HB

86

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House District 7

House of Representatives

Memorandum

To: Senator Hollis French, Senate Judiciary Committee
Fm: Representative Hugh "Bud" Fate
Cc:
Date: May 9, 2003
Re: Questions and comments regarding CS for SSHB 86am

The Committee asked several questions regarding particular case law definitions of malicious claims and bad faith. With the assistance of Legal Services, provided with this memo are three Alaska case law definitions of bad faith. You will also find attached a list of eight non-Alaskan statute references that use the term "malicious claim."

There was also an indication that testimony heard during Wednesday's hearing was also a cause for concern. I would like to address some of those comments as well as language used in a particular cited case.

As for the comments from the California Based non-profit law firm:

HB 86 is designed to require the responsible parties for malicious or bad faith claims to assume some of the responsibility. It does not have a chilling affect on anyone's ability to bring a legitimate suit against a permitted project.

Further it was stated that suits against "improper permits" would fall under the definition of the bill. Improper permits are a legitimate claim and would be filed against the permitting agency not the permittee.

This is not a free speech issue as was asserted, this is a judicial issue. Likewise, it does not prevent an individual or group from petitioning their government. It simply means that the when an appeal is filed to superior court, after exhausting the administrative procedure that the basis for the appeal must not be malicious or in bad faith.

Also addressed was liability on the part of the government. This could be true in the case of an "improper permit", beyond that, the permitting agency maintains sovereign immunity. These suits will be filed by a "quote; private individual or group against another private individual or group."

In reference to the unsigned memo you received prior to today's meeting.

Citing:
Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993)

HB 86 has nothing to do with "SLAPP suits." It has to do with responsibility. As stated in the memo "The right to petition the government by challenging government decisions may be limited only if the appeal or lawsuit **has no objective legal merit."** HB 86 uses the term malicious or bad faith claim rather than **objective legal merit**. While there may be some concern over those terms **objective legal merit** certainly falls into the same category and can be interpreted in even broader terms that the language in HB 86.

Unlike malicious, **objective** does not have a definition in *Black's Law, 6th Edition (1990)*

legal is defined as "conforming to the law; according to law; required or permitted by law; not forbidden or discountenanced by law...."

merit is also undefined in *Black's.*

Based on this we turn, as the Supreme Court has on occasion, to Webster's for guidance:

objective: 4. treating or dealing with facts without distortion by personal feelings or prejudices

merit: the intrinsic nature of a legal case; *also*: legal significance
(emphasis added)

In conclusion:

HB 86 has been reviewed and revised through the committee process, Legal Services, and private attorneys. That review was to assure that it met Constitutional muster. For too long working Alaska has been tied up with malicious and bad faith lawsuits. Only the courts and the attorneys benefit, as their fees are already covered in statute and rules. Currently, for the defendant a malicious or bad faith claim is an automatic loss; of income, and possible breech of contract lawsuits based on failure to perform. For the plaintiff it might cost them partial court and attorney fees.

As for the issue of the First Amendment, it is critical that this be applied to all. HB 86 will protect the defendant equally in these cases by allowing them the same right to "redress of grievances." Currently, that right is being denied because the language in this bill is not already law. HB 86 allows for a cause of action against those who would attempt to use the courts to do malicious damage.

Attachments

Attachments HB 86 Senate Judiciary Committee 05/09/03

While the term **malicious claim** seldom appears in case law it is common language in various state statute. Often it is, as in the case of HB 86 used with bad faith and frivolous which is commonly defined in case law.

Examples of statute:

South Dakota Codified Laws § 120-9-6.1 Claim of barratry

> Barratry is the assertion of a frivolous or malicious claim or defense of the filing of any doc ment with malice or in bad faith by a party in a civil action.

Del. C § 4382(2002) TITLE 11. CRIMES AND CRIMINAL PROCEDURE, PART II

> ...factually frivolous claims, malicious claims or legally frivolous claims and ....

Idaho Code § 20-209E (2003) PENAL CODE, TITLE 20

> ...proscribing the filing of frivolous or malicious claims. *State v. Broadway-*

Minn. Stat. § 244.035 (2002) Corrections CHAPTER 244

> ...submits a frivolous or malicious claim to a court of board or who is ....
> ...submitted a frivolous or malicious claim, testifies falsely, or submitted ....

Mont. Code Anno., § 25-10-201 (2002) TITLE 25 CIVIL PROCEDURE

> ... claims as well as frivolous or malicious claims....

57 Okl. St § 566, TITLE 57. PRISONS AND REFORMATORIES, CHAPTER 8

> ...submits a frivolus or malicious claim, on one that is intended solely or ....

Tenn. Code Ann. § 41-21-807 (2002) Title 41 CORRECTIONAL INSTITUTIONS ....

> ...filed a frivolous or malicious claim to pay filing fees ....

Tex. Civ. Prac. & Rem. Code § 13.011, (2002) CIVIL PRACTICE AND REMEDIES CODE, TITLE 2

> ...336 What constitutes frivolous or malicious claim, ...

8 of 22 DOCUMENTS

JOHN A. HILLMAN and JANET HILLMAN, individually and JANET HILLMAN as Personal Representative of the Estate of JULIE G. HILLMAN, a deceased minor, Appellants, v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, Appellee.

No. 3971, Supreme Court No. S-4555

SUPREME COURT OF ALASKA

855 P.2d 1321; 1993 Alas. LEXIS 58

July 9, 1993, Decided

PRIOR HISTORY:
[1]**

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Trial Court No. 3AN-85-4613 Civil. Peter A. Michalski, Judge.

