

HB

120

SENATE COMMITTEE REPORT

DATE: 2/14/97

FURTHER:

DATE TURNED
IN TO OFFICE: 2/27/97

Judiciary Committee considered

CS FOR HOUSE BILL NO. 120(JUD)

"An Act relating to the power of the attorney general to waive immunity from suit in federal court; and providing for an effective date."

and recommends:

be replaced with _____ CS _____ ()

adopt previous _____ CS _____ ()

attached amendment(s)

adopt Letter of Intent by _____ Committee

further referral to the _____ Committee

Senate Bill:

same title

new title

House Bill:

same title

technical change

new: SCR# _____

SIGNING DQ PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>Mike Miller</i>	<input checked="" type="checkbox"/>	<i>Miller</i>	<input checked="" type="checkbox"/>		
<i>Ray B. Parnell</i>	<input checked="" type="checkbox"/>				
<i>Deane</i>	<input checked="" type="checkbox"/>				
CHAIR <i>John Taylor</i>	<input checked="" type="checkbox"/>	CHAIR:			

NEW FISCAL NOTE(S):

Department Date Zero Fiscal

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department Date Zero Fiscal

Department	Date	Zero	Fiscal
<i>(H) Law/Civil Div</i>	<i>2/7</i>	<i>0</i>	

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

FISCAL NOTE

No. 1
 Bill Version: CSHB 120(JUD)
 (H) Publish Date: 2/12/97

**STATE OF ALASKA
 1997 LEGISLATIVE SESSION**

Revision Date: _____ Dept. Affected: Department of Law
 Title: ...power of attorney general to waive immunity BRU: Civil Division
 from suit in federal court...effective date Component: General Legal Services
 Sponsor: Representative Hudson
 Requester: House Judiciary COMPONENT SERIAL NO. 2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill will have no fiscal impact for the Department of Law.

Prepared by: Fred Fisher Phone: 465-3672
 Division: Administrative Services Division *Fred Fisher* Date: 2/7/97
 Approved by Commissioner: Bruce M. Botelho, Attorney General Date: 2/7/97
 Agency: Department of Law

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Sponsor Statement for CSHB120

The Eleventh Amendment to the United States Constitution prohibits suits against states in federal court for damages brought by citizens of that state. Recent decisions of the United States District Court for the District of Alaska have prohibited the Attorney General from waiving this immunity without express legislative authority to do so. Although the Attorney General has statutory authority to represent the state in all civil actions in which the state is a party, there is no specific legislative grant to waive Eleventh Amendment immunity where it is in the state's best interest.

From time to time there are cases where it is procedurally advantageous for the state to waive its Eleventh Amendment immunity and have a case heard in federal court - there are presently two such cases before the state of Alaska.

The first case is addressed in the original language for HB120. The United States is being sued by plaintiffs in Alaska who seek a judgment that the US owns the tidelands in the Tongass National Forest. The State has not been named as a defendant, however, it would like to intervene to determine its title to the lands in dispute.

Only by joining as a defendant in this lawsuit can the state litigate this title. The Quiet Title Act requires that the United States "claim and interest" in the disputed property. In this case, the United States has carefully avoided taking any formal position as to whether it believes it or the State has title to the tidelands in question. Therefore, by joining as a defendant, the State would secure the opportunity to establish title to lands it owns.

The second case where it would be procedurally advantageous to waive Eleventh Amendment immunity involves tort claims where the state and federal government are both potentially responsible. This issue is addressed in the amendment before you. Because of the Eleventh



Amendment immunity, and because the federal government will not appear in state court, the claims cannot be litigated in one court, and fault allocated among all parties. The state is put in a position where it cannot have fault allocated to federal agencies and employees and loses this valuable substantive right. If the state is unable to waive the Eleventh Amendment and appear and defend in federal court, it will lose its ability to have a fair allocation of fault among all responsible parties. This places the state at a substantial economic disadvantage in defending the lawsuit.

