion to the executive agencies to determine the scope of the analysis which will be conducted before a resource disposal.

In order for the state to conduct an oil and gas leasing program, discretion to make legislatively required findings must be vested in some decision maker. Someone must reach a final decision as to whether a proposed disposal is in the best interest of the state and is also consistent with the terms of the Alaska Coastal Management program. I believe that the Legislature intends that the executive agencies have the responsibility for those decisions, not the courts. The legislation introduced last month clarifies that intent.

HB 474 (O&G) does not grant any authority not already vested with the administrative agencies. And, in fact, any complaints about the agencies being granted unfettered discretion under the provisions of this legislation are groundless because, ultimately, all agency actions are subject to review by the courts. If an agency decision is challenged, courts will review the exercise of the administrative agency's discretion to ensure that the decision is not arbitrary or capacious, and that it is supported by the administrative record.

Sincerely,



James E. Eason  
Director

WALTER J. NICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES**

DIVISION OF OIL AND GAS

P.O. BOX 107034  
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March 1, 1994

The Honorable Bill Williams  
Chairman, House Resources Committee  
Alaska State Legislature  
State Capitol, Room 128  
Juneau, Alaska 99801-1182

Dear Representative Williams:

HB 474 was passed out of the House Special Committee on Oil and Gas last evening, and hopefully will receive a hearing in the House Resources Committee soon. A recurrent theme in public testimony on HB 474 is that the department is exposing the state to large fiscal risks should it be necessary to repurchase oil and gas leases if they are subsequently determined to be too environmentally sensitive for development. In her testimony earlier this week before both the Senate Finance Committee and the House Oil and Gas Committee, Ms. Ricki Ott even went so far as to suggest that conflicts will undoubtedly occur, resulting in the need for lease buybacks. Her comments, as well as those of others testifying on HB 474, suggest that there will be extraordinary financial exposure for the state should HB 474 be passed.

Those concerns seem to arise from a belief that "history will repeat itself," and that the state will be faced with the need to repurchase tracts, as resulted after the legislature decided, as a matter of policy, not to allow leasing in Kachemak Bay. For two reasons, I do not believe that passage of HB 474 will produce such dire consequences.

First, as a result of the Kachemak Bay decision, as well as general concerns about oil and gas leasing, the statutes governing oil and gas leasing underwent comprehensive revision in 1978. A major provision of those revisions was the adoption of a five-year schedule with its predictable timelines. The requirement that sales which the department proposes to conduct must be on the five-year schedule for a minimum of two calendar years was adopted at that time. The implicit purpose of this requirement was that the legislature have sufficient notice of potentially controversial sales so that it could act to set broad policy in those instances where it was the will of the legislature not to lease. HB 474 in no way diminishes the legislature's ability to review areas under consideration for leasing and to remove those which it chooses.

Secondly, the fiscal exposure about which Ms. Ott and others speculate already exists. However, the presumption that massive lease buybacks conflicts will occur as a result of that

The Honorable Bill Williams  
Chairman, House Resources Committee  
March 1, 1994  
Page 2

exposure conflicts with the record. Rather than speculating on the effects of having a situation where leasing might occur with the need to later disallow development, one should look to that record.

Since 1979, the Department of Natural Resources has included as a term in its leases a provision which makes clear that the lessee purchases the lease with the risk that it may ultimately not be allowed to develop the lease. That provision, Paragraph 20, entitled *Default and Termination; Cancellation*, provides in pertinent part:

...(b) The state may cancel this lease at any time if the state determines, after the lessee has been given notice and a reasonable opportunity to be heard, that:

(1) continued operations pursuant to this lease probably will cause serious harm or damage to biological resources, to property, to mineral resources, or to the environment (including the human environment);

(2) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(3) the advantages of cancellation outweigh the advantages of continuing this lease in effect. Any cancellation under this subparagraph will not occur unless and until operations under this lease have been under suspension or temporary prohibition by the state, with due extension of the terms of this lease, continuously for a period of five years or for a lesser period upon request of the lessee.

(c) Any cancellation under subparagraph (b) will entitle the lessee to receive compensation as the lessee demonstrates to the state is equal to the lesser of:

(1) the value of the cancelled rights as of the date of cancellation, with due consideration being given to both revenues from this lease and anticipated costs, including costs of compliance with all applicable regulations and stipulations, liability for clean-up costs or damages, or both, in the case of an oil spill, and all other costs reasonably anticipated under this lease; or

(2) the excess, if any, over the lessee's revenues from this lease (plus interest on the excess from the date of receipt to date of reimbursement) of all consideration paid for this lease and all direct expenditures made by the lessee after the effective date of this lease and in connection with exploration or development, or both, under this lease, plus interest on that consideration and those expenditures from the date of payment to the date of reimbursement.

The Honorable Bill Williams  
Chairman, House Resources Committee  
March 1, 1994  
Page 3

Since that provision was incorporated in the state's leases, 40 competitive oil and gas lease sales have been held, with more than 1758 leases having been issued. In total, leases comprising more than four million acres currently are conditioned by this provision.

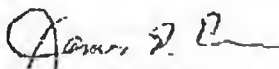
To date, there have been no conflicts which required the state to exercise this option. To the contrary, there have been instances in which major accommodations were required of lessees to assure that their proposed development plans were made compatible with competing surface resources. I have cited for the record during prior testimony on HB 474 the state's experience in permitting the Niakuk and Lisburne developments on the North Slope. In both cases the lessees' proposed developments were considerably reconfigured and conditioned to assure minimal environmental impact and compatible development. Thus, perception that the state is somehow forced into incompatible development after issuing oil and gas leases has never materialized.

Similarly, I have addressed on the record that the "conflicts" which were alleged by the plaintiffs to be inevitable should Sale 78 proceed without deletion of the fishing corridor acreage. Those supposed "conflicts" simply do not comport with the record. As noted in my February 28, 1994 letter to the committee, the corridor area has been the site of leasing in the past, as well as the drilling of four exploratory wells. There are active leases in the area today. These facts, again, are being disregarded.

The record compiled from more than 40 lease sales since 1978 reflects that adequate mitigation measures and terms have been adopted at the lease sale stage to assure that the department can condition subsequent projects with demonstrated success to assure that they are in the state's best interest and consistent with the ACMP. However, the courts' decisions demonstrate that they are unwilling to allow the department to proceed beyond leasing to the second stage, that of reviewing specific project proposals, identifying conflicts that must be resolved, and working with the responsible state agencies, the public and lessees to provide creative solutions to address those conflicts.

It is for that reason that passage of HB 474 is crucial. Without the legislature's clear guidance, the courts will continue to set oil and gas leasing policy.

Sincerely,

  
James E. Eason  
Director

Gustavus, Alaska  
March 2, 1994

Rep. Bill Hudson  
State Capitol  
Juneau, Alaska 99801-1182

Dear Representative Hudson:

As one of the chairmen of the Resources Committee, I ask you to oppose HB-474, which would alter the administrative procedures and decisions for leasing or other disposal of state lands and resources.

~~This is a really terrible bill, for it would both abridge the public process and put blinders on the responsible parties. Would damage to the fisheries and coastlines of the Alaska Peninsula have been considered a "reasonably foreseeable, nonspeculative, direct effect" of building the TransAlaska Pipeline or the Valdez terminal? Under HB 474 one would expect such a possibility to be ruled outside the scope of the administrative process.~~

What can be the purpose of allowing projects to be considered in phases, and restricting public comment, administrative review and findings to the single phase under consideration? It can only be to frustrate the public process and exhaust those who would otherwise wish to be involved in it. Wise planning can only be hindered by such a policy, and the public left frustrated and angry. One can imagine the most hazardous projects being divided into the most phases!

After the oil pipeline and terminal were built, several parties including the State of Alaska busied themselves with taking apart and reducing the safeguards surrounding that system. After the Exxon Valdez spill legislators lined up to enact new safeguards. Five years later the legislature and governor are busy taking the safeguards apart again.

This kind of legislation engenders distrust of legislators and of the administrative bureaucracy.

Yours truly,

*Judy Brakel*

Judy Brakel

Box 94, Gustavus, Alaska  
99826

Voting address - Juneau



**UCIDA**

**UNITED COOK INLET DRIFT ASSOCIATION**  
P.O. Box 389 • Kenai, Alaska 99611 - 0389  
(907) 283-3600 • FAX (907) 283-3306

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March 10, 1994

Sent by telefax

Representative Bill Williams,  
Chairman House Resources Committee  
State Capitol, Room #128  
Juneau, AK. 99801-1182

Dear Representative Williams,

On February 28, 1994, I was fortunate enough to have an opportunity to testify orally on HB 474 before the House Special Committee on Oil & Gas. That testimony was transcribed and submitted to your committee on March 4. I have since taken the opportunity to clarify my remarks and add some additional comments.

I would appreciate it if copies of my revised testimony could be distributed to each of the Committee members. Thank you for your consideration.

Sincerely,

Theo Matthews  
Administrative Assistant

**UCIDA****UNITED COOK INLET DRIFT ASSOCIATION**

P.O. Box 389 • Kenai, Alaska 99611 • 0389

(907) 283-3600 - FAX (907) 283-3306

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**Theo Matthews February 28, 1994 Testimony On HB474  
To The House Oil & Gas Committee**

Thank you Mr. Chairman. My name is Theo Matthews. I am speaking tonight as the Administrative Assistant of United Cook Inlet Drift Association (UCIDA). I am also a member of UFA and serve on the UFA Habitat and Executive Committees.

**Both UCIDA and UFA oppose HB474.** I was encouraged by the comments from AOGA tonight where it was stated that they simply did not feel that DNR should have to engage in endless speculation. I don't think anyone has argued against the fact that there should be some certainty in the scope of things that need to be considered - this is only fair to the courts and to DNR. One should not have to speculate out to the ends of the earth. However, that is not the driving force behind this legislation which, as written, would allow "directors" the discretion to deem most if not all public comments and concerns "speculative" in best interest and consistency findings at the initial disposal phase of any project.

The driving force behind this legislation is found on page 2, lines 24-27. The issue here is phasing and best interest findings, and what that does to the relevancy of public comment and to the public and state coffers. The attempt to limit what is relevant to a DNR decision to grant a property right to a leasee at the leasing stage is not acceptable. This legislation will not even permit DNR to consider the most nonspeculative of issues that can be seen down the road. The same thing is found in the section dealing with consistency findings, section 46 on page 5. Again, at its discretion, DNR may limit consistency review to a particular stage. The problem with this bill is DNR's ability to limit the scope of best interest findings and consistency reviews - this is bad public policy.

There was nothing speculative about the issues we raised in Cook Inlet with respect to Lease Sale 78. We made it very clear that a stationary production platform in certain waters in Cook Inlet would be totally incompatible with existing uses when considering physical and safety conflicts. We made this claim with respect to two areas of Cook Inlet

included in Lease Sale 78:

- 1) Tracts 20 and 21 which are located in front of the oil tanker docks in North Kenai. It is pretty obvious you don't want a stationary platform there.
- 2) We also made this claim with respect to the near shore waters south of Kasilof.

There is nothing speculative about the conflict that would be created by locating platforms in either of these areas.

UCIDA requested that DNR include a mitigation measure in the Lease that was fair to the lessee and the public. The suggested mitigation measure would have advised the lessee interested in purchasing leases in these particular marine waters that permanent production platforms would not be allowed. UCIDA also suggested that other kinds of access would have been acceptable. These included directional drilling, tapping a well and piping it to shore. We did not oppose the lease sale itself. There were many other tracts in northern waters, along the west side of Cook Inlet and onshore where no additional mitigation measures were proposed.

**DNR's response was that we were asking them to engage in speculation by considering the conflicts that would arise if a permanent production platform were to be put in these areas. We found this comment less than genuine after 35 years of offshore platforms being the only production method used in the marine waters of Cook Inlet!**

The public, in every possible forum, let DNR know that there were conflicts. Different elements of the public had different concerns. For example:

- there were many land owners who stated they had not been notified and did not want drilling on their property. DNR stated that, by law, a bond would have to be posted if an agreement could not be reached with a land owner but that drilling could, nevertheless, occur. DNR also stated that the bond would not cover a neighbor's damages.

- Cook Inlet Regional Citizen's Advisory Council opposed the entire sale, all tracts in marine waters and onshore because no environmental monitoring program has been established in Cook Inlet.

- The Kenai Peninsula Borough Assembly opposed all tracts, land and marine, south of Kasilof.

- Commercial fishermen opposed only the marine portions of tracts that were located in front of the tanker docks and south of Kasilof. As you

can see, there were many different elements of the public that had varied concerns. But commercial fishermen did not oppose this sale.

I would like to conclude, Mr. Chairman, by noting that the court in the Lease Sale 78 case was not arbitrary and did not engage in far flung speculation. The court noted DNR's own Finding where the fisheries were identified and it was stated that exploration and development of the sale area could adversely affect human uses of the area and its resources if access to hunting, fishing, or trapping were restricted by industry's operations occurring at the same time and place as harvest activities. Those were DNR's own findings. Judge Cranston concluded that DNR's failure to address and resolve specific conflicts as to proposed use imperilled the consistency findings. That is exactly what we told DNR throughout the public hearings. We expressed our conviction that conflicts would definitely arise if platforms were placed in certain tracts. We need to resolve these issues at the lease stage and in the state's best interest.

Thank you Mr. Chairman.

Sincerely,



Theo Matthews  
Administrative Assistant

March 10, 1994

James K. Eason, Director  
Alaska Department of Natural Resources  
Division of Oil and Gas  
P.O. Box 107034  
Anchorage, Alaska 99510

Dear Mr. Eason:

This is in regard to our efforts to resolve differences with you over Senate Bill 308 and House Bill 474, the legislation sponsored by the Administration that would change the requirements by which the State must make best interest determinations under Title 38 of Alaska Statutes and coastal zone consistency determinations under Title 46. Representatives of our organizations have devoted several hours to meeting with you and drafting suggested alternatives to the existing bills in order to protect the interests of coastal communities and residents. Regrettably, we appear to have reached an impasse. It is our hope that by clearly articulating our concerns in this letter, you will reconsider your position on critical points of disagreement and be amenable to evaluating some of the changes we have suggested.

#### **DELETION OF REFERENCE TO SEC. 46.40.094 CONSISTENCY DETERMINATIONS**

We have asked that you agree to deletion of sections of the existing bills that change the manner in which coastal zone consistency determinations are conducted. We have indicated that the current language would grant an inordinate amount of discretionary authority to the state government at the cost of local governments and adversely affect the ability of local governments and developers to undertake long-range planning for the completion of projects and mitigation of impacts.

The current statutory language regarding coastal zone consistency determinations is the result of many hours of cooperative effort between state administrations and local governments and many years of experience in implementing the Alaska Coastal Management Program. The changes proposed in the pending legislation are significant and far-reaching. We again ask you to consider agreeing to set aside any amendments to Title 46 during this legislative session and work with us in the interim to craft amendments that serve our mutual needs.

#### **LIMITING CHANGES IN TITLE 38 TO OIL AND GAS LEASE SALES**

As we indicated in our meetings with you, we are uncomfortable with the changes proposed in the current legislation that would allow the phasing of best interest determinations at the State's discretion under Title 38. We feel that such changes would have far-reaching consequences beyond Alaska's coastal areas, increase the state's financial liability in many instances and alter the manner in which divisions within the Departments of Fish and Game and Environmental Conservation as well as the Department of Natural Resources review initiatives which involve the disposal of interests in state resources.

However, we indicated we would be willing to consider some changes in the best interest determination provisions of Title 38 if they were limited to state oil and gas leasing and could be demonstrated to improve the current leasing program. You pointed out that you feel determining what will happen as a result of a state oil and gas lease sale involves a greater degree of uncertainty than determinations for state timber sales or mineral leases. As a result, you asserted, predicting the final outcome of potential development at the lease sale stage is more difficult. We are therefore disappointed that you are not willing to support limiting Title 38 changes to oil and gas lease sales. Given that the pending legislation was designed to address problems you identified in the state's oil and gas leasing program, we ask that you reconsider your position on this issue.

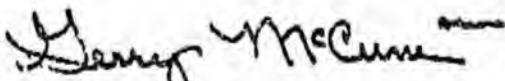
## EXPANSION OF THE WORKING GROUP

We also ask that you reconsider your opposition to expanding the current informal working group to include representatives of the Department of Law and the Department of Governmental Coordination. As was pointed out during the last meeting of the working group, the institutional experience representatives of these agencies could bring to the table would be invaluable in reviewing the complex issues affected by the pending legislation. In addition, as we have indicated, local agencies and public interest groups outside of Alaska's coastal districts that would be affected by changes in Title 38 should be brought to the table.

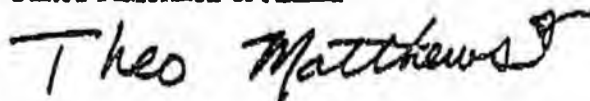
At this time we must reaffirm our opposition to the current legislation. Please understand we simply cannot support these bills in their present form. The manner in which the State makes decisions regarding the disposal of state resources in coastal areas can have profound effects on the lives and livelihoods of the citizens who live in these regions. We believe it is essential that the people most affected by the State's decisions maintain meaningful opportunities to participate in those decisions.