DISPOSITION:

The superior court's decision granting summary judgment on the bad faith claims is AFFIRMED. The award of attorney's fees is REVERSED and REMANDED.

COUNSEL:

Michael J. Schneider, Mestas & Schneider, P.C., Anchorage, for Appellants.

Peter J. Maassen, Burr, Pease & Kurtz, Anchorage, for Appellee.

JUDGES:

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices. COMPTON, Justice, with whom BURKE, Justice, joins, dissenting in part.

OPINIONBY:
MATTHEWS

OPINION:

[*1322] OPINION

MATTHEWS, Justice.

John and Janet Hillman sued their insurer, Nationwide Mutual Fire Insurance Company (Nationwide), for bad faith in the handling of their uninsured motorist claim filed after the death of their daughter. The superior court granted Nationwide's motion to dismiss the claim, **[**2]** concluding that the insurer's decisions to deny coverage and to demand arbitration were reasonable. The Hillmans appeal this decision along with the trial court's designation of Nationwide as the prevailing party for attorney's fee purposes. We affirm on the merits but reverse the award of attorney's fees.

I. FACTS AND PROCEEDINGS

On August 14, 1983, while driving an ATV owned by her father, eleven-year old Julie Hillman collided with an uninsured pickup truck driven by William Amis. Julie died six days later as a result of her injuries.

Nationwide had issued an automobile insurance policy to Julie's father, John Hillman, which provided uninsured motorist coverage up to $25,000 per person or $50,000 per occurrence. However, when on August 10, 1984, Janet Hillman, Julie's mother, contacted Nationwide to inquire about coverage and claim procedures, Maury Hafford, Nationwide's local adjustor, indicated that Nationwide had no liability. This denial was based on one of the "coverage exclusions" in the uninsured motorist section. n1 On February 7, 1985, after further inquiries by Mrs. Hillman, Hafford referred the claim to Nationwide's legal counsel in order to "clarify this issue **[**3]** of coverage for your understanding and satisfaction," as he wrote Mrs. Hillman. When, in late March 1985, Nationwide's attorney informed Hafford that "the question of coverage appears to be a roughly 50/50 proposition," Hafford wrote Hillman "seeking ... further details with regard to Julie's accident." However, he did not relay the attorney's opinion to Mrs. Hillman.

n1 The pertinent exclusion stated that

> this Uninsured Motorists insurance does not apply as follows:
>
> ...
>
> 4. It does not apply to bodily injury suffered while occupying a motor vehicle owned by you or a relative living in your household, but not insured for Uninsured Motorist coverage under this policy. It does not apply to bodily injury from being hit by

any such vehicle.

(Emphasis deleted.)

On April 1, 1985, the Hillmans filed a complaint against Nationwide for bad faith. The following month Nationwide offered the Hillmans $50,000 as a "compromise payment." The Hillmans rejected the offer, claiming that they were entitled to $150,000 [**4] under the insurance policy, plus medical benefits, incidental, consequential, and punitive damages.

The following April Judge Katz granted Nationwide's motion for summary judgment and dismissed the Hillmans' claims. The Hillmans appealed the decision.

[*1323] On July 1, 1988, this court held that the Hillmans were covered by the Nationwide policy. *Hillman v. Nationwide Mut. Fire Ins. Co., 758 P.2d 1248, 1250 (Alaska 1988)* (Hillman I). We agreed with Nationwide's interpretation of the contractual language. However, a majority of the court refused to give effect to the uninsured owned motor vehicle exclusion contained in the policy for statutory and public policy reasons. *Id. at 1251-52.*

Once coverage was established, Nationwide chose to pursue the arbitration procedure mandated by the policy for determining liability. n2 Arbitration was held on January 30, 1989. The arbitrators concluded that Amis was 33% at fault with regard to the claims related to Julie's estate. As for John and Janet's claims for negligent infliction of emotional distress, the panel agreed that Amis' negligence accounted for 15% of the harm. The arbitrators [**5] awarded $92,500 to the Hillmans. Two weeks later Nationwide paid the Hillmans $50,000, the maximum amount of the uninsured motorist coverage provided by the policy. n3

n2 In Hillman I, we rejected the Hillmans' argument that Nationwide had waived its right to arbitration. *Hillman I, 758 P.2d at 1253.* The trial court held that although "'Nationwide acted in bad faith in failing to disclose the availability of the arbitration procedure in four separate pieces of correspondence to Mrs. Hillman,' arbitration should proceed because the Hillmans were represented by counsel who 'simply made a calculated decision to attempt to obtain relief through the court system, knowing that the policy actually required dispute resolution through arbitration.'" Id. The court added that since "'none of the litigants herein has clean hands,' 'the balance tips in favor of submitting appropriate issues to the contractually mandated arbitration process.'" Id. We found no error in the trial court's reasoning or conclusion.

n3 On June 12, 1989, Judge Gonzalez granted Nationwide's motion for partial summary judgment and barred the Hillmans from recovering arbitration damages for emotional distress. The arbitration award was consequently reduced to $55,000.

[**6]

Following arbitration, the Hillmans' bad faith litigation began anew. On June 21, 1990, Judge Michalski granted Nationwide's motion for partial summary judgment, dismissing the bad faith claims associated with Nationwide's denial of coverage and decision to arbitrate.

