

SB

156

Sponsor Statement

SB 156 Best Interest Finding Under Alaska Land Act

SB 156 amends the Alaska Land Act to clarify the requirement that the Department of Natural Resources prepare a single, written Best Interest Finding for multi-phased development projects. In 1994, the Legislature passed SB 308 to amend the Alaska Land Act in response to several unfavorable Alaska Supreme Court decisions that threatened the state's leasing program. The legislation explicitly allowed project phasing and precisely defined the scope of the best interest finding determination. Since its passage, recent court decisions have continued to threaten the program and have concluded that the Department is "obliged, at each phase of development, to issue a best interests finding...relating to that phase before the proposed development may proceed."

Under SB 308, the original legislation, the Legislature intended that a Best Interest Finding would be prepared for the first phase, the disposal, and subsequent phases would be subject to the "Department's approval" and to separate reviews by extensive permitting processes that include public input and scrutiny of other agencies. The Legislature did not intend "approval" to be defined as a best interest finding determination as the Courts' have misinterpreted. The Legislature intended the Department to exercise their discretion to impose conditions in the best interest finding determination, issued for the disposal, which would minimize future impacts. Preparation of a Best Interest Finding determination for every phase would be a very costly, and time consuming process.

SB 156 elaborates the legislative findings for phasing under the Alaska Land Act and amends AS 38.05.035 so that it is clear that the Department of Natural Resources is required to issue a single written best interest finding for the disposal of state land. It also ensures the public the opportunity to comment at the exploration, production, and transportation phases of a project. By clarifying the Legislature's original intent, SB 156 will overturn the Courts' erroneous interpretation. SB 156 provides clear guidance to the Courts regarding the legislature's policy and will result in the avoidance of protracted litigation and associated delays or disruptions of the state's leasing program and development of already leased acreage.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 156
 (S) Publish Date: 3/29/01
 Dept. Affected: Natural Resources
 BRU: Oil & Gas Development
 Component: Oil & Gas Development
 Component Number: 439

Revision Date/Time (Note if correction): _____
 Title: Best Interest Finding under the
Alaska Lands Act
 Sponsor: Senate Resources
 Requester: Senate Resources

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
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						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: none

Check this box (X) if funding for this bill is included in the Governor's FY2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill clarifies that a best interest finding is not required after the initial disposal phase.

Prepared by: Mark D. Myers Phone 269-8800
 Division: Oil and Gas Date/Time 27-Mar-01
 Approved by: Pat Pourchot Date 28-Mar-01
 Agency: Natural Resources

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Sponsor Statement

SB 156: Best Interest Finding Under Alaska Land Act

SB 156 amends the Alaska Land Act to clarify the requirement that the Department of Natural Resources prepare a single, written Best Interest Finding for multiphased development projects. In 1994, the Legislature passed Senate Bill 308 to amend the Alaska Land Act in response to several unfavorable Alaska Supreme Court decisions that threatened the state's leasing program. The legislation explicitly allowed project phasing and precisely defined the scope of the best interest finding determination. Recent court decisions continue to threaten the program. The courts concluded that the Department is "obliged, at each phase of development, to issue a best interests finding...relating to that phase before the proposed development may proceed."

Under SB 308, the Legislature intended that a Best Interest Finding would be prepared for the first phase, the disposal. Subsequent phases would be subject to the "Department's approval" and to separate reviews by extensive permitting processes that include public input and scrutiny of other agencies. The Legislature did not intend "approval" to be defined as a best interest finding determination as the Courts' have misinterpreted. The Legislature intended the Department to exercise their discretion to impose conditions in the best interest finding determination, issued for the disposal, that would minimize future impacts.

Preparation of a Best Interest Finding determination for every phase would be a very costly and time consuming process. A typical Best Interest Finding for a lease disposal costs the Division of Oil and Gas approximately \$75,000, not including the costs for other agencies such as the Departments of Environmental Conservation and Fish and Game to gather information for the finding. Although the Division of Oil and Gas has never issued a Best Interest Finding for an exploration well, they estimate the minimum cost to prepare a finding at this phase would be \$50,000. There were approximately fifteen wells planned for the 2000-2001 drilling season on state land. At \$50,000 per well, the Division would spend an additional \$750,000. The Division has not estimated the cost of doing a best interest finding for the development phase of a project but that cost would be as expensive as for an exploration well.