We look forward to hearing from you.

Sincerely,



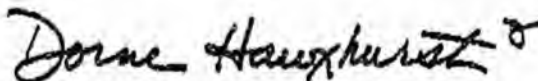
Gerry McCune, President  
United Fishermen of Alaska



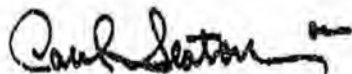
Theo Matthews, Administrative Assistant  
United Cook Inlet Drift Fishermen's Association



Loren Flagg, Executive Director  
Kenai Peninsula Fishermen's Association



Dorne Hawhurst, Executive Director  
Cordova District Fishermen United



Paul Seaton, Chairman  
Alaska Marine Conservation Council

cc: All Coastal Districts  
Harry Noah, Commissioner, Ak Department of Natural Resources

**DEPT. OF NATURAL RESOURCES**

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ANCHORAGE, ALASKA 99510-7034  
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**DIVISION OF OIL AND GAS**

(907)762-2547

March 1, 1994

The Honorable Bill Williams  
Chairman, House Resources Committee  
Alaska State Legislature  
State Capitol, Room 128  
Juneau, Alaska 99801-1182

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Those concerns seem to arise from a belief that "history will repeat itself," and that the state will be faced with the need to repurchase tracts, as resulted after the legislature decided, as a matter of policy, not to allow leasing in Kachemak Bay. For two reasons, I do not believe that passage of HB 474 will produce such dire consequences.

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The Honorable Bill Williams  
Chairman, House Resources Committee  
March 1, 1994  
Page 2

exposure conflicts with the record. Rather than speculating on the effects of having a situation where leasing might occur with the need to later disallow development, one should look to that record.

Since 1979, the Department of Natural Resources has included as a term in its leases a provision which makes clear that the lessee purchases the lease with the risk that it may ultimately not be allowed to develop the lease. That provision, Paragraph 20, entitled *Default and Termination; Cancellation*, provides in pertinent part:

...(b) The state may cancel this lease at any time if the state determines, after the lessee has been given notice and a reasonable opportunity to be heard, that:

(1) continued operations pursuant to this lease probably will cause serious harm or damage to biological resources, to property, to mineral resources, or to the environment (including the human environment);

(2) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(3) the advantages of cancellation outweigh the advantages of continuing this lease in effect. Any cancellation under this subparagraph will not occur unless and until operations under this lease have been under suspension or temporary prohibition by the state, with due extension of the terms of this lease, continuously for a period of five years or for a lesser period upon request of the lessee.

(c) Any cancellation under subparagraph (b) will entitle the lessee to receive compensation as the lessee demonstrates to the state is equal to the lesser of:

(1) the value of the cancelled rights as of the date of cancellation, with due consideration being given to both revenues from this lease and anticipated costs, including costs of compliance with all applicable regulations and stipulations, liability for clean-up costs or damages, or both, in the case of an oil spill, and all other costs reasonably anticipated under this lease; or

(2) the excess, if any, over the lessee's revenues from this lease (plus interest on the excess from the date of receipt to date of reimbursement) of all consideration paid for this lease and all direct expenditures made by the lessee after the effective date of this lease and in connection with exploration or development, or both, under this lease, plus interest on that consideration and those expenditures from the date of payment to the date of reimbursement.

The Honorable Bill Williams  
Chairman, House Resources Committee  
March 1, 1994  
Page 3

Since that provision was incorporated in the state's leases, 40 competitive oil and gas lease sales have been held, with more than 1758 leases having been issued. In total, leases comprising more than four million acres currently are conditioned by this provision.

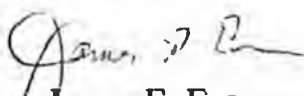
To date, there have been no conflicts which required the state to exercise this option. To the contrary, there have been instances in which major accommodations were required of lessees to assure that their proposed development plans were made compatible with competing surface resources. I have cited for the record during prior testimony on HB 474 the state's experience in permitting the Niakuk and Lisburne developments on the North Slope. In both cases the lessees' proposed developments were considerably reconfigured and conditioned to assure minimal environmental impact and compatible development. Thus, perception that the state is somehow forced into incompatible development after issuing oil and gas leases has never materialized.

Similarly, I have addressed on the record that the "conflicts" which were alleged by the plaintiffs to be inevitable should Sale 78 proceed without deletion of the fishing corridor acreage. Those supposed "conflicts" simply do not comport with the record. As noted in my February 28, 1994 letter to the committee, the corridor area has been the site of leasing in the past, as well as the drilling of four exploratory wells. There are active leases in the area today. These facts, again, are being disregarded.

The record compiled from more than 40 lease sales since 1978 reflects that adequate mitigation measures and terms have been adopted at the lease sale stage to assure that the department can condition subsequent projects with demonstrated success to assure that they are in the state's best interest and consistent with the ACMP. However, the courts' decisions demonstrate that they are unwilling to allow the department to proceed beyond leasing to the second stage, that of reviewing specific project proposals, identifying conflicts that must be resolved, and working with the responsible state agencies, the public and lessees to provide creative solutions to address those conflicts.

It is for that reason that passage of HB 474 is crucial. Without the legislature's clear guidance, the courts will continue to set oil and gas leasing policy.

Sincerely,

  
James E. Eason  
Director

WALTER J. HICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES**

**DIVISION OF OIL AND GAS**

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
PHONE: (907) 762-2553

(907)762-2547

March 1, 1994

The Honorable Bill Williams  
Chairman, House Resources Committee  
Alaska State Legislature  
State Capitol, Room 128  
Juneau, Alaska 99801-1182

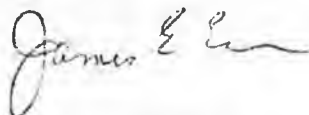
Dear Representative Williams:

HB 474 (O&G) was passed out of the House Special Committee on Oil and Gas on February 28, 1994. On behalf of the administration, I request that the House Resources Committee schedule a hearing on the legislation at the earliest possible date. In addition to the extensive record which will be conveyed to the committee, I want to take this opportunity to address a major concern expressed in prior hearings in both the House and the Senate. That concern has to do with the granting of limited discretion to the executive agencies to determine the scope of the analysis which will be conducted before a resource disposal.

In order for the state to conduct an oil and gas leasing program, discretion to make legislatively required findings must be vested in some decision maker. Someone must reach a final decision as to whether a proposed disposal is in the best interest of the state and is also consistent with the terms of the Alaska Coastal Management program. I believe that the Legislature intends that the executive agencies have the responsibility for those decisions, not the courts. The legislation introduced last month clarifies that intent.

HB 474 (O&G) does not grant any authority not already vested with the administrative agencies. And, in fact, any complaints about the agencies being granted unfettered discretion under the provisions of this legislation are groundless because, ultimately, all agency actions are subject to review by the courts. If an agency decision is challenged, courts will review the exercise of the administrative agency's discretion to ensure that the decision is not arbitrary or capacious, and that it is supported by the administrative record.

Sincerely,



James E. Eason  
Director

# Alaska State Legislature

Interim:  
P.O. Box 1287  
Soldotna, AK 99669  
(907) 262-8414



Session:  
State Capitol  
Juneau, AK 99801  
(907) 465-2693

Representative Gary L. Davis

March 07, 1994

Commissioner Harry Noah  
Department of Natural Resources  
Mail Stop 1000  
Juneau, AK 99801

Dear Commissioner Noah:

As you know, House Bill No. 474, "...modifying administrative procedures & decisions by state agencies that relate to uses & dispositions of state land, property & resources...." has passed out of the House Special Committee on Oil & Gas after two hearings. As a member of that committee with many concerned constituents I feel there are a few changes that should be considered to alleviate many of the concerns expressed.

There are a few changes which could be made that I feel would reduce an implied "trust me, I am from the government and I am here to help" sentiment. These changes are: (copy 8-LS 1692\K)

1- Page 2 Line 9- change first word in line, "may" to "shall." This maintains continuity with the paragraph. In actuality there will be a review and finding so the more directive word should be acceptable.

2- Page 2 line 27- change the word "solely." I am not sure what would fit, but even if it was deleted I think a lot of concerns would be reduced. Any recommendations by your office would be appreciated.

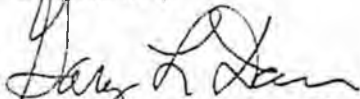
3- Page 4 line 15- the last word "or" should be changed to "and." I discussed this with Jim Eason at the last meeting and he wasn't in favor of the change, but it is my feeling that the stronger word should be used when describing an activity that will be done.

*Representing House District 8 - Soldotna to Seward*

These are my immediate concerns. I want to assure you I do support the intent of this legislation. As a long time Kenai Peninsula resident I have an understanding of the compatibility of oil/fish in Cook Inlet, but I also understand the concerns expressed when legislation such as HB 474 is introduced under its particular circumstance. There is a problem which needs to be addressed, but all involved parties should and can be a part of the solution!

Thank you for considering my proposals. I am looking forward to your response.

Regards,



Gary L. Davis, Representative

GD:jb

cc: Senator Loren Leman  
Representative Bill Williams  
Theo Matthews



# UNITED FISHERMEN OF ALASKA

2/16/94

211 Fourth Street, Suite 112,  
Juneau, Alaska 99801  
907/586-2820  
Fax: 907/463-2545

## POSITION PAPER ON HB 474 & SB 308

UFA opposes this legislation. We are not anti-development. However, this legislation attempts to ignore consideration of problems at the initial stage of projects.

### **The Alaska Coastal Management Program isn't broken: DNR is.**

In April 1993, the Alaska Supreme Court ruled that DNR failed to adequately consider salient issues in making its best-interest finding to allow Lease Sale 50 (Camden Bay) to proceed. Sale 50 was remanded because DNR did not do its homework.

In December 1993, the Alaska Supreme Court ruled that DNR again failed to adequately consider identical issues in making its best-interest finding to allow Lease Sale 55 (Demarcation Point, ANWR) to proceed. Sale 55 was remanded because DNR did not do its homework. In fact, the Supreme Court was so astonished by DNR's sloppiness in preparing its Findings, that the court specifically pointed out in its ruling that DNR appears to have copied--without alteration--the previously rejected Sale 50 Finding in Camden Bay and tried to apply this same flawed Finding to Sale 55.

In January 1994, the State Superior Court ruled preliminarily that DNR failed to adequately consider salient issues in making its best-interest finding to allow Lease Sale 78 (Cook Inlet) to proceed. Although DNR has appealed, it is obvious, this time even at the state court level, that DNR has, once again, not done its homework.

### **Legislative "fixes" won't substitute for professionalism at DNR.**

DNR has already asked the Legislature to change the law when the Alaska Supreme Court found that DNR made the initial consistency determination in Sale 50, rather than the Office of Management and Budget as required by law. The Legislature amended the law (AS 44.19.145(11)) to permit DNR to make consistency determinations--retroactive to Sale 50. Once again, DNR is requesting legislative "fixes" for departmental incompetency. The law is not the problem.

### **This legislation increases federal authority on federal lands and decreases local authority on state lands.**

This legislation tries to give DNR resource agency directors authority to limit the scope and number of issues that are raised during administrative review. However, because federal and state findings need to be consistent under the Coastal Zone Management

#### **MEMBER ORGANIZATIONS**

Alaska Crab Coalition • Alaska Longline Fisherman's Association • Alaska Trollers Association • Area K Seiners Association  
Bering Sea Fishermen's Association • Bristol Bay Driftnetters Association • Concerned Area "M" Fishermen  
Cook Inlet Aquaculture Association • Cordova District Fishermen United • Kenai Peninsula Fishermen's Association  
North Pacific Fisheries Association • Northern Southeast Regional Aquaculture Association • Peninsula Marketing Association  
Petersburg Vessel Owners Association • Prince William Sound Aquaculture Corporation • Seafood Producers Cooperative  
Southeast Alaska Seiners Association • Southern Southeast Regional Aquaculture Association  
United Cook Inlet Drift Association • Western Alaska Cooperative Marketing Association

Act, when this legislation delegates broad authority to state directors, it also delegates this same broad authority to federal directors. For example, if this legislation were enacted, the state would have far less opportunity to comment on federal findings on federal lands, such as outer continental shelf oil lease sales or Tongass timber harvests.

Similarly, by empowering DNR resource agency directors to narrow the focus of administrative reviews, this legislation also takes power away from local governments and the concerned public. This is undemocratic. The idea of concentrating control in the hands of state bureaucrats is as repulsive to local governments and people as the idea of concentrating control in the hands of federal bureaucrats is to state governments. Yet this legislation does both.

**This legislation affects future timber, mining and oil projects.**

This legislation gives all resource agency directors--timber, mining, oil-- power to limit the range of issues presented during administrative reviews. This concentrates power in the hands of state bureaucrats who have demonstrated their inability to make "reasoned determinations" in areas other than oil and gas lease sales. For example, the area forester determined that the visual impact from the 215,000 acre harvest in the Susitna Valley would be a "pleasing" mosaic of colors for viewers.

**This legislation will increase the risk of environmentally unsound projects.**

This legislation allows DNR to conduct multi-phase administrative reviews and permitting without requiring all the relevant information at the initial phase of the proposed project. This is counter to the best interests of the state, because DNR will find it difficult to slow or stop momentum once projects are initiated and developers have property interest. The lease sale buy-back situation in Bristol Bay is a perfect example. To be fair to the state, developers and the public, it is imperative that all social and environmental risks are brought to the table at the initial stage of the project.

The Alaska Supreme Court noted that "a finding... that development is economically feasible is not the same as a finding that the sale is in the State's best interests. DNR must consider the "social, cultural and environmental impacts on the state from oil production." However, the Supreme Court warned that "the more segmented an assessment of environmental hazards, the greater the risk that prior permits will compel DNR to approve later, environmentally unsound permits." Surely this is not in the state's best interests.

**This bill legislates DNR's incompetence and irresponsibility.**

The Alaska Supreme Court found that "DNR is required [by law] to take a 'hard look' at the salient problems involved with a lease sale, and [it] must engage in reasoned decision making." Further, the Supreme Court ruled that DNR must "consider the probable cumulative impact of all anticipated activities which will be a part of [the project]. Instead DNR is appealing to the legislature to remove these requirements.

The problem lies with DNR's ability to meet the requirements of the Coastal Management Program, not with the program itself. The public, industry and the state deserve to discuss and resolve issues up front to ensure projects proceed responsibly and with minimal impact on other resource users and the environment.



## Alaska Sportfishing Association

3605 Arctic Blvd. Suite 800 • Anchorage, Alaska 99503

Rep. David Finkelstein  
Alaska House of Representatives  
State Capitol  
Juneau, AK

Re: HB474/SB308

Dear Representative Finkelstein,

Thank you for asking for the position of the Alaska Sportfishing Association on HB474 and its companion bill, SB308.

The Association is opposed for the following reasons:

The bills amend AS 38.05.035 (e). The present law requires the Director of the Division of Lands to make findings as to the state's "best interest" whenever the state considers land disposal, timber sales or oil and gas leases. These findings must meet criteria that protect fish and wildlife habitat, such as sport fishing.

Section 1 of the bills would amend the statute to make the best interest determinations subject---not to specific criteria--- but to simply whatever facts and issues the Director of the Division of Lands believes are "material". This defeats public planning, and the requirements that agencies respond to public concerns. It changes agencies into some "divine hand" that knows best, rather than requiring that they respond to the public.

Section 1 of the bills would also defeat considerations of cumulative impacts in multi-phased disposal of lands, leases or timber sales. For twenty years, resource agencies (beginning with the President's Council on Environmental Quality in the early 1970's) have consistently recognized the importance of addressing the cumulative impacts in resource matters. This shoddy draftsmanship of the bills should not be allowed to persist.

Finally, this issue of cumulative impacts also arises in section 3 of the bills by limiting coastal zone consistency determinations to incremental phases of a project rather than the overall project. That's bad news for fish.

This legislation arises because of in three recent court cases, the Department of Natural Resources has lost in challenges to its best interest determinations. While the latest involved oil lease sale No 78 on the east side of Cook Inlet, which is right in the heart of the relatively new and expanding Deep Creek recreational fishery and in the heart of the long established set net and drift gill net fisheries, DNR could have easily made a sustainable decision if, as the public requested, it had simply required directional drilling from ashore in order to protect the fisheries and the aesthetic value of the area.

While the Alaska Sportfishing Association has long objected to management of the mixed stock commercial fisheries that intercept many fish other than Kenai Sockeye, and while ASA did not join in the litigation to stop that sale, we believe that maintaining the existing law regarding best interest determinations transcends such matters. That issue transcends any particular sale, transcends oil and gas matters because other dispositions such as timber sales and land sales are involved, and transcends the allocation and intercept issues. The best interests statutes are at the heart of all state land management, not just oil and gas leases.

The Legislature would be unwise to amend the statutes to legalize what the courts have determined to be illegal. In our opinion, DNR has been correctly told three times that it performs poorly on these matters. Three strikes and you're out ought to be the law on DNR. To have DNR now come to ask that the statutes it violated be amended to excuse its conduct amounts to nothing more than any law violator coming to the Legislature to ask that the law violated be expunged. If this were a criminal statute, with a petty thief making such a request, we would all recognize the absurdity of the request. Because this is a civil statute with DNR as the violator and the oil industry as a protagonist, we too easily think the issues are different. They are not. What DNR needs is a lesson in respecting the law, the public and the enactments of the Legislature.