After several pre-trial motions, Judge Michalski reconsidered an earlier ruling and granted Nationwide's motion for summary judgment on the remaining bad faith claims. n4 Dismissal of the claims was based on Judge Michalski's belief that the Hillmans failed to demonstrate that they could show damages. After issuing the Final Judgment, the superior court identified Nationwide as the prevailing party and awarded costs and partial attorney's fees in the amount of $154,899.57.

n4 What these claims consisted of is not brought into focus in the briefs before us.

This appeal followed.

II. DISCUSSION

A. Dismissal of the Hillmans' Bad Faith Claims

1. Denial of Coverage

In *State Farm Fire & Casualty Co. v. Nicholson, 777 P.2d 1152 (Alaska 1989),* [**7] we held that insurance companies could be liable for the tort of bad faith in so-called "first-party" cases — cases in which insureds seek compensation from their own insurers for losses which they have suffered. *Id. at 1156.*

We had no occasion to comprehensively define the elements of the tort of bad faith in a first-party insurance context in Nicholson; we have not done so in subsequent cases, see e.g., *State Farm Mut. Auto. Ins. Co. v. Weiford, 831 P.2d 1264 (Alaska 1992);* nor do we do so now. In recognizing the tort of bad faith in first-party cases, we aligned Alaska with those jurisdictions that have followed *Gruenberg v. Aetna Insurance Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (Cal. 1973),* apparently the first case to apply bad faith as a tort in first-party cases. n5 Gruenberg articulated the tort in a manner that seemed to require unreasonable conduct and bad [*1324] faith: "Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." *Gruenberg, 510 P.2d at 1038.*

n5 The jurisdictions that have followed Gruenberg are listed in William N. Shernoff, et al., Insurance Bad Faith Litigation, § 5.01 at 5.3 n.4 (1984 and Supp. 1992).

[**8]

A similar double requirement was imposed in *Noble v. National American Life Insurance Co., 128 Ariz. 188, 624 P.2d 866 (Ariz. 1981),* another case on which we relied in Nicholson. The Arizona Supreme Court adopted the standard expressed by the Wisconsin Supreme Court in *Anderson v. Continental Insurance Co., 85 Wis. 2d 675, 271 N.W.2d 368 (Wis. 1978):*

The Anderson Court states:

To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one. ...

The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.

271 N.W.2d at 376-77.

Under the Anderson standard an insurance company may still challenge claims which are fairly debatable. [**9] The tort of bad faith arises when the insurance company intentionally denies, fails to process, or pay a claim without a reasonable basis for such action.

Noble, 624 P.2d at 868.

A leading text has this to say about the standard in first-party bad faith cases:

In third party situations, an insurer can be liable for an excess judgment when it has failed to settle a third party action against its insured. However, courts have not agreed on the standard for imposing such liability. Some courts impose liability for a negligent failure to settle the third party action; others apply a "bad faith" test that, in practical terms, amounts to a negligence test; and a third group of courts applies a fairly strict requirement of subjective bad faith. A similar divergence of views concerning the level of wrongdoing necessary to impose tort liability on insurers for denial of benefits appears to exist among courts that have adopted the tort of first party bad faith.

Although bad faith is not fully defined in some jurisdictions, courts have consistently held that a refusal to pay benefits based on a reasonable interpretation of the insurance contract is not [**10] bad faith.

Shernoff, Insurance Bad Faith Litigation, § 5.02[1] at 5-6 (1992) (footnotes omitted).

The above authorities make it clear that while the tort of bad faith in first-party insurance cases may or may not require conduct which is fraudulent or deceptive, n6 it necessarily requires that the insurance company's refusal to honor a claim be made without a reasonable basis. n7 Neither party takes issue with this proposition. Instead, the Hillmans argue that summary judgment should not have been granted because (a) reasonableness is always a question of fact for the jury and, alternatively, (b) under the facts and circumstances of this case there was a fact question [*1325] as to whether Nationwide had a reasonable basis for denying the claim.

n6 The Wisconsin Supreme Court may have modified the Anderson standard. In *Fehring v. Republic Insurance Co., 118 Wis. 2d 299, 347 N.W.2d 595 (Wis. 1984),* the court held that proof that a reasonable insurer would not have acted as the defendant did under the circumstances establishes bad faith.

n7 In *Loyal Order of Moose v. International Fidelity Insurance Co., 797 P.2d 622 (Alaska 1990),* a case involving the somewhat analogous relationship between a surety and its obligee, we stated: "A surety may satisfy its duty of good faith to its obligee by acting reasonably in response to a claim by its obligee, and by acting promptly to remedy or perform the principal's duties where default is clear." *Id. at 628.* In a footnote, we quoted an Arizona decision, *Dodge v. Fidelity and Deposit Co. of Maryland, 161 Ariz. 344, 778 P.2d 1240 (Ariz. 1989),* which uses language mirroring the rule of law employed in today's opinion: "So long as a surety acts reasonably in response to a claim made by its obligee, the surety does not risk bad faith tort liability." Loyal Order of Moose, 797 at 627 n.8.