SB 156 elaborates the legislative findings for phasing under the Alaska Land Act and amends AS 38.05.035 so that it is clear that the Department of Natural Resources is required to issue a single written best interest finding for the disposal of state land. It also ensures the public the opportunity to comment at the exploration, development, and transportation phases of a project. By clarifying the Legislature's original intent, SB 156 will overturn the Courts erroneous interpretation. SB 156 provides clear guidance to the Courts regarding the legislature's policy and will result in the avoidance of protracted litigation and associated delays to or disruptions of the state's leasing program and to development of already leased acreage.

**6 P.3d 270 KACHEMAK BAY CONSERVATION SOC'Y V. STATE (S. Ct. 2000)
2000 Alas. Lexis 78**

**KACHEMAK BAY CONSERVATION SOCIETY, COOK INLET KEEPER,
TRUSTEES FOR ALASKA, STACEY MARZ, MICHAEL O'MEARA,
Appellants,**

vs.

**STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES; JOHN
SHIVELY, Commissioner, Department of Natural Resources;
KENNETH BOYD, Director, Division of Oil and Gas, Appellees.
MARATHON OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; COOK
INLET REGIONAL CORPORATION, INC.; FORCENERGY, INC.;
ANADARKO PETROLEUM CORPORATION; ALASKA MENTAL HEALTH TRUST,
Intervenors.**

Supreme Court No. S-8554, No. 5303
SUPREME COURT OF ALASKA
6 P.3d 270, 2000 Alas. LEXIS 78
August 11, 2000, Decided

<CASE SUMMARY>

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Sigurd E. Murphy, Judge pro tem. Superior Court No. 3AN-96-7909 CI.

COUNSEL

Patrick Lavin and Valerie L. Brown, Trustees for Alaska, Anchorage, for appellants.
Lawrence Z. Ostrovsky and Jeffrey D. Landry, Assistant Attorneys General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for appellees.
Susan E. Reeves and Thomas P. Amodio, Foster Pepper Rubini & Reeves, LLC, Anchorage, for intervenors Marathon Oil Company, Union Oil Company of California, Forcenergy, Inc., Cook Inlet Regional Corporation, Inc., and Anadarko Petroleum Corporation.
T. Henry Wilson, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for intervenor Alaska Mental Health Trust.

JUDGES

Before: Matthews, Chief Justice, and Eastaugh, Fabe, Bryner, and Carpeneti, Justices.
AUTHOR: CARPENETI

OPINION

CARPENETI, Justice.

the legislature, phasing is now expressly allowed. It is not for us to overturn that policy choice.

We note, however, that the legislature's policy choice does not, by any means, relieve DNR of its duty to take a continuing "hard look" at future development on the lease sale lands. To the contrary, DNR is obliged, at **each phase** of development, to issue a best interests finding and a conclusive consistency determination relating to **that phase** before the proposed development may proceed.⁸³

V. CONCLUSION

Because DNR has not impermissibly phased its review of the proposed lease sale, and because there is a reasonable basis for both DNR's best interests finding and conclusive consistency determination, the agency's actions are **AFFIRMED**.

DISPOSITION

AFFIRMED.

OPINION FOOTNOTES

1 "Phasing" consists of DNR's dividing a proposal into discrete parts -- e.g., exploration, construction of facilities, and production -- and examining each of these parts individually for compliance rather than examining the project as a whole.

2 928 P.2d 1206 (Alaska 1996). *Niniichik* is discussed in detail below.

3 See AS 38.05.035(l) (providing for judicial review of DNR's final written findings); Alaska R. App. P. 601(b) (providing for appeals of final decisions of administrative agencies to the superior court).

4 See *Bruner v. Petersen*, 944 P.2d 43, 47 n.5 (Alaska 1997) (citing *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992)).

5 *Thane Neighborhood Ass'n v. City and Borough of Juneau*, 922 P.2d 901, 905-06 (Alaska 1996).

6 See *Trustees for Alaska v. State, Dep't of Natural Resources (Demarcation Point)*, 865 P.2d 745, 747 (Alaska 1993) ("DNR's best-interest determination is subject to deferential review by this court. Since the determination involves complex subject matter or fundamental policy formulations, this court reviews the decision only to the extent necessary to ascertain whether the decision has a reasonable basis.") (quoting *Trustees for Alaska v. State, Dep't of Natural Resources (Camden Bay I)*, 795 P.2d 805, 809 (Alaska 1990) (footnote, internal quotation marks and brackets omitted)); *Niniichik*, 928 P.2d at 1213 ("This court's review [of DNR's consistency analysis] is limited to ensuring that DNR's decision was not arbitrary, capricious, or unreasonable." (internal quotation marks omitted)) (quoting *Trustees for Alaska v. State, Dep't of Natural Resources (Camden Bay II)*, 851 P.2d 1340, 1347 (Alaska 1993)).