Please convey our sentiments to others in the House and the Senate, and please keep us informed if the legislation progresses. It should not.

Sincerely,

*Phil Cutler 3/1/94*  
Phil Cutler, President



Pat Carter  
President

Bob Penney  
Chairman

FACSIMILE TRANSMITTAL

TO: Rep. Joe Sitton

Attention: Joe Date: 4/18/94

RE: SB 308

From: BEN ELLIS

We are sending a total of 2 page(s) including this transmittal. Please contact us at (907) 262-8588 if you encounter any problems receiving this transmission. Our fax number is (907) 262-8582.

JOE - HERE IS A COPY OF THE SHORT LETTER I HAVE FAXED TO RAMONA AND GAIL. WHEN THIS BILL GOES TO COMMITTEE WE WILL SEND A MORE DETAILED OPPOSITION LETTER AND OFFER PUBLIC TESTIMONY IF DESIRED. THANKS FOR YOUR INTEREST IN PROTECTING THE HABITAT.



SENT 11:41



Pat Carter  
President

Bob Penney  
Chairman

April 18, 1994

Honorable Joe Sitton  
House of Representatives  
Alaska State Legislature  
State Capitol  
Juneau, Alaska 99801-1182

Executive Director  
Ben Ellis  
P.O. Box 1228  
Soldotna, AK 99669  
(907) 362-8588  
1-800-478-0724

Dear Representative Sitton: *Joe,*

The board of directors of Kenai River Sportfishing, Inc. is concerned about SB308. We would request the bill be sent to the oil and gas, resources and the finance committees for close evaluation.

Sincerely,

Ben Ellis  
Executive Director  
Kenai River Sportfishing, Inc.

WALTER J. HICKEL, GOVERNOR

**DEPT. OF NATURAL RESOURCES**

**DIVISION OF OIL AND GAS**

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
PHONE: (907) 762-2553

(907)762-2547

February 23, 1994

The Honorable Bill Williams  
Alaska State Legislature  
Room 128  
State Capitol  
Juneau, Alaska 99801-1182

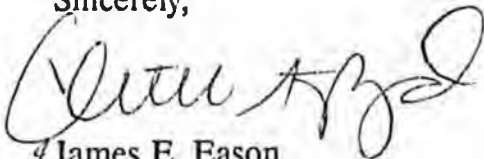
Dear Representative Williams:

There is legislation in the Senate, SB 308, and in the House, HB 474, which responds to a number of Superior Court and Alaska Supreme Court decisions affecting the state's ability to continue its competitive oil and gas leasing program. Passage of this legislation this session is vital to assuring the viability of that program and the continuation of the many benefits which it provides to all Alaskans.

I have enclosed a number of documents related to this legislation in anticipation that you may have questions concerning either the need for this legislation or what the legislation is intended to accomplish. Among the enclosures is the Alaska Supreme Court's February 22, 1994 denial of the state's petition for its review of the Superior Court's injunction of Sale 78. This final action by the Alaska Supreme Court underscores the need for addressing and passing this legislation this session.

Meanwhile, I would appreciate the opportunity, at your convenience, to discuss the legislation with you. If you have any questions concerning the enclosures, please feel free to call.

Sincerely,



James E. Eason  
Director

Enclosures:

Letter from Shelby Stastny  
4 speaking documents.  
Copy of amended legislation.  
Order from the Supreme Court.

cc: Kyle Parker

Post-It <sup>®</sup> brand fax transmittal memo 7871		# of pages	1
To	KYLE PARKER		
From	MARY LUNDQUIST		
Co.	Governor's of AG		
Co.	DOL		
Dept.	Phone # 269-5266		
Fax #	FAX #		

APPELLATE COURTS CLERK  
 303 K STREET  
 ANCHORAGE, AK 99501

Case Title: STATE V NINILCHIK TRAFFIC

RECEIVED  
 Department of Law  
 FEB 22 1994  
 Attorney General  
 French  
 Anchorage, Alaska

\*\*\*\*\* O R D E R \*\*\*\*\*

02/22/94

IT IS ORDERED: THE PETITION FOR REVIEW FILED ON JANUARY 20, 1994, IS DENIED. ENTERED AT THE DIRECTION OF THE SUPREME COURT ON FEBRUARY 22, 1994. (CHIEF JUSTICE MOORE NOT PARTICIPATING; JUSTICE BRYNER, PRO TEM).

CC: JUSTICES, JUDGE CRANSTON, CLERK OF THE TRIAL COURT  
 SKN-93-1174 CIVIL

TRW

Clerk of The Appellate Courts

MARY ANN LUNDQUIST ESQ  
 ASSISTANT ATTORNEY GENERAL  
 DEPARTMENT OF LAW  
 1031 W 4TH AVE  
 ANCHORAGE AK 99501

8-LS1689K

CS FOR SENATE BILL NO. 308(RES)  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
EIGHTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

Offered:  
Referred:

Sponsor(s): SENATE RESOURCES COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act modifying administrative procedures and decisions by state agencies that  
2 relate to uses and dispositions of state land, property, and resources, and to the  
3 interests within them, and that relate to uses and activities involving land,  
4 property, and resources, and to the interests within them, that are subject to the  
5 coastal management program when the use or activity is to be authorized or  
6 developed in phases; and providing for an effective date."

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

8 \* Section 1. AS 38.05.035(e) is amended to read:

9 (e) Upon a written finding that the interests of the state will be best served,  
10 the director may, with the consent of the commissioner, approve contracts for the sale,  
11 lease, or other disposal of available land, resources, property, or interests in them, and,  
12 in addition to the conditions and limitations imposed by law, may impose additional  
13 conditions or limitations in the contracts as the director determines, with the consent

1 of the commissioner, will best serve the interests of the state. A written finding of  
2 the director is subject to the following:

3 (1) with the consent of the commissioner and subject to the  
4 director's discretion, for a specific proposed disposal of available land, resources,  
5 or property, or of an interest in them, the director, in the written finding,

6 (A) shall establish the scope of the administrative review on  
7 which the director's determination is based, and the scope of the written  
8 finding supporting that determination; the scope of the review and finding  
9 may address only reasonably foreseeable, significant, direct effects of the  
10 uses proposed to be authorized by the disposal;

11 (B) may limit the scope of an administrative review and  
12 finding for a proposed disposal

13 (i) to the applicable statutes and regulations and the  
14 facts pertaining to the land, resources, or property, or interest in  
15 them, that the director finds are material to the determination and  
16 that are known to the director or knowledge of which is made  
17 available to the director during the administrative review; and

18 (ii) to issues that, based on the statutes and  
19 regulations and facts as described in (i) of this subparagraph and  
20 on the nature of the uses sought to be authorized, the director finds  
21 are material to the determination of whether the proposed disposal  
22 will best serve the interests of the state; and

23 (C) may, if the project for which the proposed disposal is  
24 sought is a multiphased development, limit the scope of an administrative  
25 review and finding for the proposed disposal to the applicable statutes and  
26 regulations, facts, and issues identified in (B)(i) and (ii) of this paragraph  
27 that pertain solely to a discrete phase of the project when the only uses to  
28 be authorized by the proposed disposal are part of that discrete phase, the  
29 department's approval is required before the next phase of the project  
30 may proceed, and the department conditions its approval to ensure that  
31 any additional uses or activities proposed for that or any later phase of the

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project will serve the best interests of the state:

(2) a [A] written finding for an oil and gas lease sale under AS 38.05.180 is subject to (g) of this section;

(3) a [A] contract for the sale, lease, or other disposal of available land or an interest in land is not legally binding on the state until the commissioner approves the contract but if the appraised value is not greater than \$50,000 in the case of the sale of land or an interest in land, or \$5,000 in the case of the annual rental of land or interest in land, the director may execute the contract without the approval of the commissioner;

(4) before [BEFORE] a public hearing, if held, or in any case no less than 21 days before the sale, lease, or other disposal of available land, property, resources, or interests in them, the director shall make available to the public a written finding that, in accordance with (1) of this subsection, sets out the material facts and applicable law upon which the determination that the sale, lease, or other disposal will best serve the interests of the state was based; however, a [A] written finding is not required before the approval of

(A) [(1)] a contract for a negotiated sale authorized under AS 38.05.115;

(B) [(2)] a lease of land for a shore fishery site under AS 38.05.082;

(C) [(3)] a permit or other authorization revocable by the commissioner;

(D) [(4)] a mineral claim located under AS 38.05.195;

(E) [(5)] a mineral lease issued under AS 38.05.205;

(F) [(6)] a production license issued under AS 38.05.207;

(G) [(7)] an exempt oil and gas sale under AS 38.05.180(d) of acreage offered in a sale that was held within the previous five years if the sale was subject to a written best interest finding, unless the commissioner determines that new information has become available that justifies a revision of the best interest finding; or

(H) [(8)] a lease sale under AS 38.05.180(w) of acreage offered

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in a sale that was held within the previous five years if the sale was subject to a best interest finding, unless the commissioner determines that new information has become available that justifies a revision of the best interest finding.

\* Sec. 2. AS 38.05.035(g) is amended to read:

(g) When the director prepares a written finding required under (e) of this section for an oil and gas lease sale scheduled under AS 38.05.180, the director shall consider and discuss in the finding

(1) facts that are known to the director at the time of preparation of the finding and that are

(A) material to [THE FOLLOWING MATTERS OR TO] issues that were raised during the period allowed for receipt of public comment, whether or not material to a matter set out in (B) of this paragraph, and within the scope of the administrative review established by the director under (e)(I) of this section; or

(B) material to the following matters:

(i) [(A)] property descriptions and locations;

(ii) [(B)] the petroleum potential of the sale area, in general terms;

(iii) [(C)] fish and wildlife species and their habitats within [IN] the lease sale area;

(iv) [(D)] the current and projected uses in the area, including uses and value of fish and wildlife;

(v) [(E)] the governmental powers to regulate oil and gas exploration, development, production, and transportation;

(vi) [(F)] the reasonably foreseeable cumulative effects of oil and gas exploration, development, production, and transportation on the sale area, including effects on subsistence uses, fish and wildlife habitat and populations and their uses, and historic and cultural resources;

(vii) [(G)] lease stipulations and mitigation measures,

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including any measures to prevent and mitigate releases of oil and hazardous substances, to be included in the leases, and a discussion of the protections offered by these measures;

(viii) [(H)] the method or methods most likely to be used to transport oil or gas from the lease sale area, and the advantages, disadvantages, and relative risks of each;

(ix) [(I)] the reasonably foreseeable fiscal effects of the lease sale and the subsequent activity on the state and affected municipalities and communities, including the explicit and implicit subsidies associated with the lease sale, if any;

(x) [(J)] the reasonably foreseeable effects of oil and gas exploration, development, production, and transportation on municipalities and communities within or adjacent to the lease sale area; and

(xi) [(K)] the bidding method or methods adopted by the commissioner under AS 38.05.180;

(2) a summary of agency and public comments received and the department's responses to those comments; and

(3) the basis for the director's determination that, on balance, leasing the area would be in the state's best interest.

\* Sec. 3. AS 46.40 is amended by adding a new section to read:

Sec. 46.40.094. CONSISTENCY DETERMINATIONS FOR USES AND ACTIVITIES. (a) When a use or activity is authorized or developed in discrete phases, and each phase will require decisions relating to a permit, lease, or authorization for that particular phase, the agency responsible for the consistency determination for the particular phase

(1) may, in its discretion, limit the consistency review to that particular phase if, but only if,

(A) the agency or another state agency must carry out a subsequent consistency review and make a consistency determination before a later phase may proceed; and

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(B) the agency responsible conditions its consistency determination for that phase on a requirement that a use or activity authorized in a subsequent phase be consistent with the Alaska coastal management program; and

(2) shall, when the consistency review is limited under (1) of this subsection, conduct the consistency review for the particular phase and make the consistency determination based on

(A) applicable statutes and regulations;

(B) the facts pertaining to a use or activity proposed for that phase that are

(i) known to the state agency responsible or made a part of the record during the consistency review; and

(ii) material to the consistency determination; and

(C) the reasonably foreseeable, significant, direct effects of the use or activity proposed for that phase.

(b) In this section,

(1) "agency responsible for the consistency determination" means

(A) the office of management and budget, for a consistency determination required to be made under AS 44.19.145(a)(11); and

(B) the commissioner of the resource agency that coordinates a consistency review for a proposed use or activity, or for a proposed phase of a use or activity, when required by this chapter for which a permit, lease, or authorization is required to be approved or issued only by that resource agency;

(2) "resource agency" has the meaning given in AS 44.19.152.

\* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

WALTER J. HICKEL  
GOVERNOR



P. O. Box 110001  
Juneau, Alaska 99811-0001  
(907) 465-3500

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

February 15, 1994

*The Honorable Joe Green  
Chairman  
House Oil and Gas Committee  
Capitol Building, Room 114  
Juneau, AK 99811*

*Dear Representative Green:*

*As a result of several unfavorable court decisions, the Administration simply cannot guarantee the continued efficacy of the state's oil and gas leasing program. Each of the decisions has had the effect of expanding the scope of best interest findings and coastal zone consistency determinations well beyond the letter of the law, and, we believe, beyond the intent of the Legislature. The court has made clear that, in the absence of specific legislative intent to the contrary, it will set oil and gas leasing policy by imposing its own standards on the scope and content of best interest findings and coastal zone consistency determinations related to lease sales.*

*Following the most recent adverse decision, the Superior Court's injunction of Lease Sale 78, Governor Hickel asked that I coordinate the Administration's review of statutory amendments necessary to address this problem. Participants in that review included the Commissioners of Commerce and Economic Development, Environmental Conservation, Fish and Game, and Natural Resources, as well as the Director of the Division of Governmental Coordination, other representatives of the Governor's Office and me.*

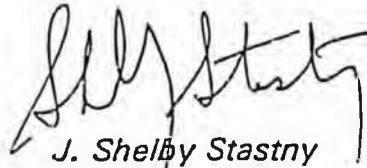
*We have carefully reviewed the language of H.B. 474 and are convinced that it represents a realistic common-sense approach toward resolving the growing threat to the state's leasing program. We believe that its careful definition of the scope of best interest finding and CZM determinations, coupled with an explicit acceptance of phased determinations when the agency has the authority to further condition subsequent project approvals, will discourage litigation based upon speculation and better serve the public interest.*

*The Honorable Joe Green  
February 15, 1994  
Page 2*

*Your committee's bill will also further several other goals to which the Administration is committed. It will ensure a best interest finding and CZM consistency procedure that is factual, fair and timely. It will also reduce litigation risks substantially, and, therefore, reduce litigation costs. We believe that H.B. 474 will accomplish these worthwhile goals while providing for meaningful and undiminished public review and participation in the leasing program.*

*On behalf of the Administration, I appreciate the willingness of you and your committee to promptly address this difficult issue. I pledge our full and undivided support in working to assure passage of H.B. 474.*

*Sincerely,*



*J. Shelby Stastny*

*J. Shelby Stastny  
Director of Management and Budget*

# THEY SAY OIL & GAS LEASING IS BROKEN

*Has the Commissioner considered both offshore oil and gas development and a fishery as water dependent and (sic) activities?*

*... no discussion of a significant public need for the lease sale*

*Appellants' motion to stay (lease sale 78) is granted*

Superior Court order staying Lease Sale 78

*... DNR should undertake seismic studies prior to the sale to identify particular areas having special hazards*

*DNR has not demonstrated that it has taken all feasible and prudent steps to maximize conformance with the ACMP*

Brief to the Supreme Court by:

Trustees for Alaska  
Alaska Environmental Center  
The Sierra Club  
Nat'l Parks and Conservation Assoc.  
The Wilderness Society

*... Noah fails to adequately evaluate the cumulative effect of current and planned oil and gas exploration and development activities on the Inlet or explain how the sale can proceed without such an analysis*

Brief to the Superior Court on Sale 78 by:

Trustees for Alaska  
Ninilchik Traditional Council  
Alaska Environmental Center  
Greenpeace  
Kenai Peninsula Fishermen's Assoc.  
United Cook Inlet Drift Assoc.