[**11]

The Hillmans' argument that reasonableness always presents a question of fact is without merit. Although questions of reasonableness often must be resolved at trial, we have not held that they are never an appropriate subject for summary judgment procedures. If, when viewing the evidence most favorably to the opponent of a motion for summary judgment, the trial court finds that a reasonable jury could only conclude that the challenged

conduct must be characterized in one way, then summary judgment in accordance with that conclusion should be entered. Schneider v. Pay ' *N Save Corp., 723 P.2d 619, 623 (Alaska 1986).*

The Hillmans also argue that the superior court tacitly accepted the standard of bad faith articulated in *National Savings Life Insurance Co. v. Dutton, 419 So. 2d 1357 (Ala. 1982).* In Dutton, the Alabama Supreme Court held that, except in extraordinary circumstances, "if the evidence produced by either side creates a fact issue with regard to the validity of the claim ... the [bad faith] tort claim must fail and should not be submitted to the jury." *Id. at 1362.* In short, **[**12]** under the Dutton test, the plaintiff must prove that plaintiff is "entitled to a directed verdict on the c ntract claim and, thus, entitled to recover on the contract claim as a matter of law." Id.

We need not address whether the superior court adopted the Dutton standard. Dutton does not state the Alaska rule of law. Our position is merely ...at where the insurer establishes that no reasonable jury could regard its conduct as unreasonable, the question of bad faith need not and should not be submitted to the jury.

The Hillmans' alternative argument — that they presented sufficient evidence to raise a fact question as to whether Nationwide's denial of coverage had a reasonable basis — requires more discussion. The Hillmans argue that they presented evidence showing that Nationwide denied coverage before making any investigation of the facts or the law and that Nationwide made subsequent, formal denials of coverage without having conducted significant investigation. They also argue that Nationwide's agents violated its guidelines and policies, which are intended to guarantee fair, honest and reasonable claims handling. Among others, this included violating the **[**13]** company policy requiring local adjustors to consult with higher echelons in the company before denying a death claim; failing to resolve all reasonable doubts about coverage in favor of the policy holder; withholding from the file any explanation for why the policy holder was required to sign a nonwaiver agreement; obtaining a legal opinion just to "paper the file" and for the main purpose of denying the claim; failing to provide a policy holder with a previously promised letter from Nationwide's attorney regarding coverage; lying to the policy holder about whether that letter was available; and "stonewalling" the claim for four years because of vindictiveness towards the Hillmans' attorneys. n8 Finally, the Hillmans argue that even after Nationwide had given its personnel the authority to concede coverage and settle the underlying case for the $50,000 policy limits, its Regional Claims Attorney unilaterally decided not to do so.

n8 The Hillmans maintain that Nationwide's District claims Manager and its Regional Claim Attorney concede that Nationwide failed to follow its own policies and procedures in all these respects.

[14]**

In our view none of these facts suffice to raise a factual question as to whether Nationwide's denial of coverage lacked a reasonable basis. The denial was based on an explicit exclusion in the policy. The question in this case is whether Nationwide was unreasonable in treating the exclusion as valid. As to this question, the Hillmans have directed us to no evidence suggesting unreasonableness. We have found that "the only reasonable interpretation" of this exclusion was that advanced by Nationwide. *Hillman I, 758 P.2d at 1250.* We also concluded in Hillman I that the exclusion was invalid on statutory and public policy grounds. Two of the five members **[*1326]** of this court disagreed that the exclusion was invalid. *Id. at 1255* (dissenting opinion of Justice Burke, joined by Justice Moore). See also *State Farm Mut. Auto. Ins. Co. v. Bass, 231 Ga. 269, 201 S.E.2d 444, 445 (Ga. 1973)* (where appellate court was divided on interpretation of uninsured motorist statute, "insurer was legally justified in litigating the issue and cannot, as a matter of law, be liable for ... bad faith"). Further, as we acknowledged **[**15]** in Hillman I, a respectable minority of jurisdictions have reached the same conclusion as the dissent. *Hillman I, 758 P.2d at 1251.* The facts that Nationwide did not follow its standard procedures in denying coverage, that it did not forward its attorney's letter to the Hillmans, and that its $50,000 offer was conditioned on settling all of Hillmans' claims rather than their uninsured motorist claims, do not suffice to create a fact question as to whether Nationwide's decision to deny coverage lacked a reasonable basis, as they have little or no relevance on that point. We conclude, therefore, that there are no genuine issues of material fact as to whether Nationwide's denial of coverage was reasonable. n9

n9 This conclusion is consistent with *State Farm Mutual Automobile Insurance Co. v. Bass, 231 Ga. 269, 201 S.E.2d 444 (Ga. 1973)* and *Aetna Casualty & Surety Co. v. Superior Court, 161 Ariz. 437, 778 P.2d 1333 (Ariz. App. 1989).* In both cases, courts found that an insurer was not liable for bad faith when it denied coverage to an insured on the basis of an uninsured motorist exception which was later held invalid. See also *Hanson v. Prudential Insurance Co. of America, 772 F.2d 580 (9th Cir. 1985)* (applying California law).

[16]**

2. Demand for Arbitration

In the same order dismissing the bad faith claim related to coverage denial, Judge Michalski also dismissed the bad faith claim based on Nationwide's demand for arbitration. Judge Michalski found that the arbitration demand was not in bad faith because Nationwide "merely exercised its right." The court reiterated the decision in its March 7, 1991 order dismissing the Hillmans' remaining bad faith claims.

The Hillmans contend that Nationwide had no reasonable basis to demand arbitration. Instead, they argue, Nationwide's agents insisted on arbitration in order to discourage the Hillmans from proceeding with their legitimate claims and because of vindictiveness and aggravation with their attorneys.