The purpose of HB120 is to ask the Alaska State Legislature to allow the Attorney General to give the State's consent to appear in Federal Court as a defendant in a case that involves the state's title to submerged lands. The amendment before you would further enable the Attorney General to waive Eleventh amendment immunity and litigate in federal court in cases where the state seeks to allocated fault to the federal government or a federal employee under AS 09.17.080.

Background on the Need for the Proposed Amendment to House Bill 120

As a "deep pocket," the State of Alaska is frequently named as the only defendant in cases where other nonparties are clearly at fault, and ordinarily the state can receive a fair allocation of potential liability by joining those parties as third-party defendants for apportionment of fault under AS 09.17.080. However, a problem exists when the federal government is involved.

By federal law the federal government (agencies, officials, employees, etc.) can only be sued in federal court. Thus, fault can only be apportioned to the federal government in federal court. However, the Eleventh Amendment of the United States Constitution deprives federal courts of jurisdiction over tort actions brought by private parties against consenting states. Thus, the state cannot appear in federal court as a defendant (or third-party plaintiff) in a tort action brought by a private party unless it waives its Eleventh Amendment immunity.

While it clearly would not be in the state's interest to waive its Eleventh Amendment immunity in all cases, in the occasional case where the state could reduce its liability in a tort action by joining the federal government as a third-party defendant for apportionment of fault under AS 09.17.080 it would be in the state's interest to waive its Eleventh Amendment immunity, since federal court is the only forum where a third-party claim against the federal government can be brought.

In fact, the state faces such a situation now. The state has been sued by approximately one hundred and fifty residents of Hooper Bay in two civil actions in Superior Court in Bethel. The cases are Smith v. State and Melba Joseph, et al v. State, and they arise out of one wrongful death (Smith case) and many illnesses (Joseph case) which were caused by excess fluoride in Hooper Bay's public water system. (The liability issues in the two cases are identical, and the Joseph case has been stayed pending a determination of liability in the Smith case.)

Hooper Bay is responsible under state law to prevent the distribution of contaminated water, but Hooper Bay had no insurance. Consequently, Smith originally filed suit against the Yukon Kuskokwim Health Corporation (YKHC), alleging that YKHC failed to properly supervise Hooper Bay's water system. However, YKHC was acting under a contract with the federal government, and the action was removed to federal court.¹ After the case against YKHC was removed to federal court Smith essentially abandoned the action, and initiated a new action against the State of Alaska in Bethel Superior Court. Smith now claims that the state should have assured the safety of Hooper Bay's water system. And more specifically, Smith seeks

¹ The state and federal governments are engaged directly and indirectly in several programs to improve drinking water and sanitation facilities in the bush communities, and both were aware of problems in Hooper Bay and both had been providing direct and indirect assistance to Hooper Bay.

to hold the state vicariously liable for the negligence of Steve Weaver, a federal (Public Health Service) employee detailed to the State of Alaska (Village Safe Water) who was working to rehabilitate Hooper Bay's public water system

It obviously would be in the state's best interest to have fault allocated to any negligent federal entities in the Smith and Joseph actions (and in any similar action in the future) pursuant to AS 09 17 080. Indeed, the federal government intended to join the state as a third-party defendant in the original action against YKHC if that action had gone forward.

Some federal courts have held that only the Alaska Legislature can waive the state's Eleventh Amendment immunity, and only by giving an unequivocal indication of its intent to do so. Thus the purpose of the proposed bill is to unequivocally authorize the Attorney General to waive the state's Eleventh Amendment immunity on a case by case basis in any case in which the state seeks to allocate fault to the federal government or a federal employee pursuant to AS 09.17.080.