*DNR failed to take a hard look at the impact of (offshore) Sale 55 on the (onshore) Porcupine Caribou Herd, and on the subsistence users of this herd.*

Alaska Supreme Court

## YOU CAN FIX IT

# IT'S A FACT

Since The Inception Of Competitive Leasing in 1959:

- Over 75 Lease Sales Have Been Held
- Over 80 Best Interest Findings Have Been Compiled
- Over 25 Million Acres Have Been Offered For Lease And Over 11 Million Acres Have Been Leased
- Over 3,800 Wells Have Been Drilled
- The State Has Collected Over \$45 Billion In Bonuses, Rents, Royalties and Taxes
- Competitive Oil And Gas Lease Sales Have Been The Cornerstones On Which Alaska's Economy Has Been Built—And Have Provided Benefits To ALL Alaskans

## **AFTER 35 YEARS OF OIL & GAS LEASING**

- The courts—and not the Legislature or the Executive Branch—are setting the state's leasing policy
- The Supreme Court says the Best Interest Findings under Title 38 are insufficient
- The Superior Court cannot determine whether lease sales are consistent with ACMP unless all potential future development can be described
- The Superior Court is unable to determine that there is a significant public need for the lease sale
- The Ombudsman finds that although we have met or exceeded all legal requirements, the process—as defined in current statute—is not “fair”

## **WHAT IS THE PROBLEM?**

With 85% of State Revenue At Stake

## **HOW DO WE FIX IT?**

## FIRST, UNDERSTAND THE PROBLEM

- Under Title 38, the commissioner must take a "hard look" at "the salient factors" in best interest findings that an oil and gas lease sale should be held.
- However, through a series of Supreme Court decisions beginning in 1987 and continuing through this year, the court has systematically rejected the commissioner's authority both to determine what are the salient factors and "how much" analysis is "enough" before proceeding with a lease sale.
- Both the Alaska Supreme Court, and now the Superior Court, have ruled that best interest findings under Title 38 and ACMP consistency determinations for lease sales under title 46 cannot rely upon deferred consistency reviews of post-sale projects until specific exploration or development projects are proposed.
- Since no one can predict the consequences of a lease sale; litigants are encouraged to speculate on the sufficiency of the commissioner's considerations on future events, and the courts have become the arbiter of what is "proper weight" and "adequate analysis." Arguments over "how many angels might someday come to sit on the head of the pin" are disrupting the leasing program, frustrating legislative intent and threatening the state's future economic health.

## **TO FIX IT**

### **THE STATUTES MUST BE CHANGED**

- Modify Title 38, the oil and gas leasing statutes, and Title 46, the ACMP statutes, to clarify legislative intent
- Eliminate the opportunity for courts to substitute their judgment by providing clear guidance as to the scope of best interest findings and ACMP findings and consistency determinations for lease sales
- Regulatory "fixes" do not carry the force of law and will NOT solve the problem

## **IF LEGISLATION IS NOT PASSED**

- Continued disruption and delay of lease sales
- Lost reliability of lease sale process
- Loss of industry participation
- Lost state revenue
- Increased litigation costs
- Increased unemployment as service industry contracts

## **WHAT THIS LEGISLATION DOES**

- "Tightens" the scope of the best interest finding and ACMP determination for leasing
- Creates a best interest finding and ACMP procedure
  - that is factual, fair and timely
  - that is more likely to withstand judicial and public scrutiny
- Provides for meaningful public review process and directs the commissioner to determine best interest and find consistency when
  - valid, material and relevant facts are known and considered
  - required permits meet established standards

## **BOTTOM LINE**

**This Legislation More Clearly  
Defines Legislative Intent With  
Respect To Oil and Gas Lease Sales**

## TITLE 38 AND THE ACMP STATUTES NEED TO BE AMENDED

### IF THIS LEGISLATION IS NOT ADOPTED

- We must accept jeopardizing ALL future lease sales
- We must accept the inevitable loss of revenue
- We must accept the increased costs of litigation
- We must accept the court's opinion that oil and gas leasing is not in the public interest
- We must accept the court's opinion that oil and gas exploration cannot coexist with fishing
- We must accept that spending tens of millions of dollars for more "studies" is a necessary use of revenue
- We must accept that leasing cannot occur if there is an alleged risk to the environment, no matter how remote or unlikely that risk may be

### WITHOUT THIS LEGISLATION

We must accept the continuing erosion of the Legislature's authority and judgment to special interest groups and the courts

### THE RECORD SENDS THE FOLLOWING MESSAGES . . .

#### Consistency with the ACMP (Sale 78)

##### *Trustees for Alaska:*

"Direct conflicts exist between oil and gas exploration and development activities and fishing and large vessel traffic. Consequently, oil and gas exploration and development activities must give way to those activities which are of higher priority; fishing and large vessel traffic...the decision to proceed with Sale 78 is not consistent with 6 AAC 80.040 and thus not consistent with the ACMP."

". . .Noah fails adequately to evaluate the cumulative effect of current and planned oil and gas exploration and development activities on the Inlet or explain how the sale can proceed without such analysis."

*Alaska Superior Court:*

"...the Court cannot divine the basis for the consistency determination. First, there is no discussion of the priority required in 6 AAC 80.040. Has the Commissioner considered both offshore oil and gas development and a fishery as water dependent and (sic) activities? Or, is oil and gas a water related activity?...There is no discussion of a significant public need for the lease sale ...6 AAC 80.130(d) requires a finding of no feasible prudent alternative to meet the public need for the proposed use and a finding that all feasible and prudent steps to maximize conformance with standards will be taken."

*DNR:*

Analysis of ACMP consistency was included in the Preliminary Best Interest Finding which the court failed to look at when making its decision to stay the sale. The court appears to accept without question that potential offshore oil and gas development is not a water-dependent activity. DNR took a hard look at the requirements and issues of 6 AAC 80.130. The court created of its own accord the argument that DNR did not comply with 6 AAC 80.130, then relied on its own unsupported argument, without examination of the relevant parts of the record or response from DNR, to impose the stay.

*Trustees for Alaska:*

"The Court has further stated that environmentally protective purposes "require that at the time DNR reviews any...permit application it consider the probable 'cumulative impact' of all anticipated activities which will be part of [the project in question] whether or not the activities are part of the project under review. If DNR determines that the cumulative impact is problematic, the problems must be resolved before the initial permit is approved." (emphasis added)

### **Best Interest Finding (Sale 78)**

*Trustees for Alaska:*

"Because Noah has failed to adequately address these issues in the 'best interest' finding and explain how they fit into the 'best interest' equation, the finding is legally deficient".

### **Geophysical Hazards (Sale 50)**

*Trustees for Alaska:*

DNR violated the ACMP "by utterly failing (emphasis added) to identify known geophysical hazard areas within the Sale 50 area as required by 6 AAC 80.050(a). DNR does not consider geophysical hazards until it reviews a company's plans of operations. In contrast, MMS has demonstrated that an identification of geophysical hazards is practical at the lease sale stage."

*Alaska Supreme Court:*

"The geophysical hazards in a given area could be such as to make any use or activity inconsistent with the ACMP...we conclude that this case must be remanded to DNR with instructions to identify and report on known and substantially possible areas of geophysical hazards within Sale 50...a draft environmental impact statement for a federal sale just north of Sale 50 deals with faults and earthquakes in the Camden Bay area in much greater detail than the State's decisional document."

*DNR:*

"The Court has understated DNR's efforts to identify geophysical hazards...On the basis of its consideration of the existing information, DNR identified and discussed the known

potential geophysical hazards in the Sale 50 area....Unless the court is to require DNR to go beyond the express language of the regulation, there is nothing more to be done."

DNR's petition for rehearing was denied.

## Archeological Resources (Sale 50)

### *Trustees for Alaska:*

DNR failed to identify or describe any of the historic, prehistoric and archeological resources in the Sale 50 area; and DNR deferred analysis of such data to the exploration and production stages of development.

### *Alaska Supreme Court:*

"DNR's decision to defer identification of archeological sites does not comply with 6 AAC 80.150. The regulation clearly requires the identification of archeological sites, but it does not state when they are to be identified. In our view the regulation is most reasonably interpreted to require...the identification of known archeological sites at the initial sale stage...DNR must comprehensively survey the known data, set out the results, and state its conclusions."

### *DNR:*

"Because unrestricted availability to information concerning the nature and location of any archeological resource increases the threat to site destruction, access to such information is closed to the general public by the Alaska Office of History and Archeology. Authority for this policy is contained in AS 9.25.120 and 16 U.S.C. § 47 (O)....DNR is required to withhold specific information regarding those sites until the plan of operations stage..."

DNR's petition for rehearing was denied.

## Transportation (Sale 55)

### *Trustees for Alaska:*

"DNR failed to discuss how development would occur, the riskiness of any methods chosen, and whether, in light of the risk, the lease sale was in the best interests of the state..."

### *Alaska Supreme Court:*

"DNR did not take a hard look at the transportation issue in making its best-interest determination for Sale 55...the Finding concludes that offshore development would be "feasible" without use of ANWR, but does not discuss how the oil would be transported or what risks these methods would pose."

### *DNR:*

"DNR, in its final finding, ...requires that lessees submit a detailed plan of operations for approval before conducting any exploratory or development operations, and imposes 26 restrictions or terms as a condition of the approval of plans of operations...Seven of these terms...specifically address environmental concerns arising from the transportation of oil and gas. DNR recognizes that the transport of oil and gas by pipeline is environmentally preferable to transport by tanker. DNR carefully considered the impact that the unchanged legal status of ANWR might have, and the risks presented by various oil and gas transportation methods that might be necessary to develop Sale 55 tracts."

## The Porcupine Caribou Herd (Sale 55)

### *Trustees for Alaska:*

"The Final Best Interest Finding... does not address the impacts of the sale on the Porcupine Caribou Herd nor does it indicate how these impacts are factored into the 'best interest' equation. This failure on behalf of DNR also reveals the inadequacy of DNR's analysis of the effect of the sale on the subsistence activities of the people of Alaska."

### *Alaska Supreme Court:*

"Although DNR asserts that development 'should not' affect ANWR or the caribou that utilize ANWR, DNR has made no finding to this effect. Rather, it has simply made the unsupported assumption that offshore development cannot affect caribou."

### *DNR:*

"[AS 38.05.035(g)] requires that DNR thoroughly consider the effects of an oil and gas lease sale on fish and wildlife species and the subsistence uses of those species in the sale area (emphasis added). However, it does not require DNR to extend its consideration to potential effects on species located outside the sale area. As the Porcupine Caribou Herd is clearly not found in the sale area, DNR did not violate the statute."

DNR's petition for rehearing was denied

## Goodnews Bay Offshore Prospecting Permit (OPP) Disposal

### *Alaska Supreme Court:*

"The State's argument that it could have done little more to fully assess the impacts of mining in the region than it did at the OPP stage is significantly undercut by evidence of comparable federal studies. The record indicates that the federal government has conducted environmental impact studies for offshore mining based on various mining scenarios. DNR can emulate these studies." (emphasis added)

**FAILURE TO ADOPT THIS LEGISLATION WILL  
MAINTAIN THE STATUS QUO—AND GUARANTEE AN  
UNCERTAIN ECONOMIC FUTURE FOR ALASKA**

## **THE ALASKA SUPREME COURT WOULD HAVE DNR DO NEPA-LIKE BEST INTEREST FINDINGS FOR ITS LEASE SALES**

"The record indicates that the federal government has conducted environmental impact studies....DNR can emulate these studies."

Alaska Supreme Court—Goodnews Bay Decision

### **WHAT WOULD BE THE COST?**

DNR's Best Interest Findings, prepared by a staff of five, average \$105,000 each

- The Minerals Management Service (MMS) EIS's average \$500,000 each
- MMS employs 53 people in their leasing section, which is responsible for producing the EIS
- MMS has spent \$72.6 million for environmental studies within the Cook Inlet region

**DNR Would Have To Greatly Increase Its Operating Budget And  
Staff Level In Order To Fund The Necessary Environmental Studies  
And Prepare The Document**

#### **Would The Number Of Sales Decrease? YES!**

- In 14 years of leasing since 1979, DNR has held 42 lease sales, averaging three sales per year
- MMS has held only 15 Alaska OCS lease sales in the 17 years since 1976, when the Federal program began in Alaska
- With increased best interest finding requirements, DNR would be able to conduct only one lease sale every 18 months

#### **Would EIS's Prevent Lawsuits? NO!**

- Based on alleged NEPA violations and on the EIS findings, lawsuits were filed against half of the MMS lease sales
- These lawsuits resulted in two sales being enjoined, and two sales being postponed by MMS

**CONCLUSION:**

Given the required funding for staff and environmental studies, DNR could emulate the federal EIS process.

However, doing so would mean a tremendous increase in operating costs; a significant reduction in the number of lease sales held; a decrease in state revenue; a delay in future revenue resulting from new discoveries; and no guarantee that litigation would be reduced.

**DESPITE THE STUDIES, DESPITE THE TREMENDOUS EXPENSE**

**NO OIL OR GAS HAS BEEN PRODUCED FROM ALASKA'S  
FEDERAL WATERS**

## SALE 78 - THE PROBLEM - A CASE STUDY

### TRUSTEES CREATE A CONFLICT:

"There is ample—and uncontroverted—evidence that these uses and activities simply cannot coexist with certain oil and gas exploration and development activities. To take a simple example, assume that an oil company purchases a marine tract south of Kasilof and, during exploration, discovers a commercially viable deposit of oil. The company then places a production platform on its tract, in the heart of the fishing grounds. Given the area's extreme tides and strong currents no fishing could occur within, at best, a half-mile circle around the platform. The danger is simply too great that a net, or a boat, will get wrapped up with the platform."

Trustees, et al, "Response to State's Petition to the Alaska Supreme Court for Review of Sale 78 Injunction"

### REALITY:

There is no evidence of incompatibility—ample, uncontroverted or otherwise—just allegations and speculation. That speculation, however, is inconsistent with the actual "evidence" of coexistence of fishing, subsistence, and oil and gas exploration and development activities in Cook Inlet. The "fishing corridor" itself currently has valid leases within its boundaries and it has in the past been the site of several exploratory wells. Nevertheless, the Superior Court accepted Trustees' "evidence" of incompatibility as a basis for its Injunction of Sale 78.

In the case of Sale 78, there are no known, absolute conflicts at the lease sale stage. As in all lease sales, there is the potential for conflicts, depending upon what is proposed to occur, when it may occur, where it may occur, and for how long it may occur. By retaining flexibility to entertain alternative proposals which may be conditioned to achieve "consistency," the state remains able to at least try to accommodate competing uses of its resources. In those instances where accommodation is impossible, it retains the authority to disallow the proposed activity.

Under the Sale 78 lease provisions, for example, the following alternative scenarios could be accommodated.

- The "corridor" tracts may or may not receive bids—if there were no bids, there is no conflict.
- If bids and leases within the corridor are issued, there still is no assurance of a conflict. There may or may not ever be an application to drill an exploratory well on the tracts. If there isn't, there is no conflict.
- If there is an application, it may or may not be for a location which creates a conflict. For example, it may be accessible from adjacent acreage—either onshore or offshore.
- It may present a potential conflict that can be avoided through alternative site selection or scheduling so that the activity can be conducted when there are no commercial, subsistence or sport fishing activities.
- If an exploratory well can be accommodated, it may or may not result in a commercial discovery. If there is no commercial discovery, there is no conflict from development that will not occur.

In selecting Sale 78 lease terms, DNR adopted Term 13 to allow for a subsequent site-specific evaluation of alternatives in light of potential conflicts, while retaining full authority to disallow activities which cannot be made consistent with the ACMP or which are found not to be in the state's best interest.

**"Term 13:** To prevent conflicts with subsistence and commercial fishing operations, the Director may restrict lease-related use. In enforcing this term the division, during review of plans of operation, will work with other agencies and the public to assure that potential conflicts are identified and avoided to the fullest extent possible. Available options include alternative site selection, requiring directional drilling, and seasonal drilling restrictions."

## **Adopt This Legislation To Fix The System**

SENATE BILL NO. 308

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act modifying administrative procedures and decisions by state agencies that  
 2 relate to uses and dispositions of state land, property, and resources, and to the  
 3 interests within them, and that relate to land, property, and resources, and to  
 4 the interests within them, that are subject to the coastal management program;  
 5 and providing for an effective date."