However, the insurance policy covered the Hillmans "only to the extent the uninsured motorist was liable." Based on evidence from the initial police report, Nationwide could reasonably conclude that Amis was only partially responsible for the accident. n10 The subsequent findings of the arbitrators, that Julie was 66% at fault for the accident and her parents 85% at fault for their emotional distress, lend additional support to Nationwide's claim that its demand **[**17]** for arbitration was reasonable. See *Sullivan v. Allstate Ins. Co., 111 Idaho 304, 723 P.2d 848, 850 (Idaho 1986)* (a subsequent arbitrator's decision that a claimant was partially negligent was clear evidence that an insurer's denial of liability was not in bad faith). Consequently, Nationwide's decision to demand arbitration was reasonable and therefore not in bad faith.

n10 The report stated that Julie had "failed to yield when entering Long Lake Road from a side road." The Hillmans note that the information available to Nationwide when it insisted on arbitration was insufficient to prove that Amis was not at all at fault. This is true but irrelevant. Nationwide was entitled to arbitration if it could reasonably maintain that Amis was not completely at fault.

B. Award of Attorney's Fees

An award of attorney's fees will be reversed if the trial court's determination is an abuse of discretion or "manifestly unreasonable." *Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1138 (Alaska 1989).* **[**18]** Designation of the prevailing party "is committed to the broad discretion of the trial court." *Apex Control Systems, Inc. v. Alaska Mechanical, Inc., 776 P.2d 310, 314 (Alaska 1989).*

The determination will be affirmed on appeal "unless it is shown that the court abused its discretion by issuing a decision which is arbitrary, capricious, manifestly **[*1327]** unreasonable, or improperly motivated."

Howard S. Lease Constr. Co. & Assoc. v. Holly, 725 P.2d 712, 720 (Alaska 1986) (quoting *City of Yakutat v. Ryman, 654 P.2d 785, 793 (Alaska 1982)).*

After the Final Judgment was issued, Judge Michalski awarded Nationwide approximately $155,000 in costs and partial attorney's fees. n11 The Hillmans argue that the trial court abused its discretion when it determined that Nationwide was the prevailing party. The Hillmans claim that since they prevailed on two of the three issues in the case, coverage and liability, but not on bad faith, they were the "prevailing party."

n11 The total consisted of $44,448.57 in costs and $110,451.00 in fees. The attorney's fees award was 40% of the total amount of attorney's fees Nationwide incurred after July 1988.

[19]**

Civil Rule 82(a) directs that attorney's fees be awarded to the prevailing party. n12 "The prevailing party is the one 'who has successfully prosecuted or defended against the action, the one who is successful on the "main issue" of the action and "in whose favor the decision or verdict is rendered and the judgment entered."'" *Day v. Moore, 771 P.2d 436, 437 (Alaska 1989)* (quoting *Adoption of V.M.C., 528 P.2d 788, 795 n.14 (Alaska 1974)).*

n12 Alaska R. Civ. P. 82(a)(2) states:

In actions where the money judgment is not an accurate criterion for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

This court has recognized that "it is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party." *Owen Jones & Sons, Inc. v. C.R. Lewis Co., 497 P.2d 312 313-14 (Alaska 1972).* **[**20]** We have been cited to two cases n13 where the party who obtained an affirmative recovery was held not to be the prevailing party by the trial court and this decision was affirmed on appeal. The cases are Owen Jones and *Hutchins v. Schwartz, 724 P.2d 1194 (Alaska 1986).* In Hutchins, the plaintiff sought $275,000 in compensatory damages. After a trial the jury returned a verdict in favor of the plaintiff, awarding some $1,900, which in turn had to be reduced by 40% because of the plaintiff's comparative negligence. *Id. at 1204.* Thus the plaintiff's affirmative award was only approximately $1,100. This recovery is so small in comparison with what was sought that it may properly be considered de minimis. The verdict

essentially was a defense verdict. n14

n13 *Buoy v. ERA Helicopters, Inc., 771 P.2d 439 (Alaska 1989),* is not a case in which the plaintiff received an affirmative recovery. The $141,676 jury verdict the plaintiff received in that case was reduced to nothing because of prior settlements which the plaintiff had made. *Id. at 441.*

[**21]

n14 In addition, in Hutchins the defendant had made an offer of judgment under Civil Rule 68 for $35,000 and therefore under that rule he was in any case entitled to attorney's fees incurred after the date of the offer. Id. at 1203.

Owen Jones may not be so easily distinguished. There, Jones-Western, a contractor, sued its subcontractor, C.R. Lewis Co., to recover approximately $120,000 in progress payments that Jones-Western had paid C.R. Lewis in connection with construction of a building that was destroyed by an earthquake before it was completed. The subcontractor counterclaimed for services rendered and materials furnished before the collapse. The trial court held that Jones-Western was not entitled to recover progress payments and that the subcontractor had a claim in quantum meruit for the reasonable value of the services and materials supplied prior to the earthquake. The trial court fixed this sum at approximately $142,000. Thus, the subcontractor would have been entitled to an affirmative recovery of some $22,000 except for the fact that it salvaged some materials [**22] from the building after the earthquake on which the court placed a value of $30,000. Because of this, Jones-Western was left with a small affirmative recovery. We described this recovery in Owen Jones as merely "incidental": "This recovery based on the accounting can be classified as an incidental recovery which will not be a sufficient recovery to bar a party who has defended a large claim from being considered [*1328] a prevailing party." *Owen Jones, 497 P.2d at 314, n.5.* We also noted that the "main issue" in the case below was whether the subcontractor had an obligation to refund the progress payments. The subcontractor prevailed on this issue. *Id. at 314.* Accordingly, we affirmed the trial court's holding that the subcontractor was the prevailing party. Id.