7 *Hammond v. N. Slope Borough*, 645 P.2d 750, 758-59 (Alaska 1982) (internal brackets omitted) (quoting *Moore v. State*, 553 P.2d 8, 36 n.20 (Alaska 1976)). See also Ch. 38, § 1(2), SLA 1994 ("each determination under AS 38.05 that the interests of the state will be best served is a policy decision involving facts unique to each proposed disposal, and complex issues the analysis and resolution of which are most appropriately left to the expertise of the agency making the determination").



State of Alaska
Division of Oil and Gas
Department of Natural Resources



**Chapter Eight: Governmental Powers to Regulate
Oil
and Gas Exploration, Development, Production, and
Transportation**

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**Chapter Eight: Governmental Powers to Regulate Oil and Gas
Exploration,
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C. Alaska Department of Environmental Conservation (ADEC)

D. Alaska Department of Fish and Game (ADF&G)

E. Alaska Oil and Gas Conservation Commission (AOGCC)

F. U.S. Environmental Protection Agency (EPA)

G. U.S. Army Corps of Engineers

H. Other Requirements

**Chapter Eight: Governmental Powers to Regulate Oil and Gas
Exploration, Development, Production, and Transportation**

All oil and gas activities subsequent to an oil and gas lease sale, exploration, development, production, and transportation, are subject to numerous federal, state, and local laws, regulations, policies, and ordinances. Each successful bidder awarded a lease in a state oil and gas lease sale is obligated to comply with all federal, state, and local laws. A sample lease contract is contained in Appendix C. This portion of the finding discusses the broad powers that various government agencies have to prohibit, regulate, and condition any activities related to oil and gas which may ultimately occur on oil and gas leases. A list of important laws and regulations applicable to oil and gas activities is included in Appendix B. Each of the

buildings, roads, utilities, airstrips, and all other facilities and equipment necessary to conduct the proposed operations;

- plans for rehabilitation of the affected lease area after completion of operations or phases of those operations; and
- a description of operating procedures designed to prevent or minimize adverse effects on other natural resources and other uses of the leased area and adjacent areas, including fish and wildlife habitats, historic and archeological sites, and public use areas.

Other stipulations, in addition to the mitigation measures already developed at the lease sale stage, may be required at the plan of operations approval stage. These will address site-specific concerns directly associated with the proposed project. The stipulations and the terms and conditions of the lease are attached to the plan of operations approval and are binding on the lessee. Lease activities are field monitored by ADNR, ADEC, ADF&G, and AOGCC to ensure compliance with each agency's respective permit terms. Paragraph 16 of the lease contract requires that the lessee keep the area of activity open for inspection by authorized state officials. The lessee must post a \$500,000 statewide bond to cover a drill site. Lease operations approvals are generally granted for three years.

Geophysical Exploration Permit: The geophysical exploration permit is a specific type of land use permit issued by DO&G (11 AAC 96.010(a)(1)(E)). Seismic surveys are the most common activity authorized by this permit. The purpose of the permit is to minimize adverse effects on lands and resources while making important geological information available to the state.¹

Seismic surveys in the Cook Inlet area are subject to individual 30-day ACMP reviews. If the survey is part of an exploration program, agencies will review the geophysical exploration permit application as part of the exploration well permit package.

The application must contain sufficient detail to allow evaluation of the activities' effects on the lands and resources. A map showing the general location and routes of travel, and a description of the activity and equipment that will be used must be included. Maps showing the precise location of the survey lines must also be provided, though this information is usually held confidential. A \$100,000 bond is usually required.

The permit will contain measures to protect the land and resources of the area. The permit is usually issued for one year or less but may be extended. If the permit is extended, the director may modify existing terms or add new ones when he issues the extension. The permit is revocable.