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

7 \* Section 1. AS 38.05.035(e) is amended to read:

8 (e) Upon a written finding that the interests of the state will be best served,  
 9 the director may, with the consent of the commissioner, approve contracts for the sale,  
 10 lease, or other disposal of available land, resources, property, or interests in them, and,  
 11 in addition to the conditions and limitations imposed by law, may impose additional  
 12 conditions or limitations in the contracts as the director determines, with the consent  
 13 of the commissioner, will best serve the interests of the state. A written finding of

1 the director is subject to the following:

2 (1) with the consent of the commissioner and subject to the  
3 director's discretion, for a specific proposed disposal of available land, resources,  
4 or property, or of an interest in them, the director

5 (A) shall establish the scope of the administrative review on  
6 which the director's determination is based, and the scope of the written  
7 finding supporting that determination; the scope of the review and finding  
8 may address only reasonably foreseeable, nonspeculative, direct effects of  
9 the uses proposed to be authorized by the disposal;

10 (B) may limit the scope of an administrative review and  
11 finding for a proposed disposal

12 (i) to the applicable law and the facts pertaining to  
13 the land, resources, or property, or interest in them, that the  
14 director finds are material to the determination and that are known  
15 to the director or knowledge of which is made available to the  
16 director during the administrative review; and

17 (ii) to issues that, based on the law and facts as  
18 described in (i) of this subparagraph and on the nature of the uses  
19 sought to be authorized, the director finds are relevant to the  
20 determination of whether the proposed disposal will best serve the  
21 interests of the state; and

22 (C) may, if the project for which the proposed disposal is  
23 sought is a multiphased development, limit the scope of an administrative  
24 review and finding for the proposed disposal to the applicable law, facts,  
25 and issues identified in (B)(i) and (ii) of this paragraph that pertain solely  
26 to a discrete phase of the project when the only uses to be authorized by  
27 the proposed disposal are part of that discrete phase, the department's  
28 approval is required before the next phase of the disposal may proceed,  
29 and the department conditions its approval to ensure that any additional  
30 uses or activities proposed for that or any later phase of the disposal will  
31 serve the best interests of the state;

1                   (2) a [A] written finding for an oil and gas lease sale under  
2 AS 38.05.180 is subject to (g) of this section;

3                   (3) a [. A] contract for the sale, lease, or other disposal of available  
4 land or an interest in land is not legally binding on the state until the commissioner  
5 approves the contract but if the appraised value is not greater than \$50,000 in the case  
6 of the sale of land or an interest in land, or \$5,000 in the case of the annual rental of  
7 land or interest in land, the director may execute the contract without the approval of  
8 the commissioner;

9                   (4) before [. BEFORE] a public hearing, if held, or in any case no less  
10 than 21 days before the sale, lease, or other disposal of available land, property,  
11 resources, or interests in them, the director shall make available to the public a written  
12 finding that, in accordance with (1) of this subsection, sets out the material facts and  
13 applicable law upon which the determination that the sale, lease, or other disposal will  
14 best serve the interests of the state was based; however, a [. A] written finding is not  
15 required before the approval of

16                   (A) [(1)] a contract for a negotiated sale authorized under  
17 AS 38.05.115;

18                   (B) [(2)] a lease of land for a shore fishery site under  
19 AS 38.05.082;

20                   (C) [(3)] a permit or other authorization revocable by the  
21 commissioner;

22                   (D) [(4)] a mineral claim located under AS 38.05.195;

23                   (E) [(5)] a mineral lease issued under AS 38.05.205;

24                   (F) [(6)] a production license issued under AS 38.05.207;

25                   (G) [(7)] an exempt oil and gas sale under AS 38.05.180(d) of  
26 acreage offered in a sale that was held within the previous five years if the sale  
27 was subject to a written best interest finding, unless the commissioner  
28 determines that new information has become available that justifies a revision  
29 of the best interest finding; or

30                   (H) [(8)] a lease sale under AS 38.05.180(w) of acreage offered  
31 in a sale that was held within the previous five years if the sale was subject to

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a best interest finding, unless the commissioner determines that new information has become available that justifies a revision of the best interest finding.

\* Sec. 2. AS 38.05.035(g) is amended to read:

(g) When the director prepares a written finding required under (e) of this section for an oil and gas lease sale scheduled under AS 38.05.180, the director shall consider and discuss in the finding

(1) facts that are known to the director at the time of preparation of the finding and that are material to the following matters or to the issues that are within the scope of the administrative review that was established by the director under (e)(1) of this section and that were raised during the period allowed for receipt of public comment;

- (A) property descriptions and locations;
- (B) the petroleum potential of the sale area, in general terms;
- (C) fish and wildlife species and their habitats within [IN] the lease sale area;
- (D) the current and nonspeculative projected uses in the area, including uses and value of fish and wildlife;
- (E) the governmental powers to regulate oil and gas exploration, development, production, and transportation;
- (F) the reasonably foreseeable cumulative effects of oil and gas exploration, development, production, and transportation on the sale area, including effects on subsistence uses, fish and wildlife habitat and populations and their uses, and historic and cultural resources;
- (G) lease stipulations and mitigation measures, including any measures to prevent and mitigate releases of oil and hazardous substances, to be included in the leases, and a discussion of the protections offered by these measures;
- (H) the method or methods most likely to be used to transport oil or gas from the lease sale area, and the advantages, disadvantages, and relative risks of each;

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(I) the reasonably foreseeable, nonspeculative fiscal effects of the lease sale and the subsequent activity on the state and affected municipalities and communities, including the explicit and implicit subsidies associated with the lease sale, if any;

(J) the reasonably foreseeable, nonspeculative effects of oil and gas exploration, development, production, and transportation on municipalities and communities within or adjacent to the lease sale area; and

(K) the bidding method or methods adopted by the commissioner under AS 38.05.180;

(2) a summary of agency and public comments received and the department's responses to those comments; and

(3) the basis for the director's determination that, on balance, leasing the area would be in the state's best interest.

Sec. 3. AS 46.40 is amended by adding a new section to read:

Sec. 46.40.094. CONSISTENCY DETERMINATIONS. (a) When a consistency determination is required for a project, the party responsible for the consistency determination shall conduct the consistency review of the project and make a consistency determination based only on

(1) applicable law;

(2) the facts pertaining to the project that are

(A) known to the party responsible or made a part of the record during the project's consistency review; and

(B) material to the project's consistency determination; and

(3) the reasonably foreseeable, nonspeculative, direct effects of the project.

(b) If a consistency determination is required for a project that is a discrete phase of a multiphased development project, in addition to the requirements of (a) of this section, the party responsible for the consistency determination may, in its discretion,

(1) limit the consistency determination for the proposed project to that discrete phase if each later phase of the project requires the party responsible to review

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and make a consistency determination before that later phase of the project may proceed; and

(2) condition the consistency determination for that phase of the project on a requirement that an additional use or activity proposed for that or any later phase of the project be consistent with the Alaska coastal management program.

(c) In this section,

(1) "party responsible for the consistency determination" or "party responsible" means

(A) the office of management and budget, for a consistency determination required to be made under AS 44.19.145(a)(11); and

(B) the commissioner of the resource agency that coordinates a consistency review for a proposed project when required by this chapter for which a permit, lease, or authorization is required to be approved or issued only by that resource agency;

(2) "resource agency" has the meaning given in AS 44.19.152.

\* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

**DEPT. OF NATURAL RESOURCES**

*DIVISION OF OIL AND GAS*

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
PHONE: (907) 762-2553

(907)762-2547

April 21, 1994

The Honorable Bill Williams  
Alaska State Legislature  
Room 128  
State Capitol  
Juneau, Alaska 99801-1182

Dear Representative Williams:

As you will recall, HB 474 was introduced earlier this session following a series of adverse court decisions concerning oil and gas lease sales and offshore prospecting permits. A summary of the lawsuits which led to the drafting of HB 474/SB 308 is enclosed. The decisions in those lawsuits confirmed the need to amend the Title 38 Best Interest Finding provisions and the Title 46 Alaska Coastal Management Program requirements. In response, these bills were drafted to clarify the legislature's intent regarding the procedures to be followed in preparing for resources disposals, as well as permitting projects in Alaska's Coastal Zone. It is critical that the legislature act this session to ensure the state's continued ability to conduct its oil and gas leasing and other disposal programs.

Earlier today, the Senate passed its amended counterpart of HB 474, CSSB 308 (Fin). It is my understanding that CSSB 308 (Fin) is being referred to the House Resources Committee where hearings are expected to be held next week. With limited time remaining in the session, I wanted to be sure that you are aware of the recent amendments to this legislation, and how these amendments have broadened public acceptance and support for this bill.

To that end, I have enclosed several documents which address the specific amendments made to SB 308 between the time the bill moved into the Senate Finance Committee and its passage by the Senate. These documents include April 9 and 12, 1994 memoranda from me to Senator Pearce describing amendments which had been made as of those respective dates. In addition, I have enclosed the three-page amendment which subsequently was offered by Senator Pearce and adopted by the Senate just prior to the bill's passage. An accompanying document provides a short description of the basis for each provision of Senator Pearce's amendment on a page and line number basis.

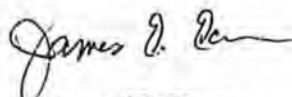
Re HB 474  
April 21, 1994  
Page 2

I have also enclosed letters of support from Mr. Jon Isaacs and Ms. Nancy Wainwright, both of whom are independent consultants to certain of the Coastal Districts, as well as from Ms. Linda Freed of the Kodiak Island Borough. Also enclosed is a copy of Resolution #94-046 from the Matanuska-Susitna Borough, reversing its earlier Resolution #94-032 and supporting passage of CSSB 308 (Fin), as amended on the floor by Senator Pearce. It is important to note that both Mr. Isaacs and Ms. Wainwright submitted their letters of support on behalf of themselves, and not as representatives of the district.

I hope that your review of these materials confirms that in the intervening weeks since you last saw this legislation, it has undergone many substantive amendments in response to concerns raised by the public, the Coastal Districts and affected municipalities, among others. As with any legislation of this scope, however, it is virtually impossible to accommodate every amendment suggested. Nevertheless, I feel that all the parties have made a good faith effort to assure that reasonable compromises are represented in the bill which now comes to the House. I believe CSSB 308 responds to public concerns, while at the same time maintaining the protections which are necessary to assure continuation of these vital state programs. I urge you and your colleagues to support passage of this very important legislation.

I look forward to the opportunity to answer any questions which you or your staff may have or to discuss the legislation and its background in greater detail if you desire.

Sincerely,



James E. Eason  
Director

Enclosures

# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

## DEPT. OF NATURAL RESOURCES

P.O. BOX 107034  
ANCHORAGE, ALASKA 99510-7034  
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### DIVISION OF OIL AND GAS

TO: Senator Drew Pearce  
Senator Steve Frank

DATE: March 28, 1994

FILE NO.:

PHONE: 762-2553

FROM: Barbara Fullmer  
Kyle Parker

SUBJECT: SB308 - Litigation  
Summary

#### Resources Disposal Litigation Summary

#### BACKGROUND

Under current law, the Department of Natural Resources ("DNR") may not dispose of state land, resources, or property, or interests in them, unless the Commissioner first determines that such action will serve the best interests of the state and issues a written finding to that effect. Except in the context of oil and gas lease sale best interest findings, however, the legislature has not directed specific requirements for a best interest findings analysis. Rather, the generally applicable best interest finding provision simply states, in pertinent part:

Upon a written finding that the interests of the state will be best served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property or interests in them, and, in addition to the conditions and limitations imposed by law, may impose additional conditions or limitations in the contracts as the director determines, with the consent of the commissioner, will serve the best interests of the state. . . . [T]he director shall make available to the public a written finding that sets out the facts and applicable law upon which the determination that the sale, lease, or other disposal will best serve the interests of the state was based.

AS 38.05.035(e). The legislature has chosen not to define the scope of DNR's best interests analysis or even to suggest specific things that should be included in the written finding. The current statute merely requires that DNR "set out the facts and applicable law" which form the basis for its best interests determination. The legislature, therefore, apparently intended to leave the details concerning the proper

scope of the written finding and the review upon which it is based to the expertise and discretion of DNR.

The Alaska Supreme Court, however, has not been content to let DNR define the scope of its best interests finding or coastal consistency determination in light of the uses to be authorized by the proposed disposal of land or resources. Instead, beginning in 1990 with its first decision on Oil and Gas Lease Sale 50 (Camden Bay), the Supreme Court has repeatedly reversed superior court decisions upholding DNR's best interest findings and coastal consistency determinations, particularly when DNR deliberately limited the scope of the finding challenged in accordance with limits on the uses directly authorized by the disposal. In short, the Court disapproves of DNR deferring consideration of remote, speculative impacts that possibly could result if the uses authorized pursuant to a best interest finding and coastal consistency determination lead to future development -- none of which could happen without further review and authorization.

The following chronologies of the administrative appeals to DNR, the appeals to the superior courts and the Supreme Court, and the subsequent remands, graphically illustrate both the scope and complexity of this litigation.

#### OIL AND GAS LEASE SALE 50 (CAMDEN BAY)

In the Trustees for Alaska v. State ("Camden Bay I") decision, issued on March 16, 1990, the Supreme Court ruled on the six issues raised by Trustees in their points on appeal:

- 1) The Court rejected Trustees' claim that they had been denied a fair opportunity to comment on the issues concerning offshore development, holding that the preliminary best interest finding gave sufficient notice that offshore facilities were contemplated.
- 2) The Court rejected Trustees' argument that DNR's best interest finding, in general, did not sufficiently explain the basis for its decision that the sale was in the best interest of the state.
- 3) The Court rejected Trustees' claim that DNR did not adequately address the cumulative effects of its leasing decision.
- 4) The Court agreed with Trustees' claim that DNR did not adequately consider the methods and risks of oil transportation from Camden Bay if ANWR remains unavailable for onshore support facilities.
- 5) The Court rejected Trustees' argument that leasing Camden Bay was unreasonable because oil production and transportation would not be economically feasible without onshore support facilities in ANWR, holding that "this court need not inquire into the feasibility of future development."

6) The Court agreed with Trustees' assertion that AS 44.19.145(a)(11) required the office of Management and Budget ("OMB"), rather than DNR, to render the conclusive consistency determination under the Alaska Coastal Management Program ("ACMP").

The Court remanded the Sale 50 final best interest finding stating that DNR omitted "any discussion" of the facilities necessary to transport oil from the Sale 50 area if ANWR's status remains unchanged.

The state petitioned the Court for rehearing of its Sale 50 decision asserting that the Court overlooked the fact that DNR did discuss transportation issues, including specific potential alternatives and their risks and benefits, in the final finding to the extent feasible at the lease sale stage. DNR argued that, given the uncertain nature of the quantity, quality, and location of oil deposits, and of the nature of the technology used to produce any deposits discovered, detailed hypothetical studies of alternative development scenarios at the lease sale stage are "unfair and unwise," "speculative," and "a gross misallocation of resources." See Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1192 (9th Cir. 1989); Park County Resource Council V. United States, 817 F.2d 609, 624 (10th Cir.1987); County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1378 (2d Cir.1977) cert.denied, 434 U.S. 1064 (1978); Village of False Pass v. Watt, 565 F.Supp. 1123, 1134 (D.Alaska 1984), aff'd, 733 F.2d 605 (9th Cir. 1984).

The Court never acted on the state's petition for rehearing. DNR, therefore, issued a supplemental best interest finding in September 1990 to comply with the Court remand. The Court's ruling in Sale 50, however, also led to the enactment of new legislation intended to clarify the Title 38 best interest finding requirement for oil and gas lease sales. See AS 38.05.035 (g).

Two weeks after the Camden Bay I decision was issued, then-Governor Cowper requested that the Alaska Legislature enact legislation addressing the Court's decision. Two bills were introduced at the Governor's request. SB 539 provided for ratification of the Camden Bay lease sale. SB 540 amended AS 44.19.145(a) to make clear that DNR and the other resource agencies have the authority to render conclusive consistency determinations if a project involves only the permits of that agency.<sup>1</sup> The Governor also requested that amendments be introduced to HB 128 to

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<sup>1</sup> Although the Senate overwhelmingly passed SB 539 to ratify the Camden Bay lease sale, the House Resources Committee did not move the bill to the floor for a vote before the legislature adjourned. The legislature did, however, enact SB 540, which clarified that DNR was the proper agency to render the conclusive consistency determination for oil and gas lease sales. The

identify the subjects that DNR must discuss in its best interest finding for oil and gas lease sales. The Governor explained the purpose of the proposed legislation as follows:

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).

1990 Senate Jour. 3132 (emphasis added). The Governor further explained that the proposed legislation was intended to clarify that in preparing its best interest finding, "DNR need not speculate concerning the location and size of discoveries, the economic feasibility of ultimate development, future environmental or other laws that may apply at the time of any future development, or other such factors that cannot be reasonably foreseen at the time of leasing."

The legislature enacted SCS CSHB 128 (FIN) which in its final form added a new subsection (g) to AS 38.05.035. The new subsection provides a complete list of what must be considered and discussed in a written best interest finding for an oil and gas lease sale. The director's duty to consider and discuss facts is limited to "facts that are known to the director at the time of preparation of the finding and that are material to the [matters listed in the statute] or to issues that were raised during the period allowed for receipt of public comment." Governor Cowper signed this bill into law on June 14, 1990.

In May 1991, Trustees initiated their second appeal of Sale 50 on issues regarding the Alaska Coastal Management Program ("ACMP"). After briefing and oral argument, the Supreme Court, in its second opinion in the Sale 50 litigation ("Camden Bay II"), remanded DNR's coastal consistency determination for additional findings. This second remand was based, in part, on an erroneous predicate: that DNR's determination of geophysically hazardous areas was limited to "a summary statement that the entire Sale 50 area is a 'known geophysical hazard.'" In its Opinion, however, the Court understated DNR's efforts to identify geophysical hazards, and the extensive

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legislature removed the inconsistency between the regulations and the statute by amending the statute retroactively. The Governor signed this bill into law on May 11, 1990.

Sale 50 administrative record established that DNR advanced more than a "summary statement" that the entire sale area is a known geophysical hazard.