In reaching our conclusion in Owen Jones, we distinguished *Buza v. Columbia Lumber Co., 395 P.2d 511 (Alaska 1964).* Buza was a suit brought for conversion of a quantity of logs. The plaintiff sought the return of the logs, worth some $8,000, plus compensatory and punitive damages of $31,000. After a trial the plaintiff [**23] was awarded the logs, but no damages. We held, nonetheless, that the plaintiff was the prevailing party, defining that term to mean the party "who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention." *Buza, 395 P.2d at [illegible].*

In Owen Jones we distinguished Buza as follows:

The main issue in that case was the ownership of a quantity of logs, and the plaintiff proved his right to the logs although he was not able to obtain compensating or punitive damages.

The instant case differs because the recovery of appellants was based only on an accounting for materials salvaged by the appellee. It was clear that the main issue had been resolved against appellants when the court found that appellee had no obligation to refund its progress payments under the contract ....

Owen Jones, 497 P.2d at 314 (footnote omitted).

In our view the present case more closely resembles Buza than Owen Jones. Here, as in Buza, plaintiff prevailed on the basic liability question and received an affirmative recovery [**24] based on its successful litigation of that question, which was substantial in amount. Owen Jones is distinguishable because the plaintiff's affirmative recovery there was based on a minor accounting issue, not on the liability theory which plaintiff tried unsuccessfully before the court.

In the present case, the Hillmans are no doubt disappointed that they did not receive compensatory and punitive damages against the insurance company on their claim of bad faith. Nonetheless, they prevailed against vigorous opposition on their claim of policy coverage and received $50,000 on that claim. This recovery cannot be classified as an incidental one unrelated to the main focus of the litigation in this case. We conclude therefore that the trial court erred in refusing to designate the Hillmans as the prevailing party. n15 Accordingly the award of attorney's fees must be reversed and this case remanded so that an award of reasonable attorney's fees may be made in favor of the Hillmans.

n15 The fact that Nationwide made an offer of settlement of $50,000 is irrelevant to the question of who the prevailing party is since this offer was not made under civil Rule 68 *Myers v. Snow White Cleaners & Linen Supply, Inc., 770 P.2d 750, 753 (Alaska 1989)* ("no offers not in compliance with Civil Rule 68 should be considered in determining questions of costs and attorney's fees").

[**25]

III. CONCLUSION

We affirm the decision of the superior court grant-

ing Nationwide's motion for summary judgment on the Hillmans' bad faith claims. Nationwide's decisions to deny coverage and then to demand arbitration were reasonable. In light of our decision, there is no reason to consider the damages issue. n16

> n16 In addition, we decline to address the Hillmans' claim that several of the superior court's evidentiary rulings were an abuse of discretion. Even if the superior court's rulings concerning the admissibility of evidence during trial were erroneous, such error was harmless where the case was never submitted to the jury.

The superior court's designation of Nationwide as the prevailing party was an abuse of discretion. Since the Hillmans prevailed on two of the three issues central to the case and won a substantial affirmative recovery based on these issues, they were the prevailing party. The trial court [*1329] should make a new award reflecting this determination.

The superior court's decision granting summary [**26] judgment on the bad faith claims is AFFIRMED. The award of attorney's fees is REVERSED and REMANDED.

DISSENTBY:
COMPTON (In Part)

DISSENT:

COMPTON, Justice, with whom, BURKE, Justice, joins, dissenting in part.

While declining to comprehensively define the elements of the tort of **bad faith,** the court has actually eliminated the implied covenant of good faith and fair dealing in insurance contracts. The court concludes that summary judgment is appropriate if the insurer has a reasonable (colorable) contractual basis for denying liability. In other words, the insurer may enforce a contractual basis for denying liability regardless of any subjective bad faith. Because the court's analysis is contrary to law and not supported by policy, and because a reasonable jury could find that Nationwide acted with subjective bad faith, I dissent.

The court concludes that the tort of bad faith in the context of first party insurance claims necessarily includes a requirement that the insurer's refusal to honor the claim be made without a reasonable basis. It should be noted that the Hillmans do not accept this proposition, because contrary to the court's conclusion, the Hillmans do not accept that a reasonable basis [**27] can exist if actions are motivated by improper purposes. The Hillmans argue that because evidence was presented that shows Nationwide's denial was motivated by self serving, dishonest and improper purposes, summary judgment was inappropriate. "Where the record supports plaintiff's contention that acts or omissions by the carrier were for a bad-faith purpose or motive, the matter should be submitted to a jury for its determination." Thus the issue is properly before us.