Herring Coalition

4. *Peratrovich v. United States* (United States District Court No. A92-734 Civ. (Judge Holland); our file no. 221-93-0340; state's attorneys: Henry Wilson and Joanne Grace (monitoring); plaintiffs' attorneys: Thomas Luebben and Richard Young of Albuquerque, New Mexico; U.S.' attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in *John* and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

The plaintiffs seek declaratory and injunctive relief requiring the Federal Subsistence Board (FSB) to issue a collective permit allowing the harvest of up to 366,000 pounds of herring roe on kelp (1000 pounds per individual for 366 applicants) from the waters of southeast Alaska as "customary trade." The FSB has taken the position that it lacks jurisdiction over the navigable waters where the harvest would occur. The plaintiffs claim that navigable waters are "public lands" for purposes of ANILCA, or alternatively that the waters and submerged lands within the boundaries of the Tongass National Forest were reserved by the United States as part of a pre-statehood withdrawal. The state has not been named as a party, and has sought unsuccessfully to intervene. In March, 1993, the State Board of Fisheries adopted a "customary trade" regulation allowing sale of up to 32 pounds of herring spawn on substrate by an individual, and up to 158 pounds per household. Also in March 1993, Judge Holland denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs had not shown that they face irreparable injury or a likelihood of success on the merits. On February 12, 1996, in response to the federal defendants' most recent status report, the plaintiffs indicated that they wish to proceed with their alternative claim that the waters and submerged lands of the Tongass are "public lands" because of a pre-statehood withdrawal.

In April 1996, the United States moved to dismiss the complaint because the plaintiffs did not challenge the regulations establishing the FSB, which limit its authority over navigable waters, and for failure to name the state as a defendant. On July 26, 1996, Judge Holland granted the motion to dismiss based on the first theory, with leave to amend to challenge the jurisdictional limitations of the FSB. Judge Holland suggested, however, that the plaintiffs wait to amend their complaint until the federal rulemaking concerning implementation of the Ninth Circuit's *Katie John* decision runs its course. Judge Holland also tentatively indicated that the state will be an indispensable party if the case proceeds.

On October 24, 1996, the plaintiffs filed an amended complaint, and did not name the state as a party. On December 18, 1996, the United States moved for judgment on the pleadings, arguing that the case should be dismissed for failure to join the state as

an indispensable party, because the plaintiffs have not exhausted administrative remedies through the federal rulemaking process, and because the plaintiffs' remaining claims have been rejected by the Ninth Circuit in the *Katie John* decision.


5. *Fish and Game Fund v. Alaska and United States* (United States District Court No. A92-0443 Civ. (Judge Holland); our file no. 221-92-0832; state's attorneys: Joanne Grace and Henry Wilson; plaintiff's attorneys: Edgar Paul Boyko; intervenor attorneys: Mike Stanley and Marc Slorim). This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in *John* and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

A coalition of commercial salmon fishermen in the Yukon and Kuskokwim Rivers challenge the Area M (False Pass) fishery also addressed in the *Elim* state court case. Plaintiffs raise various constitutional and statutory grounds, including violation of the Magnuson Act and Title VIII of ANILCA, and seek to have the Secretary of Commerce or Interior take over management of commercial and subsistence fisheries in Area M and in the Y-K region. A coalition consisting of the Peninsula Marketing Association, Concerned Area M Fishermen, Aleutian Borough, and various Area M Native groups have intervened. The state, federal defendants, and intervenors have filed motions to dismiss plaintiffs' second amended complaint. Judge Holland had the matter under advisement until the case was stayed.

6. *Kerzler v. Alaska* (United States District Court No. F90-040 Civ. (Judge Holland); our file no. 221-92-0278; state's attorney: Robert Nauheim; plaintiffs' attorney: none, as Marc Grober has withdrawn). This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in *John* and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

This case challenged the closure of the Kantishna and Toklat Rivers to subsistence fishing for chum salmon under state regulations now superseded. On December 7, 1996, the case was dismissed without prejudice as moot.

7. *Kluti Kaah v. Alaska* (United States District Court No. A90-004 (Judge Holland); our file no. 221-90-0433; state's attorney: Robert Nauheim; plaintiff's attorneys: Heather Kendall of the Native American Rights Fund (NARF); Mike Walleri of Tanana Chiefs' Conference (TCC)). This is one of the jointly managed ANILCA cases

MEMORANDUM**State of Alaska****Department of Law****TO: The Honorable Bill Hudson
Alaska House of Representatives****DATE: February 7, 1997****FILE NO:****TEL. NO: 465-2133****SUBJECT House Bill 120****FROM:**
**Bruce M. Botelho
Attorney General**

I support House Bill 120, which authorizes the Attorney General to waive the state's Eleventh Amendment immunity and thereby consent to suit in federal court in very limited cases. The Eleventh Amendment to the United States Constitution provides that a state generally may not be sued in federal court without its consent. This bill would permit the Attorney General to consent to suit in federal court in cases involving the state's title to submerged lands, which will benefit the state in ongoing litigation.