In its Sale 50 finding, under the heading "Potential Geological and Geophysical Hazards in Camden Bay," DNR noted:

Geophysical surveys conducted in the Camden Bay region (Grantz et al, 1982) have delineated several potential hazards to oil and gas exploration and production which may be of greater significance to the Sale 50 area than other sale areas on the North Slope. Recent uplift on the Beaufort Sea shelf north of Camden Bay and the occurrence of numerous faults and shallow earthquakes indicate that this area may be an active tectonic zone. The magnitude of earthquakes recorded in the Sale 50 vicinity range from less than 1.0 to 5.3 on the Richter Scale. In addition, documented slump features indicate that sediments are susceptible to liquefaction and tectonically triggered sliding or slumping in the deeper waters. The instability of poorly consolidated sediments on the Beaufort Sea shelf may present a potential hazard to pipelines, platforms, and artificial islands.<sup>2</sup>

In its assessment of geological and geophysical hazards in the Sale 50 finding, DNR specifically cites to a detailed survey of geophysical hazards in the Camden Bay area: "Map cross sections and chart showing late Quaternary faults, folds, and earthquake epicenters on the Alaskan Beaufort Shelf: USGS Miscellaneous Investigations Series, Map I-1182-C, scale 1:500,000," Grantz, A. and others, 1982.<sup>3</sup> In fact, at the time of

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<sup>2</sup> In its Opinion, the Court quotes from the federal environmental impact statement ("EIS") prepared for OCS Sale 97 (in the Beaufort Sea adjacent to the Sale 50 tracts) and states that: "The federal statement deals with faults and earthquakes in the Camden Bay area in much greater detail than the State's decisional document." However, a comparison of the statement in the Sale 50 finding, quoted in the text above, with that quoted favorably by the Court, shows that the Sale 50 statement is at least as detailed, if not more, than the federal statement. The federal statement on faults and earthquakes in the OCS Sale 97 EIS states in full: "Earthquakes indicate active movement along the faults in the Camden Bay area and tend to occur along the axes of anticlines and synclines. They are part of the central Alaska Seismic system. Most of the earthquakes recorded since 1968 range in magnitude from 3.0 to 4.0."

<sup>3</sup> The U.S. Fish and Wildlife Service referred this survey to DNR in its comments on proposed Sale 50. DNR specifically relied on the Grantz survey ("Grantz et al., 1982") in its analysis of geophysical hazards. DNR also compiled and considered additional

its final finding for Sale 50, DNR incorporated by reference the only publicly available maps and cross-sections of known geophysical hazards.

In Camden Bay II, the Court remanded the finding to DNR "to identify and report on known and substantially possible areas of geophysical hazards within Sale 50." When preparing the best interest finding and coastal consistency determination, however, DNR "conduct[ed] a survey of available sources" and "report[ed] the results." Specifically, DNR identified known geophysical hazards based on the only survey of the Camden Bay area then available, the Grantz survey. In addition to addressing and identifying known hazards, DNR imposed stipulations and terms of sale to mitigate the currently unknown but potentially discoverable geophysical hazards that subsequently may be determined to exist at specific exploratory or development sites. It took this step to ensure the sale's compliance with 6 AAC 80.050. Unless the Court wished DNR to go beyond the express language of the regulation -- and in its Opinion, the Court specifically "excludes a requirement to conduct field studies" for geophysical hazards -- there was nothing more to be done at the lease sale stage.

In the Camden Bay II decision, the Court also misinterpreted the geophysical hazards standard (6 AAC 80.050) of the ACMP. Under the geophysical hazards standard (6 AAC 80.050) of the ACMP, state agencies must "identify known geophysical hazard areas and areas of high development potential in which there is a substantial possibility that geophysical hazards may occur." In its Opinion, the Court interprets this to mean that DNR must "identify known or substantially possible hazard areas." This is not what the regulation requires. There is a subtle, but crucial difference in the language of the regulation which the Court overlooked.

The regulation clearly requires identification of only two types of areas: (1) those with known geophysical hazards, and (2) those having high development potential in which there is a substantial possibility that geophysical hazards may occur. As discussed above, DNR identified those areas of known geophysical hazards in the sale area. However, the second type of area, areas of high development potential, obviously cannot be identified at the leasing stage because the exploration necessary to define the location of any oil deposits has not taken place. Therefore, DNR requires surveys and site specific mitigation for geophysical hazards when -- but not before -- specific activities are proposed at specific sites.

The Court rejected DNR's reasonable approach to identifying and mitigating geophysical hazards, and it did not defer to agency expertise as courts generally do in decisions involving complicated technical matters. In the same decision, however, the Court deferred to DNR's expertise and acknowledged that DNR utilized the preferred

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information regarding geophysical hazards generally, and seismicity in particular, in the Sale 50 area.

approach when addressing transportation concerns: "Until exploration is proposed and, in all likelihood, until and unless a commercially exploitable discovery is made, there will be no occasion for siting, designing or constructing transportation and utility routes." The same logic the Court used in upholding DNR's approach to addressing transportation issues under the ACMP, applies to DNR's handling of geophysical hazards because development potential is unknown until after exploration has taken place.

Finally, in its Camden Bay II decision, the Court overlooked extensive evidence that DNR's consistency determination complied with the historic, pre-historic and archeological standard (6 AAC 80.150) of the ACMP. Under 6 AAC 80.150: "Districts and appropriate state agencies shall identify areas of the coast which are important to the study, understanding, or illustration of national, state, or local history or prehistory." In its Opinion, the Court interprets the regulation to require, "the identification of known archeological sites at the initial sale stage." Identification of known cultural resource sites requires, according to the Court, "literature surveys and personal contact with individuals who may have knowledge concerning such sites."<sup>4</sup>

The Court's conclusion that "DNR did not attempt to identify archeological sites within the sale area," was wholly mistaken. In its consistency determination, DNR surveyed the known data, set out the results, and stated its conclusions. Specifically, DNR found that:

It is not likely that any cultural resources sites would be identified within the proposed sale area since it is offshore. However, no cultural resource surveys have been conducted in the area, and the discovery of sites, especially in nearshore areas, should not be ruled out.

This conclusion was based directly on comments submitted by Judith E. Bittner, Chief, State of Alaska Office of History and Archeology:

The offshore aspects of the proposed sale offer little impact to cultural resources of the north slope. There are currently no known cultural resource sites with the submerged lands identified in Sale 50, and the potential for encountering such sites would be low due to ice scouring. Be that as it may, appropriate stipulations should be applied to the leases for the protection of any as yet unknown cultural resources in the sale area.

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<sup>4</sup> In its Opinion, the Court specifically rejects the need to conduct field surveys and exploration in an effort to identify unknown sites.

Furthermore, contrary to the Court's conclusions, DNR did not leave to its lessees the discretion to determine how and when identification of cultural sites would occur. Rather, in compliance with Ms. Bittner's suggestions, DNR noted the potential for discovery of sites in the nearshore areas, and established lease terms and stipulations in recognition that future oil and gas related activity may result in the identification of currently unknown resource sites.

Specifically, stipulation 1 to the Sale 50 leases requires the lessee to report the discovery of any site, structure, or object of historical or archeological significance and to make every reasonable effort to preserve and protect the site until DNR issues directions regarding its protection. Additionally, at the permitting stage, lease term 3 requires consistency with the ACMP, and term 22 requires that the lessee complete an archeological survey before exploration and development activities are undertaken.<sup>5</sup> Each of these points was brought to the Court's attention in the state's request for reconsideration of its decision. Although the Court took that opportunity to correct the factual errors in its original decision, it declined to reverse its decision.

#### OIL AND GAS LEASE SALE 55 (DEMARCATIION POINT)

In its Sale 55 Opinion, issued in December 1993, the Supreme Court determined that DNR failed to consider what the Court viewed to be a "salient" factor - the possible effects of the lease sale on the Porcupine Caribou Herd and the subsistence use of that herd by the residents of the City of Kaktovik. In so doing, however, the Court failed to defer to agency expertise and simply substituted its judgment for that of DNR in determining what is a "salient" factor for purposes of a best interests finding in support of a decision to lease. To compound its error, the Court disregarded the fact that the Sale 55 administrative record supports DNR's decision that offshore activities in the Sale 55 area would not foreseeably have an adverse impact on the caribou herd located onshore.

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<sup>5</sup> Because unrestricted availability to information concerning the nature and location of any archeological resource increases the threat of site destruction, access to such information is closed to the general public by the Alaska Office of History and Archeology. Authority for this policy is contained in AS 9.25.120 and 16 U.S.C. 470hh. Therefore, even if there were information on known sites offshore in the sale area, DNR is required to withhold specific information regarding those sites until the plan of operations stage when the director of the Division of Oil and Gas and Division of Parks and Outdoor Recreation can work with the lessee to develop site specific mitigation measures.

Subsection (g) of AS 38.05.035 currently provides a complete list of what DNR must consider and discuss in a best interests finding for an oil and gas lease sale. The statute requires that DNR consider the effects of an oil and gas lease sale on fish and wildlife species and the subsistence uses of those species in the sale area. However, it does not require DNR to extend its consideration to potential effects on species located outside the sale area. As the Porcupine Caribou Herd clearly is not found in the sale area, a marine environment, DNR did not violate the statute. Ruling otherwise, however, the Supreme Court created an undefined zone around the sale area which DNR must somehow, without guidance or restriction, delineate and evaluate. Extension of this logic makes it virtually impossible for DNR to assure that it has considered all the species in all the areas that may be alleged to be material.

#### GOODNEWS BAY OFFSHORE PROSPECTING PERMIT DISPOSAL

In the Goodnews Bay offshore prospecting permit case, decided in January of 1994, the Supreme Court again redefined the scope of DNR's best interest analysis. The Court rejected DNR's decision to defer consideration of the possible effects that might result from future mining if workable mineral deposits were found, even though the kind and number of mining operations that might result and whether mining would indeed take place were matters of speculation, and, more important, DNR's subsequent approval of mining leases (and of mining plans of operation) would have been required before mining actually could have taken place. Though the superior court had upheld DNR's best interest finding, the Supreme Court disregarded these uncertainties and the retained authority of DNR, concluding that DNR should have fully analyzed the potential impacts of mining in the region at the prospecting permit stage.

The Supreme Court remanded the Goodnews Bay finding to DNR with instructions to prepare a best interest finding which takes a "hard look" at the effects of mining, including the cumulative regional effects, that might eventually result from the limited exploration to be authorized by the offshore prospecting permits. In response to DNR's argument that its best interest analysis had been as complete as possible at the prospecting permit stage where no development was authorized or even contemplated, the Court suggested that DNR should have emulated the federal practice of conducting environmental impact studies in which a range of possible scenarios are considered.

#### OIL AND GAS LEASE SALES 57 AND 75A

DNR's legislatively mandated administrative proceedings provide a constructive forum where issues regarding lease sales are fleshed out and addressed.

This process is involved, costly and time-consuming. The current system, however, is subject to abuse which unnecessarily delays administrative decisions and obstructs the administrative decision making process. The Sales 57 and 75A appeals are examples of this abuse. Abuse which cost the state significant amounts of money for staff time and resources at DNR and the Department of Law. More important than these direct costs incurred as a result of such abuse, are the indirect costs of chilling participation in the state's leasing program by signaling that Alaska is more vulnerable to litigation over leasing than other areas.

#### Oil and Gas Lease Sale 57 (North Slope Foothills)

DNR's administrative review for Sale 57 began on June 4, 1986, when it issued the first general call for comments on the proposed lease sale. A second call for comments was issued on August 21, 1986, requesting consideration of two proposed leasing schedules involving five proposed lease sales, including Sale 57. Two more calls for comments were issued for Sale 57 on August 14, 1987 (general call for comments), and on March 13, 1989 (request for specific comments on fish and wildlife populations, human uses of those resources, and the potential effects of the sale on those resources and uses).

On June 27, 1990, DNR was forced to defer the date for several lease sales, including Sale 57, because of budget reductions in fiscal year 1990. As a result of the re-scheduling of Sale 57, DNR started the public comment process over again, issuing a general call for comments on September 17, 1990. On May 26, 1992, DNR issued another call for comments (requesting socioeconomic and environmental information and comments). Later, the public was encouraged to comment yet again following the issuance of the preliminary finding on March 23, 1993. Oral testimony on the proposed lease sale also was taken at a public hearing held April 19, 1993, in the community of Anaktuvuk Pass.

DNR's adherence to the administrative process required by law provided ample opportunity for public participation and comment during the Sale 57 administrative proceedings. Only once, however, did Trustees for Alaska and Alaska Center for the Environment ("Trustees"), appellants in the case filed with the superior court, avail themselves of those opportunities. And then, Trustees only submitted one short paragraph of general comments on the sale.

Trustees' one paragraph of general comments was submitted in response to DNR's August 21, 1986 call for comments on two proposed leasing schedules involving five proposed lease sales, one of which was Sale 57. The one paragraph addressing Sale 57 in Trustees' September 2, 1986 submission, contains a general criticism of DNR for failing to mention the proximity of the proposed sale to the Gates of the Arctic National Park and Preserve in the initial public notice. Trustees also

stated that there are questions about the transportation of oil and possible socioeconomic effects in the village of Anaktuvuk Pass associated with the sale.<sup>6</sup> Aside from these broad conclusory statements, Trustees did not explain their concerns. Nor did Trustees submit further comments, scientific data, specific criticisms or testimony.

In fact, during the lengthy administrative review process that followed Trustees' September 2, 1986 generalized and brief criticism of the initial public notice, Trustees never submitted additional comments on Sale 57. Trustees never responded to the four additional calls for comment. Trustees failed to participate in the public hearing held in Anaktuvuk Pass. And Trustees did not submit comments on DNR's preliminary best interest finding -- the document that "describes the proposed sale area and presents the department's review of the areas resources," and which formed the basis for DNR's final best interest finding.

Submission of one paragraph of generalized comments at the very start of a seven year administrative review does not constitute sufficient participation in an administrative proceeding for the purpose of standing to appeal. In the present case, beyond a general criticism of DNR's alleged failure to mention in the public notice the proximity of the proposed sale to the Gates of the Arctic National Park and Preserve, Trustees did not raise any specific concerns regarding Sale 57. Throughout the seven year administrative review, when DNR was actively soliciting public comments (and when criticism would have been constructive), Trustees failed to sufficiently participate. Only after time and resources were spent in conducting a critical review of Sale 57, did Trustees decide to voice their concerns through the appeals process in the courts.

#### Oil and Gas Lease Sale 75A (Colville River Exempt)

The Alaska Supreme Court has held that under the state's Administrative Procedure Act, an appellant must meet three requirements in order to have standing to challenge an administrative agency decision. First, the appellant must have a direct interest in the proceedings. Second, the appellant must be factually aggrieved (suffered an actual injury) by the agency decision. And, third, the appellant must have participated at the agency level. In their appeal of Oil and Gas Lease Sale 75A, Trustees for Alaska and Alaska Center for the Environment ("Trustees") failed at least two of the three requirements established by the Court. Trustees were not factually

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<sup>6</sup> Noticeably absent from that one submission are any concerns regarding riparian areas or archeological resources, or any specific comments regarding impacts of the sale on the Gates of the Arctic National Park and Preserve, which are the issues Trustees subsequently brought on appeal to the superior court.

aggrieved by the DNR's decision to lease tracts of land in Sale 75A. In addition, Trustees did not participate in DNR's administrative proceedings for Sale 75A.

First, Trustees lacked standing to challenge DNR's decision to proceed with Sale 75A because Trustees suffered no actual injury as a result of DNR's decision to lease tracts of land in the sale area. In their points on appeal filed with the superior court, Trustees maintained they were organizations "concerned about sustaining the many values of the region, including the cultural, fish, wildlife, scenic and other values." This abstract concern, however, is not a special damage different in kind from that of the public generally, and it is not the concrete personal injury required by the Court to establish that Trustees were factually aggrieved by DNR's decision to offer the Sale 75A lands for lease.

With respect to the members of the appellant organizations, Trustees' only claim was that their members use and enjoy the sale area for a variety of purposes such as recreation, cultural activities, hunting, fishing, wildlife observation and scientific studies. However, the surface estate of the Sale 75A area is private property wholly owned by the Kuukpiik Corporation. The members of the appellant organizations thus have no right to use the privately held surface estate for their activities. Consequently, Trustees could not honestly assert that any individual member their organizations sustained an actual injury when DNR determined that leasing the Sale 75A area was in the best interests of the state.

In order to establish standing to appeal Sale 75A, Trustees also needed to demonstrate that they participated in the administrative proceedings below. DNR's adherence to the administrative process required by law provided ample opportunity for public participation and comment on proposed Sale 75A. See, e.g., January 15, 1993 Call for Comments; and March 23, 1993 Notice of Intent to Issue a Final Finding (inviting the public to submit written comment on any aspect of the sale, and giving notice of an April 14, 1993 public hearing scheduled in accordance with AS 38.05.180(d)(2)). Trustees never availed themselves of those opportunities. Therefore, Trustees lacked standing to challenge DNR's decision and their appeal of Sale 75A was frivolous.

#### OIL AND GAS LEASE SALE 78 (LOW...P COOK INLET)

The appeal of Oil and Gas Lease Sale 78 was initiated on November 19, 1993, when the appellants filed their notice of appeal, statement of points on appeal

and designation of record with the superior court in Kenai.<sup>7</sup> Seven weeks after filing their appeal, on the eve of the sale, the appellants filed their "emergency" motion for stay. Late on January 24, 1994, less than 18 hours before the sale was scheduled to occur, the superior court issued its decision staying Sale 78.

In its order staying the sale, the court held that DNR did not comply with 6 AAC 80.040 when making its coastal consistency determination. The court's superficial analysis on this point states in full:

First, there is no discussion of the priority required in 6 AAC 80.040. Has the Commissioner considered both offshore oil and gas development and a fishery as water dependant and [sic] activities? Or, is oil and gas [sic] a water related activity? The Court cannot determine whether the sale is consistent with either standard absent a finding.