Until today the covenant of good faith and fair dealing, which we have implied in every contract including insurance contracts, has imposed duties above and beyond express contractual duties. *Guin v. Ha, 591 P.2d 1281, 1291 (Alaska 1981).* The additional duties imposed by the covenant of good faith and fair dealing were not eliminated when this court accepted the argument that in insurance contracts, a breach of the covenant sounds in tort. "That responsibility is not the requirement mandated by the terms of the policy itself — to defend, settle, or pay. It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its [**28] contractual responsibilities." *Gruenberg v. Aetna Insurance Company, 9 Cal. 3d 566, 510 P.2d 1032, 1037, 108 Cal. Rptr. 480 (Cal. 1973).*

The covenant of good faith and fair dealing requires that the party act with both subjective good faith and objective fairness. *Luedtke v. Nabors Alaska Drilling, Inc., 834 P.2d 1220, 1225 (Alaska 1992).* It is objectively reasonable to rely on contractual rights. Contractual rights, therefore, provide a reasonable basis for a position. But this does not end our inquiry. The covenant of good faith and fair dealing requires that contractual rights be pursued with subjective good faith. In *Mitford v. de Lasala, 666 P.2d 1000, 1007 (Alaska 1983),* even though the employment at will contract allowed the firing of Mitford for no reason at all, "the circumstances surrounding Mitford's termination give rise to an inference that he was fired ... for the purpose of preventing him from sharing in future profits," thereby violating the duty of good faith and fair dealing. In *Loyal Order of Moose v. International Fidelity Insurance Co., 797 P.2d 622, 629 (Alaska 1990),* [**29] we noted that while the surety had a contractual right to demand arbitration, "the demand for arbitration may not itself be made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim."

We have declined to hold that a breach of the covenant of good faith and fair dealing sounds in tort in the context of employment contracts. However, because of the special nature of insurance contracts, a breach of the covenant of good faith and fair dealing in first party insurance claims does sound in tort. *State Farm Fire & Cas. Co. v.* [*1330] *Nicholson, 777 P.2d 1152, 1156-57 (Alaska 1989).*

The adhesionary aspects of the insurance contract, including the lack of bargaining strength of the insured, the contract's standardized terms, the motivation of the in-

sured for entering into the transaction and the nature of the service for which the contract is executed, distinguish this contract from most other non-insurance commercial contracts. These features characteristic of the insurance contract make it particularly susceptible to public policy considerations.

Id., quoting Louderback & Jurika, Standards for Limiting the Tort of Bad [**30] Faith Breach of Contract, *16 U.S.F.L. Rev. 187, 200-01 (1982)*. The reason for holding that such claims sound in tort is because "an action in tort provides a remedy for harm done to insureds though no breach of an express contractual covenant has occurred and where contract damages fail to adequately compensate insureds." Id., quoting *White v. Unigard Mutual Insurance Co., 112 Idaho 94, 730 P.2d 1014, 1017-18 (Idaho 1986)*.

Nicholson is consistent with our policy that because of the special nature of insurance contracts, they are particularly susceptible to public policy considerations. *Hillman v. Nationwide Mutual Fire Ins. Co., 758 P.2d 1248, 1250 (Alaska 1988)* (invalidating uninsured motor vehicle exclusion on the basis of public policy); *CIII of Alaska, Inc. v. Employers Reinsurance Corp., 844 P.2d 1113 (Alaska 1993)* (granting an insured the unilateral right to select independent counsel in cases where an insurer has reserved its rights, despite the insurer's express contractual right to select counsel); *Estes v. Alaska Ins. Guar. Ass'n, 774 P.2d 1315 (Alaska 1989)* [**31] (concluding that a time limitation on commencement of suit will only be enforced on a showing of prejudice); *Alaska Energy Authority v. Fairmont Insurance Co., 845 P.2d 420 (Alaska 1993)* (concluding that the failure to file suit within the time limitation of the contract does not bar a claim without a showing of prejudice).

In spite of these cases, this court now concludes that as long as there exists a reasonable contractual basis for a denial of liability, a bad faith claim sounding in tort will fail regardless of any evidence of subjective bad faith. The court interprets our adoption of Gruenberg as "seeming" to require proof of both objectively unfair conduct and subjective bad faith. Gruenberg was the first case to hold that a breach of the covenant of good faith and fair dealing sounds in tort, giving the plaintiff broader remedies than those in contract. While in Gruenberg there may have been evidence of both unfair conduct and bad faith, the court clearly articulated "the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." [**32] *510 P.2d at 1037* (emphasis added).

Instead of providing more protection for an insured by adopting the proposition that a bad faith claim may sound in tort, in fact we are providing less protection. In the context of first party insurance claims, the court has actually limited the covenant of good faith and fair dealing by imposing a twofold requirement which it has not required in any other contract. The covenant of good faith and fair dealing is meaningless if existence of a reasonable contractual basis for denial of liability is alone sufficient to defeat a bad faith claim. n1

> n1 This court stated in *State Farm Mutual Auto Insurance Co. v. Weiford, 831 P.2d 1264, 1266 (Alaska 1992)*, that an insured may bring a bad faith claim "in tort as well as in contract." The duty of good faith and fair dealing implied in every contract requires the insurer to act with subjective good faith and objective fairness, unlike the tort of bad faith which, as now defined, permits the insurer to act with subjective bad faith. If Weiford is still a correct statement of the law, then the proper disposition of this case would be to remand it to the superior court for further proceedings. The Hillmans should be permitted to proceed on a claim based on a breach of the implied covenant of good faith and fair dealing arising out of the contractual relationship, distinct from a claim based on the tort of bad faith. They have set forth specific facts which, viewed in a light most favorable to them, raise genuine issues of material fact. Contractual damages based on a breach of the implied covenant of good faith and fair dealing may be narrower in scope than tort damages, yet some relief may be available to the Hillmans. However, the correctness of the statement in Weiford is now doubtful, despite this court's assertion that it is declining to "comprehensively" define the elements of the tort of bad faith.