Table 8a & 8b: Typical Permit Process Onshore and Offshore

for Cook Inlet

ID	Name	M	J	J	A	S	O	N	D	J	F	M	A	M
1	ACMP Preapplication Conference	█												
2	ACMP Consistency Determination - AS 46.40				█									
3	DNR DO&G - Lease Plan of Operations Review				█									
4	DNR Parks - Cultural Resource Survey		█											
5	DNR DW - Temporary Water Use Permit				█									
6	DEC - Oil Spill Discharge and Contingency Plan				█									
7	DEC - Certificate of Reasonable Assurance				█									

C. Governmental Powers to Regulate Oil and Gas Exploration, Development, Production, and Transportation

All post-lease sale activities, exploration, development, production, and transportation are subject to numerous federal, state, and local laws, regulations, policies, and ordinances. Each successful bidder awarded a lease in a state oil and gas lease sale is obligated to comply with all federal, state, and local laws. A sample lease contract is contained in Appendix C. This section does not provide an exhaustive description of all laws and regulations that may be applicable to such activities. However, it does provide a sufficient illustration of the broad powers of various government agencies to prohibit, regulate, and condition any activities related to oil and gas which may ultimately occur on sale leases. A list of important laws and regulations applicable to oil and gas activities is included in Appendix B. Each of the regulatory agencies, (state, federal, and local) has a different role in the oversight and regulation of post-lease sale activities.

Each lease issued as a result of the sale will grant the lessee exclusive rights to subsurface mineral interests. However, as discussed in the previous section, a lease does not authorize subsequent activities. The lessee's rights are subject to the terms of the sale and the provisions of the lease (including the mitigation measures contained in Chapter Seven), all applicable state and federal laws and regulations, and may allow the lease holder to drill for, extract, remove, clean, process, and dispose of any oil, gas, or associated substances that may underlie the lands described by the lease.

Permits and approvals that each agency requires are presented below, with additional information on the review process (see Table 1.1). There is, however, no "typical" project. Actual processes, terms and conditions will vary with time-certain, site-specific operations. Each agency has field monitors assigned to ensure that operations are conducted as approved. The appropriate statutes and regulations should be consulted when specifics are required as agency procedure will change from time to time.

1. Alaska Coastal Management Plan Review

Permit applications for post-lease sale activities must be as detailed as necessary for a comprehensive agency review. If an activity affects or occurs within a coastal area, an ACMP review of the permit application will be conducted to determine whether the activity is consistent with the ACMP standards. Following the review, each agency will approve or disapprove the permit and determine whether any additional protective stipulations or permit terms are required prior to approval.

The public is provided the opportunity to participate in ACMP reviews. For example, most permits needed for exploratory wells require public notice. The ACMP permitting process goes through a 50-day agency review, and if approvals are needed by many agencies, the review is coordinated by Division of Governmental Coordination (DGC). This process provides for coordinated agency reviews, public input, and insures consistency with the ACMP and local coastal district plans. The coastal district plan applicable to this sale is the NSBCMP.

Application packages are distributed to affected coastal resource districts and permitting agencies by the lessee or designated operator, and DGC. Consistency review is initiated, and additional information must be requested within 25 days. Public and agency review of comments are due on or before day 34, and a consistency finding is issued on or before day 44. Requests for additional review must be received on or before

Table 1.1: Permit Process: North Slope Onshore Exploration Well

ID	Task Name	J A S O N D						J F M A M				
		1	Exploration Well - Permitting and Drilling									
2	DNR Parks - Cultural Resource Survey											
3	North Slope Borough Development Permit											
4	ACMP Pre-application Conference											
5	Permits that may also be Subject to ACMP Corrdinated Individual Project Review											
6	ACMP Consistency Determination - AS 46.40											
7	DNR DO&G - Plan of Operation Review											
8	DNR DO&G - Geophysical Exploration Permit											
9	DNR DL - Cross Country Travel or Ice Road Land Use Permit											
10	ADFG - Fish Habitat Permit, Water Sources and Stream Crossings											
11	DNR DW - Temporary Water Use Permit											
12	DEC - Authorzallon for Temporary Storage of Drilling Wastes											
13	DEC - Oil Spill Discharge and Contingency Plan											
14	DEC - Solid Waste Disposal Permit											
15	DEC - Air Quality Control Permit to Operate (Title V)											
16	DEC - Wastewater Disposal Permit											
17	Other Permits											
18	EPA - NPDES Coverage Under General North Slope Permit for Wastes											
19	USFWS - LOA for Incidental Take of Polar Bears											
20	AOGCC - Conservation Order											
21	AOGCC - Permit to Drill											
22	Ice Construction - Drilling - Demobilization											