With this limited analysis, the court failed to recognize the "plain meaning" of the regulation, and it ignored both DNR's discussion of this regulation and the restrictions DNR placed through the terms of its leases and mitigating measures on potential future offshore oil and gas development.

6 AAC 80.040(a) states that "[i]n planning for and approving development in coastal areas, districts and state agencies shall give in the following order, priority to . . . ." As was discussed in detail in DNR's Opposition to the Stay -- and apparently conceded to by the court -- an oil and gas lease sale is not itself "development." Development, if and when it ever occurs, requires permits, plans of operation, and other authorizations. Therefore, the relevant part of this regulation would be "planning for . . . development." The oil and gas lease sale itself has no direct impact on other water-dependent activities, and in planning for potential future

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<sup>7</sup> The appellants' statement of points on appeal for Sale 78 wholly fails to identify any specific issues with regard to DNR's best interest finding and coastal consistency determination. The appellants only allege that DNR's Sale 78 best interest finding is arbitrary and capricious because: (1) it fails to "properly weigh the pros and cons of the lease sale," and (2) it fails to "evaluate standards in AS 38.05.035 (e), (g), the ACMP, and applicable local coastal management plans." The appellants did not identify any of the "cons" DNR failed to address, nor do they specify which of the standards in the cited statutes and regulatory programs DNR failed to evaluate. Even after the state asked the court to require a more specific description of the points on appeal, the court refused, thereby indicating its willingness to accept anything.

activities, DNR cannot give priority to either of these two water-dependent uses (fishing and the offshore oil and gas industry) because neither by its nature has a priority over the other.

The appellants argued, and the court appeared to accept without question, that potential offshore oil and gas development is not a water-dependent activity.<sup>8</sup> However, the appellants' argument that offshore development cannot be water-dependent simply ignores the plain meaning of the term "offshore,"<sup>9</sup> a characteristic of areas of this sale described over and over in the final finding and the preliminary finding.

Moreover, the appellants acknowledged the water-dependency of potential offshore oil and gas activity when they stated in their Memorandum that "DNR should have required in the lease terms directional drilling to access all tracts south of Kasilof and tracts 20 and 21 wherever possible." If directional drilling is not possible and yet the oil or gas prospect is offshore, the appellants' statement concedes to the obvious: that the exploration or development of that prospect cannot be carried out without being in or on the water and therefore must be "water-dependent."

The appellants and the court ignored the numerous Mitigation Measures imposed to avoid potential conflicts between two such activities that must each be carried out in or on the water.<sup>10</sup> Since no specific projects can or have been proposed at the lease sale stage, DNR cannot determine if, where or when any restriction might be invoked, but it has planned for such. Where possible, in order to avoid conflict, DNR has reserved the right to require that fishing be accorded accommodation by allowing only directional drilling in offshore oil and gas development. Where such measures are not possible, no priority exists between

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<sup>8</sup> "[W]ater-dependent" means a use or activity which can be carried out only on, in or adjacent to water areas because the use requires access to the water body." An offshore oil or gas deposit cannot be found anywhere except in water.

<sup>9</sup> Although DNR did not make an explicit and redundant statement of the obvious, the water-dependent status of potential offshore oil and gas development is reflected in DNR's statement in the Preliminary Finding that "[t]he following proposed Mitigation Measures are designed to prevent significant interference with other water-dependent and water-related activities . . . ."

<sup>10</sup> For example, Mitigation Measures 9(b) (addressing offshore pipelines); 13 (restrictions to avoid conflict with fishing); 16(d) (offshore disposal); 20 (offshore seismic activities).

these two activities, neither of which can be carried out onshore, but other measures to mitigate any potential conflicts between the two uses have been imposed. Therefore, DNR's consistency determination complied with 6 AAC 80.040, and deference should have been given to its decision.

The superior court's order also stated summarily that DNR's consistency determination does not discuss the requirements of 6 AAC 80.130(d) and therefore cannot be consistent with the ACMP standards. The court failed, however, to acknowledge that 6 AAC 80.130(d), upon which it relies exclusively in this argument, is invoked only when "uses and activities in the coastal area which will not conform to the standards contained in (b) and (c) of [6 AAC 80.130]" exist. The court never discussed or analyzed the requirements of 6 AAC 80.130 (b) or (c). 6 AAC 80.130(b) states as follows:

The habitats contained in (a) of this section must be managed so as to maintain or enhance the biological, physical, and chemical characteristics of the habitat which contribute to its capacity to support living resources.

6 AAC 80.130(c) provides a standard for the management of each of the different habitats listed in 6 AAC 80.130(a) excluding "important upland habitat." The court did not discuss or cite evidence that the habitats are not being managed so as to maintain such characteristics or standards.

DNR took a hard look at the requirement and issues of 6 AAC 80.130.<sup>11</sup> First DNR imposed numerous stipulations and mitigation measures that are specifically designed to achieve maxim compliance with the 6 AAC 80.130(c) standards of maintaining and enhancing the coastal habitats.<sup>12</sup> DNR's analysis points out that:

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<sup>11</sup> DNR's discussion of and actions taken in response to 6 AAC 80.130 reflect that, to the extent possible at the lease sale stage, DNR has dealt with the "knowns," and further, even tried to provide for future possibilities by requiring mitigation measures. This comported fully with the Supreme Court's recent case law under the ACMP developed in the Camden Bay II decision (DNR must identify known hazards and known archeological sites). Still, the superior court did not accept or defer to the agency's analysis and decision.

<sup>12</sup> There is no requirement that DNR include all of its analysis in its conclusive consistency determination. The Supreme Court had held that DNR must only "establish a record which reflects the basis for [its] decision."

Issuance of oil and gas leases in itself authorizes no uses or activities in the sale area. The measures discussed in this section of the consistency analysis are designed to minimize the impact of post-lease sale oil and gas activity on the environment and to conform to 6 AAC 80.130(b) 6 AAC 80.130 (c), and the MSECMP and KPBCMP policies.

Second, DNR acknowledged that despite these precautions, "[p]articularly if oil and gas deposits are discovered in the proposed sale area, there may be uses or activities in the sale area which will not 'maintain or enhance the biological, physical, and chemical characteristics' of the coastal habitat in which they are located." DNR then parsed through, analyzed, and responded to each of the three parts of 6 AAC 80.130(d).

Therefore, since the court held that there was no irreparable harm shown nor any clear showing of probable success on the merits of the appellants' arguments against the best interest finding, and there is no basis for any showing of probable success on the merits with regard to 6 AAC 80.140 and .130, the stay of Sale 78 should not have been imposed and was issued in error. Nevertheless, DNR's appeal of this obviously flawed decision was summarily dismissed by the Alaska Supreme Court in a one sentence order.

## CONCLUSION

Only the legislature can take some of the unpredictability out of judicial review of DNR's best interest findings and coastal consistency determinations. To do so, Title 38 and Title 46 must be amended to explicitly grant DNR the discretion to define the scope of its analyses and to require that issues be brought to DNR's attention during public review of a proposed disposal if they are later to be the subject of an appeal to the courts.

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 308(FIN)

Page 2, line 22:

Delete "necessary"

Insert "required by the state"

Page 3, line 2, after "completion":

Insert "but is not intended to artificially divide or segment a proposed development project to avoid thorough review of the project or to avoid consideration of potential future environmental, sociological, or economic effects"

Page 4, line 16, after "department":

Insert "describes its reasons for a decision to phase and"

Page 6, line 29, after "finding":

Insert ". if required."

Page 7, line 11, after "a":

Insert "preliminary or"

Page 8, line 18, after ",":

Insert "and"

Page 8, lines 19 - 29:

Delete "in a preliminary written finding, facts that are known to the director at the time of preparation of the finding and that are

(A) material to issues that the department identifies.

whether or not material to a matter set out in (B) of this paragraph, and within the scope of the administrative review established by the director under (e)(1) of this section or

(B) material to a matter described in (1)(B) of this subsection [A SUMMARY OF AGENCY AND PUBLIC COMMENTS RECEIVED AND THE DEPARTMENT'S RESPONSES TO THOSE COMMENTS]; and

(3)"

Insert "[A SUMMARY OF AGENCY AND PUBLIC COMMENTS RECEIVED AND THE DEPARTMENT'S RESPONSES TO THOSE COMMENTS; AND

(3)]"

Page 9, line 7:

Delete all material.

Renumber the following paragraphs accordingly.

Page 9, line 9, before "the economic":

Insert "except as otherwise provided in AS 38.05.073 for land suitable for recreational facilities development leasing,"

Page 9, line 12:

After "file"

Insert "an administrative appeal or"

After "reconsideration"

Insert ", as appropriate,"

Page 9, line 15, after "finding,":

Insert "file an administrative appeal or"

Page 9, line 16, after "file":

Insert "an administrative appeal or"

Page 9, line 20, after "comment;":

Insert "or"

Page 9, line 22:

Delete "or"

Insert "and".

Page 9, lines 23 - 26:

Delete

"(C) adopting as the person's own testimony concerns that were expressed by another, either by submitting a written statement to that effect during the period for receipt of public comment or by so declaring during a public hearing; and"

Page 9, line 28:

Delete "A"

Insert "An administrative appeal or a"

Page 9, line 30, after "deny the":

Insert "administrative appeal or reconsideration"

Page 10, line 3, after "If":

Insert "an administrative appeal or"

Page 10, line 4:

Delete "after reconsideration"

Page 10, line 8, after "request,":

Insert "an administrative appeal or"

Page 10, line 9, after "on":

Insert "administrative appeal or"

Page 10, line 13, after "person's":

Insert "administrative appeal or"

Page 13, lines 18 - 19:

Delete "proposed for that phase"

Insert "for which the consistency determination is sought"

Page 13, line 24:

Delete "proposed for that phase"

Insert "for which the consistency determination is sought"

Page 13, line 26:

Delete "prepare and issue a written statement describing"

Insert "describe in the consistency determination"

ADDITIONS/CORRECTIONS TO SENATE AMENDMENT OF CSSB 308  
APRIL 20, 1994

- o Page 3, Line 2  
Purpose: Fixes glitch - language was adopted in the wrong place.
  
- o Page 8, Line 18  
Purpose: Chenowith rewrite for clarity.
  
- o Page 8, Line 19 - 29  
Purpose: Chenowith rewrite for clarity.
  
- o Page 9, Line 7  
Purpose: Chenowith rewrite for clarity.
  
- o Page 9, Line 9  
Purpose: Chenowith rewrite for clarity.
  
- o Page 9, Line 12  
Purpose: To clarify that there may be appeals or requests for reconsideration, depending upon whether or not the best interest finding is issued with the advanced review and concurrence of the commissioner.
  
- o Page 9, Line 15  
Purpose: Technical amendment, same as page 9, line 12.

- **Page 9, Line 16**  
Purpose: Technical amendment, same as page 9, line 12.
  
- **Page 9, Line 20**  
Purpose: To clarify that a party may demonstrate meaningful participation in the administrative process by either submitting written comment or presenting oral testimony.
  
- **Page 9, Line 22**  
Purpose: Technical amendment, to clarify that meaningful participation for the purposes of judicial appeal requires submittal of written or oral comments and that the party is a party who is affected by the final written finding.
  
- **Page 9, Line 28**  
Purpose: Technical amendment, same as page 9, line 12.
  
- **Page 9, Line 30**  
Purpose: Technical amendment, same as page 9, line 12.
  
- **Page 10, line 3**  
Purpose: Technical amendment, same as page 9, line 12.
  
- **Page 10, Line 4**  
Purpose: Technical amendment to conform language to changes made at page 9, line 12.

- o Page 10, Line 8

Purpose: Technical amendment, same as page 9, line 12.

- o Page 10, Line 9

Purpose: Technical amendment, same as page 9, line 12.

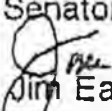
- o Page 10, Line 13

Purpose: Technical amendment, same as page 9, line 12.

- o Page 13, Line 26

Purpose: Fixes glitch - eliminates redundancy; deletes "shall."

# MEMORANDUM

TO: Senator Drue Pearce  
FROM:  Jim Eason, Director  
Division of Oil and Gas, DNR  
RE: CSSB 308  
DATE: April 9, 1994

You have asked that I respond to the concerns raised in the "Coastal Districts' Briefing Paper on CSSB 308" dated April 7, 1994, which was addressed to members of the Senate Finance Committee. My comments below address the issues raised in that document, and summarize briefly the responsive amendments reflected in the current CSSB 308. In addition, I have outlined certain other amendments which are currently being drafted which will respond to specific recommendations received during yesterday's hearing and subsequently.

Based upon my review, I believe there may be some confusion arising from the fact that the Districts' comments are directed to the prior version of CSSB 308, version K. The work draft of CSSB 308 which the Finance Committee adopted yesterday is version U. Version U represents DNR's response to the working groups' comments and recommendations which were raised during the five meetings between the parties since S.B. 308 arrived in the Senate Finance Committee.

Version U of CSSB 308 contains many substantive amendments which were made to address concerns of the Districts, as well as others including the federal Office of Coastal Resource Management (OCRM). The changes which were incorporated to address specific concerns identified in the Coastal Districts' Briefing Paper are summarized below.

First, in response to the groups' concerns about scope of review, language was incorporated in the Findings of Section 1 to make clear that the scope of review for findings will include a response to all

concerns raised during the public review period before a disposal. For oil and gas lease sales, for example, all factors listed under current A.S. 38.05.035 (g) must be addressed plus any other issues raised by the public.

In response to concerns about potential abuse of the right to phase consideration of projects, language was added in Findings 10 and 11 to clarify intent, and Section 8 was amended to make clear that phasing of state disposals and projects would occur only under the same circumstances as federal regulations now provide.

Under both federal and state law, as amended by Version K of CSSB 308, phasing would be appropriate when not enough is known about the potential future aspects of a development project to issue just one conclusive consistency determination. If the specifics of a proposed project can be sufficiently defined in the beginning, phasing cannot be allowed.

To further strengthen this concept, Finding 11 provides explicit guidance to a director that "...consideration of a disposal as a phase of a development project is not intended to avoid consideration of potential future environmental or sociological effects, but rather is intended to allow for consideration of those issues when sufficient data are available upon which to make reasoned decisions."

The Briefing Paper expressed concern that "...certain portions of S.B. 308 may be disallowed by the federal government..." and referenced earlier correspondence from OCRM and an April 24, 1994 Alaska Attorney General's Opinion. However, both the OCRM letter and the Attorney General's Opinion were written in response to version K of S.B. 308.

The two provisions of version K which both of those documents questioned as potentially being disallowed were the effect of limiting the review of effects under both best interest findings and consistency determinations to "direct effects", and not defining the circumstances under which phased review of projects would be allowed.

We have addressed both concerns in the current version of CSSB 308 by deleting the references to "direct" in Sections 2 and 8 and, as mentioned above, by adopting the standard applied under the

applicable federal regulations for determining when phasing is appropriate in Section 8 of version U of the CSSB 308.

The Coastal District representatives also asked that the legislature take no action on S.B. 308, and that instead it support deferral of any action until a broad-based working group addresses phasing in greater depth.

In the best of all possible worlds, we might have the luxury of a more lengthy process. It was never our intent that the legislature have to deal with these issues at all, much less under the pressures of having to bring controversial legislation forward during a session when many important issues must be addressed. However, we find ourselves having to respond to decisions by the Court, the timing of which was beyond our control.

The effect of those decisions has been to place all leasing decisions at risk to successful challenges absent amendment of both Title 38 and Title 46 as proposed in CSSB 308. As a result, we all find ourselves having to deal with these issues under less than perfect circumstances. Nevertheless, we have listened carefully to the concerns of everyone who has participated in the working group meetings on this legislation, and we have tried to accommodate those concerns where we can.

In addition to the amendments described above, version U of the CS for CSSB 308 also reflects the following amendments:

- The requirement to issue a preliminary best interest finding for oil and gas lease sales has been codified in statute. Further, the amendments provide that the preliminary finding will be issued no later than six months before a scheduled sale, and that the public will have no less than 60 days in which to comment.
- The public notice provisions for preliminary and final best interest findings have been enhanced. New minimum standards have been established to assure that notice for oil and gas disposal decisions will consist of legal notices, display ad notices, notice by electronic media and at least one other method.
- The proposed amendment to A.S. 38.05.035 (g) to limit discussion of fish and wildlife species and their habitats to those within the sale area has been deleted.

- Appeal procedures have been drafted which clarify and make more predictable for all parties the standards and timelines for appeals of final best interest findings.

Comments received during and after the hearing on April 8th are being addressed by the following amendments:

- Section 4 (B) is being amended to require that the final best interest findings for oil and gas lease sales will be issued 90 days before a scheduled sale instead of 21 days as is currently required. This amendment responds to concerns raised by Trustees for Alaska that appeal rights might otherwise be truncated.

- In response to comments received from the Kenai Peninsula Borough, an amendment is being drafted to assure that the director addresses in writing both issues either raised during public review or otherwise required by statute to be considered regardless of whether or not they are determined by the director to be material to the phase of the proposed disposal or project under consideration. The director will have to rationalize in writing the basis for his determinations of materiality.