I also support a proposed amendment which would allow the Attorney General to consent to suit in federal court in tort cases in which the state seeks to allocate fault to the federal government or a federal employee under AS 09.17.080. The state needs to be able to litigate, in federal court, tort cases in which federal entities are potentially liable, because the federal government and its employees cannot be sued in state court.

If you have any questions about either of these issues, please do not hesitate to contact my office.

BMB:SDC:kh

MEMORANDUM

State of Alaska

Department of Law

TO: Ron Somerville
Special Assistant

DATE: February 5, 1997

FILE NO: 269-5100

TEL NO: 11th Amendment Bill

SUBJECT:

FROM: Joanne Grace
Assistant Attorney General
Federal Relations, Anchorage

stay to copy
refer
CONFIDENTIAL

This memorandum explains the need of the Department of Law for passage of the draft bill attached.

A group of plaintiffs has sued the United States, claiming that the federal government rather than the State owns the tidelands and territorial sea within the Tongass National Forest (*Peratrovich v. United States*). They seek this judgment because if the United States owns these submerged lands, they constitute "public lands" under the Alaska National Interest Lands Conservation Act ("ANILCA") and are subject to the jurisdiction of the Federal Subsistence Board. The plaintiffs want their purchase of herring roe on kelp from rural residents and resale to other markets to constitute "customary trade" subject to a priority under title VIII of ANILCA.

The plaintiffs have not named the State as a defendant, however. They want title to the submerged lands litigated without the State's involvement. The United States has not answered the complaint, and therefore has not stated whether it believes it owns the submerged lands, but has moved for judgment. One of its bases for judgment is that the plaintiffs have failed to join an indispensable party, the State. The United States argues that the Court cannot decide the issue of title to the submerged lands without the State's participation because of the State's strong interest in them. We agree with this argument and believe the Court will dismiss the case unless the State intervenes.

The State would like to intervene because it wants to litigate title to these lands against the United States. The State would have problems simply filing suit against the United States to quiet title to them, however, because the Quiet Title Act requires as a prerequisite to federal court jurisdiction that the United States "claim an interest" in the property in dispute. The United States has carefully avoided taking any formal position as to whether it

believes it or the State has title to the submerged lands within the boundaries of the Tongass, although Forest Service employees certainly have taken the position that they are federally-owned in dealings with the state. Therefore, this litigation affords the State an opportunity to litigate title to these lands that the State otherwise may not have for many years.

The attorney for the United States has notified the State's attorneys that if the State tries to intervene as a defendant, he will assert a violation of the 11th Amendment. The 11th Amendment provides that federal courts do not have jurisdiction over suits against unconsenting states. A state may waive its 11th amendment immunity, but only by giving an "unequivocal indication" that it consents to suit in a federal court. This authority is held by the legislature, however, which may delegate it to the Attorney General. The federal district court in Alaska twice has found that Alaska has no statute expressly waiving 11th amendment immunity, and that the Attorney General's power to expressly consent to federal jurisdiction "in the context of litigation"¹ does not grant him or her the authority to consent to federal jurisdiction for the trial of a single case. Although the Department of Law thinks it has good arguments that the legislature has delegated this authority, these cases carry some weight as precedent, and we want to eliminate the issue in the *Peratrovich* case and other submerged lands cases.

This is the purpose of the drafted bill. Judge Holland has indicated that he will withhold decision on the United States' attempt to have the case dismissed until February 14 to give the State an opportunity to intervene. The State must have some level of assurance by that date that the bill will pass and the State will be able to intervene.

¹ AS 44.23.020(b) provides in part that the Attorney General shall "represent the State in all actions in which the State is a party" and "perform all other duties required by law or which usually pertain to the office of Attorney General in a state."