Project: North Slope Task Public Notice/Comment

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TABLE 8A: Typical Permit Process - Onshore Exploration Well in Cook Inlet Area

ID	Name	M	J	J	A	S	O	N	D	J	F	M	A	M
1	ACMP Preapplication Conference													
2	ACMP Consistency Determination - AS 46.40													
3	DNR DO&G - Lease Plan of Operations Review													
4	DNR Parks - Cultural Resource Survey													
5	DNR DW - Temporary Water Use Permit													
6	DEC - Oil Spill Discharge and Contingency Plan													
7	DEC - Certificate of Reasonable Assurance													
8	DEC - Solid Waste Disposal Permit													
9	DEC - Wastewater Disposal Permit													
10	ADFG - Special Areas Permit													
11	Army Corps of Engineer - Sec. 404 Permit													
12	AOGCC - Conservation Order													
13	AOGCC - Permit to Drill													
14	AOGCC - Application for Sundry Approval													
15	Construction and Drilling													
16	Demobilization and Rehabilitation													

Project: Onshore Date: 3/5/96 Permitting Activity Public Notice

TABLE 8B: Typical Permit Process - Offshore Exploration Well in Cook Inlet Area

ID	Name	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A
1	ACMP Preapplication Conference																		
2	ACMP Consistency Review																		
3	DNR DO&G - Lease Plan of Operations Review																		
4	DEC - New Oil Spill Discharge and Contingency Plan																		
5	DEC - Annual Injection under General Permit																		
6	DEC - Air Quality Permit to Operate																		
7	DEC - 401 Certificate of Reasonable Assurance																		
8	Army Corps of Engineer - Sec. 10 Permit																		
9	EPA - Individual NPDES Waste Disposal Permit																		
10	AOGCC Conservation Order																		
11	AOGCC - Permit to Drill																		
12	AOGCC - Application for Sundry Approvals																		
13	Drill Rig on Location																		
14	Discharge and Environmental Monitoring																		

Project: Offshore Permit Activity Date: 3/5/96 Permitting Activity Public Comment Period

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 156
 (S) Publish Date: 3/29/01
 Dept. Affected: Natural Resources
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Estimate of any current year (FY2001) cost: none

Check this box (X) if funding for this bill is included in the Governor's FY2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill clarifies that a best interest finding is not required after the initial disposal phase.

Prepared by: Mark D. Myers Phone 269-8800
 Division: Oil and Gas Date/Time 27-Mar-01
 Approved by: Pat Pourchot Date 28-Mar-01
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CS SB 156 ~ BEST INTEREST FINDING UNDER AK LAND ACT

TO: House Resources Committee Members

DATE: April 18, 2001

Alaska Conservation Alliance and Alaska Conservation Voters are sister nonprofit organizations dedicated to protecting Alaska's environment through public education and advocacy. Our 44 member organizations and businesses represent over 35,000 registered Alaskans, many of whom participate in public notice and comment opportunities during the state's review of development projects of all types. This ability of concerned citizens to meaningfully express their opinions about activities that involve the disposal of state land or an interest in state land is a protected right under our Alaska constitution.

In essence, CSSB 156, in an effort to avoid inconvenience and cost for the oil and gas industry, significantly limits the public's ability to evaluate disposals of state land. Why shouldn't DNR be obliged to take a "big picture," hard look and issue a best interest finding at subsequent phases of a multiphase project that may span 6 years or more?

This legislation provides for public notice and comment on subsequent phases through the Alaska Coastal Management Program (ACMP) process for projects within coastal districts. For projects outside of a coastal district, the bill is unclear whether or not DNR will adopt new regulations. The ACMP process for public participation is NOT a reasonable alternative to a best interest finding process. The Byzantine ACMP process is extremely difficult to navigate for any Alaskan who is not familiar with the intricacies of state law.

ACV encourages committee members, through amendments to SB 156, to provide DNR some direction as to what to include in the new public notice and comment regulations the agency may adopt for projects not covered by the ACMP. Unless SE 156 requires DNR to adopt rules that truly allow Alaskans a meaningful opportunity to evaluate subsequent phases of multi-year projects both within and outside of coastal districts, ACV urges you to oppose this legislation for the simple reason that while it may be in the oil industry's best interests, it clearly is not in the public's.

Susan Schrader, Conservation Advocate

Conserve Alaska. It's Only Natural.