Finally, as you well know, it is difficult, if not impossible to adopt every proposed amendment to any piece of legislation. To do so in the case of CSSB 308 would inevitably lead to legislation that would not be responsive to the problems which the Courts have identified. Nevertheless, I believe the current version of CSSB 308 represents a good faith effort to be responsive to the concerns of the Coastal Districts and others without diminishing the intent of the legislation.

If I can answer any additional questions, please feel free to call

# STATE OF ALASKA

DEPT. OF NATURAL RESOURCES

DIVISION OF OIL AND GAS

*file*  
WALTER J. HICKEL, GOVERNOR

P.O. BOX 107036  
ANCHORAGE, ALASKA 99510-7036  
PHONE: (907) 762-2653  
(907)762-2547

April 12, 1994

The Honorable Drue Pearce  
Alaska State Legislature  
State Capitol, Room 508  
Juneau, Alaska 99801-1182

via fax 465-3872 and mail

Subject: Amendments to CSSB 308

Dear Senator Pearce:

By memorandum dated April 9, 1994 I discussed the amendments reflected in version U of CSSB 308. In addition, I described two amendments which were, at that time, being drafted in response to comments which had been received during and after the Senate Finance Committee hearing on April 8.

In addition to the two amendments which were being drafted at the time, eight additional amendments have now been drafted for consideration by the Finance Committee. I have summarized below the purpose for each of those amendments.

- o Amendment #3 clarifies that persons may meaningfully participate in an administrative review by presenting oral testimony or by affirmatively adopting the testimony of others by submitting a written statement to that effect during the period allowed for receipt of public comment or during the public hearing.
- o Amendment #4 was drafted in response to any public comments indicating concern that comments on proposed disposals or projects would be summarily dismissed if determined by the Director to be non-material. The amendment clarifies that the Director will discuss, in writing, the reasons for any determination of non-materiality, as well as discussing, in writing, those issues which he finds material to a proposed disposal or project.
- o Amendment #5 clarifies that the determinations of the state's best interest are those rendered under Title 38; specifically, AS 38.05.
- o Amendment #6 clarifies that it is the Legislature's intent that the public have an opportunity to timely and meaningfully participate in the Director's determination of the scope of review appropriate to a specific finding.

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APR 12 1994

FAX NO. 9076623852

DIV OF OIL AND GAS

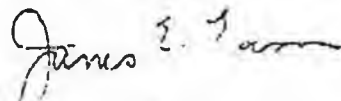
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The Honorable Drue Pearce  
April 12, 1994  
Page 2

- o Amendment #7 simply adds economic effects to environmental or sociological effects in finding #11 of CSSB 308.
- o Amendment #8: The language of this amendment is designed to reinforce legislative intent that a Director should not "divide or segment" proposed projects in order to avoid a thorough review of the project.
- o Amendment #9 clarifies that both Oil and Gas Preliminary and Final Best Interest Findings will include a summary of agency and public comments received as of the time of each finding, as well as the department's responses to those comments. In addition, this amendment codifies the requirement that all written findings issued under AS 38.05.035 will include a summary of agency and public comments, as well as the department's response to those comments.
- o Amendment #10 establishes a requirement that when a consistency review is limited to consideration of a specific phase, the Director or the responsible agency will prepare and issue a statement describing its bases for making a consistency determination in phases.

If you have any additional questions, please feel free to call.

Sincerely,



James E. Eason  
Director

041294pjr



## Kodiak Island Borough

710 MILL BAY ROAD  
KODIAK, ALASKA 99615-6340  
PHONE (907) ~~452-1111~~

April 15, 1994

VIA FAX 465-3872

Senator Drue Pearce  
Alaska State Legislature  
State Capitol (MS 3100)  
Juneau, Alaska 99801-1182

RE: SB 308 version X and proposed amendments (April 14, 1994)

Dear Senator Pearce:

Due to time constraints this letter of necessity will be brief. After careful consideration of the recent amendments proposed for version X of SB 308, the Kodiak Island Borough feels we can work with you to gain passage of this legislation.

We want to thank you and your staff, especially David Rogers, and the administration, especially Jim Eason for your efforts to resolve issues surrounding this bill. Such effort, on all sides, has improved this bill dramatically.

As you are aware, the Kodiak Island Borough previously objected to the inclusion of phasing, as a concept, in this bill. It is evident to us that the Senate intends to include phasing in this bill and to that end we have worked to make the language of the bill acceptable. We believe the most recent amendments, for the most part, accomplish this.

There are five sections of the bill that continue to contain language that is unclear to us. We believe that we have conceptual agreement on the intent of this language, however, we would like to continue discussions about the implications of this language. The language in question is: the meaning of "may address only" on line 22, page 3; the implications of "aggrieved" and



## *Kodiak Island Borough*

Senator Drue Pearce

Page 2 of 2

April 15, 1994

"affected" on lines 13 and 27 of page 9, respectively; the meaning of "economic feasibility" on line 9 page 9; the meaning "material" on line 23 page 13; and the meaning of "for which the consistency determination is sought", to be added on page 13. We hope to continue productive, informative dialog about this language; at the same time we applaud and support your efforts to resolve the other issues we have identified in previous versions of the bill.

Again, please accept our thanks for working with us to improve the language of this bill.

Sincerely,

A handwritten signature in cursive script, appearing to read "Linda L. Freed".

Linda L. Freed, Director  
Community Development Director

c.c. Jerome Selby, Borough Mayor  
Kodiak Island Borough Assembly

Jon Isaacs and associates . 2416 forest park drive . Anchorage, Alaska . 99517 . (907)274-5719 . fax 276-6117

April 15, 1994

Honorable Senator Drue Pearce  
Chair, Senate Finance Committee

Dear Senator Pearce:

As a member of an informal coastal district working group, I have been participating in the review of Senate Bill 308 with representatives of the Department of Natural Resources, and Mr. David Rogers, who has been representing your committee. Over the last two months, I have participated in several Senate Finance Committee Meetings and workgroup discussions to develop a bill that addresses the concerns of the Department of Natural Resources without creating significant problems for the coastal districts and other municipalities.

On the afternoon of April 15, a small group of individuals worked on the significant outstanding issues identified by the informal coastal district working group. I should mention that this group does not represent or speak for all coastal districts, many of whom have other valid concerns regarding this legislation. In this meeting, we came to consensus on most of the major issues, with a few exceptions. The issues where consensus was reached was to:

- include finding language that phasing of coastal consistency determinations is not intended to artificially segment a project
- that the reasons for phasing a best interest finding are included in the preliminary finding, and are subject to public comment and appeal under appropriate avenues
- that when a consistency review is phased, the consistency review will be based on the use or activity for the consistency determination is sought rather than restricted to the phase - this allows consideration of "known facts" and reasonably foreseeable significant effects related to the use of activity
- that when a consistency review is phased, the consistency determination will include a basis for phasing the review, and that this basis is subject to standard coastal management elevation or appeal rights.


Issues where there is still some differences regarding language or resolution include:

- use of "may address only" vs. shall address reasonably foreseeable significant effects related to the use in Section 2 (A) of AS 38.05.035(e). DNR's verbal intent is that, at a minimum, reasonably foreseeable significant effects related to the use will be addressed. The appropriate language needs to be used.

- on page 5, item (6), DNR has indicated that 21 days may not be adequate time for public involvement in this step; they are researching best interest requirements and have indicated that they will come up with an appropriate number
- standing to request appeal or reconsideration of a best interest finding; I understand that DNR is looking into what language may be more appropriate
- in Section 8, page 13, line 22, the concept of material to the consistency determination has not been previously used or defined; I would prefer the term relevant be used in its place or material defined
- finally, I understand that some municipalities are still concerned about the lack of guidance regarding other best interest findings besides oil and gas, mining, timber, and commercial recreation; while language in the bill requires addressing reasonably foreseeable significant effects related to the use, and the basis of phasing can be appealed, I suggest that DNR continue to consider other solutions.

I greatly appreciate the efforts of members of the Senate and particularly Senator Pearce in supporting this working group process and resulting in better legislation. I also appreciate the efforts of Jim Eason and other members of the administration, David Rogers, coastal districts, fishing groups, and environmental groups in trying to reach consensus. While not a perfect bill that makes everyone happy, the language changes as provided by Mr. Rogers has addressed major concerns. Again, the legislature should be aware that I can only speak for myself and not represent or speak for all coastal districts, many of whom have other concerns. Thank you all for your efforts.

Sincerely,

  
Jon Isaacs

April 15, 1994

Honorable Senator Drue Pearce  
State of Alaska Senate

Dear Senator Pearce:

I have been part of the informal working group which has been working to try and achieve consensus on SB 308. I have had an opportunity to review Version X, and to discuss, in concept, the amendments which are to be proposed on April 15, 1994. There has been substantial improvement in the bill and I appreciate the efforts of DNR and the Senate Finance Committee to attempt to address concerns raised by the coastal districts and others. I believe the efforts of those who have worked on this bill will result in a better public process. There are a few remaining issues which need to be resolved, and I support the continued efforts of the Legislature to resolve the remaining issues this session.

There have been numerous revisions made to this legislation, and I wish to highlight a few which I can support without reservation:

I support the examination of "reasonably foreseeable significant effects" and commend DNR for its selection of this as a standard for what will be examined upon the decision to phase.

I endorse the public notice provisions and the provision that a final best interest finding will be issued not less than 90 days before the sale lease or other disposal.

I also endorse the establishment of the requirement for a preliminary best interest finding for oil and gas lease sales in statute, a practice which DNR has, heretofore, undertaken voluntarily.

I commend DNR and the Senate Finance Committee for their agreement that the effects on fish and wildlife species and their habitats in the area will remain in the existing statute.

Finally, I commend DNR and the administration for adopting the federal language on phasing, into the Title 46 portions of the statute.

There are remaining issues which, I believe, can be resolved through the legislative process. Those issues are addressed below:

Phasing of all land disposals under Title 38

Throughout this process the some coastal districts have identified a fundamental problem with this legislation that arises under Title 38, which proposes to allow phasing for all land disposals. I believe that the provisions of section 38.05.035(g)

affords the necessary guidance to DNR to phase oil and gas lease sales. However, that same guidance is not provided for phasing of other types of disposals (timber, mining etc.) I believe that there need to be specific factors developed or referenced which the Director will examine in the decision to phase other disposals.

#### Phasing under Title 46 (ACMP)

There is one remaining question under Title 46. The language states that the consistency review shall be based on facts pertaining to the use or activity for which the consistency determination is sought that are "material" to the consistency determination. There is no definition of what constitutes issues which are "material" and that language does not appear elsewhere in the ACMP. Since this section addresses phasing for all projects, we believe that this vague language will result in additional litigation on the specific meaning of that word. We recommend deletion of that section. I understand that the language proposed to be added "for which the consistency determination is sought." is intended to mirror the federal scope of review for phased projects. If that intent is confirmed, then I believe this language will be adequate to meet concerns I have previously expressed about phasing under the ACMP.

#### Standing to Request Reconsideration/Appeal

The issue of standing is one which significantly affects public participation under this legislation. DNR has stated that the intent of this legislation is to provide for that any person who has submitted written or oral comments during the comment period be allowed to request reconsideration or, as appropriate, administrative appeal. There is remaining confusion as to whether the commenting person may raise any issue that has been identified during the public comment period, or whether the person will be limited to those issues which he or she personally raised. I believe that any issue which was raised during the administrative review should be examined on reconsideration if raised by a person who has commented during the administrative review.

I further believe that the words "is affected by the decision" (page 9, line 27) should be deleted from the bill, because it does not comport with the existing Alaska law on standing. I support the "private attorney general" theory of standing which has been endorsed by the Alaska Supreme Court. Finally, there may be some confusion by the simple addition of the word "appeal" on p. 9, line 12. I suggest the words "administrative appeal" be added so that it is not confused with an appeal to Superior Court.

#### Clarification of "Economic Feasibility"

Section 4 of the bill states that the director may not be required to speculate about the "economic feasibility" of ultimate development. That phrase is troubling because it is not defined, and it has implications for disposals which affect coastal

districts. In discussions with DNR it was suggested that this phrase is directed toward the economic feasibility of the applicant's ultimate development project. I believe that clarifying language should be added to state that the best interest finding shall consider the potential economic benefits and potential economic detriments from a disposal, but may not be required to speculate about future effects subject to future permitting which relate to economic feasibility, if there is no known information which can be reasonably determined.

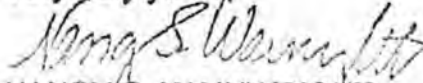
Changing the words "may address only" to "shall address"

The language in Section 2 states that the scope of review and finding of the Director "may address only" reasonably foreseeable significant effects. The use of the word "may" means that the director is not obligated to address those effects. The addition of the word "may ...only" implies that there is no ability to look further, if, in the Director's discretion, there are effects which should be analyzed. We suggest the changing of the language to read: "The Director shall address reasonably foreseeable...". This will make this requirement mandatory, but will also allow the flexibility to the Director to consider other effects.

Conclusion

I am encouraged by the progress which has been made on this bill. While every interest may not have been fully satisfied, I believe that the overall result of this bill will be better public policy decision-making, which will successfully withstand legal challenges. I look forward to working with DNR, fishing groups, environmental groups, and all other interests to resolve the few remaining issues and to develop a process which will implement this legislation successfully.

Very truly yours,

  
NANCY S. WAINWRIGHT

April 17, 1994

Honorable Senator Drua Pearce  
Chair, Senate Finance Committee

Dear Senator Pearce:

Linda Freed and I would like to express our sincere thanks for your efforts in making possible the process for developing a sound version of Senate Bill 308. Without your support and direction for consensus based legislation, it would not have been possible to come as far as we have. Given that the bill is a priority of the Senate, and there are many other pieces of important legislation that require your attention, we appreciate your patience with us while we attempted to come up with language that addresses the concerns of the Department of Natural Resources without creating significant problems for the coastal districts and other municipalities.

David Roger's participation was invaluable in reaching a compromise over language; he was able to facilitate from a neutral position and encourage cooperation. We also appreciate the suggestions and compromises made by Mr. Eason and the administration during the course of discussion; our understanding of his concerns initiated our working group approach to finding appropriate solutions.

Over the weekend, Linda and I have contacted several of the coastal districts who have been involved with SB 308 and urged that they support the amendments introduced last Friday. We expect that some of them will contact their Senators to request support of the amendments during reconsideration. Because not everyone has seen the amended language, it remains problematic for us to speak on behalf of all coastal districts; however, we feel most of the major issues have been addressed and have expressed our position to others.

In closing, again thank you for your invaluable assistance, and we hope that you will continue to support the amendments.

Sincerely,

Jon Isaacs  
Linda Freed

**MATANUSKA-SUSITNA BOROUGH  
RESOLUTION SERIAL NO. 94-046**

**A RESOLUTION OF THE MATANUSKA-SUSITNA BOROUGH ASSEMBLY REVISING  
THE BOROUGES POSITION REGARDING PROPOSED SENATE BILL 308 OF THE  
ALASKA STATE LEGISLATURE.**

WHEREAS, proposed Senate Bill 308 would modify administrative procedures and decisions by State agencies that relate to uses and dispositions of State land, property, and resources, and to the interests within them, and further modify administrative procedures that relate to uses and activities involving land, property, and resources, and to the interests within them that are subject to the Coastal Management Program when the use or activity is to be authorized or developed in phases; and

WHEREAS the Matanuska-Susitna Borough previously adopted MSB Resolution Serial No. 94-032 opposing House Bill 308 and its identical counterpart House Bill 474; and

WHEREAS, since the adoption of MSB Resolution Serial No. 94-032 the Borough has participated with the State of Alaska and other interested parties in review and revision of Senate Bill 308; and

WHEREAS, the Borough recognizes the cooperative review and legislative committee process is working and has produced an improved revised CS Senate Bill 308 (FIN) and significant proposed amendments to the Bill which if approved, would relieve many concerns of the Borough; and

WHEREAS, the Bill if approved by the Senate will proceed to the House of the Alaska State Legislature for further review, and possible revision; and

NOW THEREFORE BE IT RESOLVED the Matanuska-Susitna Borough supports passage by the Senate of CS Senate Bill 308 (FIN) if it is amended as proposed by Senator Pearce in accordance with the senate amendment document dated 4-18-94

BE IT FURTHER RESOLVED the Borough supports the Senate passage of a letter of intent for CS Senate Bill 308 (FIN) as submitted by Senator Suzanne Little and which reads as

follows: ("It is the intent of the legislature that the sections of this legislation pertaining to AS 46.40 will be consistent with the federal coastal zone management program regulations and intent governing phased consistency determinations."); and

BE IT FURTHER RESOLVED that the Borough asks the State legislature to ensure the rights of the local government to protect the interests of its residents are preserved within the implementation of this act through preliminary and final best interest findings conducted under AS 38 and consistency determinations conducted under AS 46.

ADOPTED by the Matanuska-Susitna Borough Assembly this 19 day of April, 1994.

ERNEST W. BRANNON, Borough Mayor

ATTEST:

*Linda A. Dahl*

LINDA A. DAHL, Borough Clerk