[**33]

[*1331] This is contrary to our previous holdings. For example, in *State Farm Mutual Auto Insurance Co. v. Weiford, 831 P.2d 1264, 1266 (Alaska 1992)*, we reaffirmed that "bad faith claims brought by insured persons against their insurance companies may be brought in tort as well as in contract." We vacated the award of punitive damages because "the $20,000 offer clearly was reasonable. While the suspect note to the file might be reflective of bad motive, since the offer in question was reasonable, the note cannot independently form the basis for a punitive damages award." *Id. at 1268*. However, we noted that "the crux of Weiford's bad faith case was the testimony of her expert, George Broatch. Broatch testified that no single act of State Farm amounted to bad faith, but that cumulatively State Farm's actions did: 'It—to me it was a matter of the company philosophy. I don't really have any quarrel with the day to day handling of the file

particularly.'" *Id. at 1267.* We concluded "that there was sufficient evidence to support a jury finding that State Farm acted in bad faith." *Id. at 1269.* [**34] The court is correct in rejecting the Hillmans' assertion that reasonableness is always a question of fact for the jury. But the proper question is whether a reasonable jury could conclude that Nationwide acted unreasonably, i.e. either objectively unfairly or with subjective bad faith.

In reviewing a grant of summary judgment we view the facts in the light most favorable to the non-prevailing party. *Loyal Order of Moose, 797 P.2d at 628.* The Hillmans presented evidence that Nationwide denied coverage before making an investigation of the facts or law. Nationwide violated its internal guidelines and policies which guarantee fair, honest and reasonable claims handling. Specifically, Nationwide: (1) failed to follow internal procedures when local adjustors failed to consult with higher echelons in the company before denying the death claim; (2) failed to resolve all reasonable doubts about coverage in favor of the policy holder; (3) failed to explain why a nonwaiver agreement was required; (4) obtained a legal opinion in order to justify denying the claim; (5) failed to provide the Hillmans with previously promised information from its attorney; [**35] (6) lied about whether a letter from its attorney was available; (7) stonewalled for four years because of alleged vindictiveness toward the Hillmans' attorneys; and, (8) even after authority to concede coverage and settle the case was granted, the Regional Claims Attorney unilaterally decided not to settle.

Taking these assertions as true, n2 a reasonable jury could conclude that by failing to investigate, lying to the policy holder and stonewalling for four years, Nationwide acted with subjective bad faith. The grant of summary judgment was improper. Yet this court concludes that as long as Nationwide had a reasonable contractual basis for denying liability, evidence of bad faith and unfair dealings "have little or no relevance."

n2 While the Hillmans have not at this point presented convincing evidence of their assertions, they have set forth specific facts which, viewed in the light most favorable to the Hillmans, raise a genuine issue of fact.

The court applies this same standard to the question of arbitration. [**36] Again, on summary judgment we view the facts in a light most favorable to the non-prevailing party. *Loyal Order of Moose, 797 P.2d at 628.* The Hillmans claim Nationwide insisted on arbitration in order to discourage the Hillmans from proceeding with their legitimate claims, and because of vindictiveness and aggravation with Hillmans' attorneys. Again, a reasonable jury could conclude that Nationwide acted with subjective bad faith. Yet because Nationwide's insurance policy contained an arbitration provision, "Nationwide's decision to demand arbitration was reasonable and therefore not in bad faith." This conclusion ignores *Loyal Order of Moose, 797 P.2d at 629,* which specifically states that even though a surety may have a right to arbitration, "the demand for arbitration may not itself be [*1332] made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim." The court's conclusion again effectively eliminates the covenant of good faith and fair dealing.

The Hillmans presented evidence from which a reasonable jury could conclude Nationwide acted with subjective bad faith. There are genuine issues [**37] of material fact which preclude summary judgment.

12 of 22 DOCUMENTS

STATE FARM FIRE & CASUALTY COMPANY, Appellant, v. David G. NICHOLSON and Doreen C. Nicholson, husband and wife, Appellees

No. 3465, File No. S-2303

Supreme Court of Alaska

777 P.2d 1152; 1989 Alas. LEXIS 82

July 21, 1989

PRIOR HISTORY:
[1]** Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, 3AN-85-14616 Civil, Anchorage, J. Justin Ripley, Judge.

COUNSEL:
Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for Appellant.

Ralph B. Cushman, Anchorage, for Appellees.

JUDGES:
Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.

OPINIONBY:
MOORE

OPINION:

[*1153] David and Noreen Nicholson sued State Farm Fire & Casualty Company for unreasonably and willfully breaching its duty to act in good faith. The Nicholsons alleged that State Farm did not promptly settle a claim under their homeowner's policy. The jury returned a special verdict in favor of the Nicholsons, awarding $105,700 in compensatory damages and $7,500 in punitive damages. On appeal, we address whether the breach of the implied covenant of good faith and fair dealing in "first-party" insurance cases is a tort, thereby possibly justifying an award of punitive damages, and whether the award of prejudgment interest was appropriate.

I.

In 1981, the Nicholsons purchased homeowner's insurance from State Farm, covering their residence at 1841 Early View Drive in Anchorage. In the event the Nicholsons suffered **[**2]** a loss that was covered, the policy obligated State Farm "to place the insured back in the situation they were in prior to the loss."

In February, 1983 a water main belonging to Central Alaska Utilities, Inc. broke. The water main was buried eight feet underground and ran beside the Nicholson house and other houses in the subdivision. The escaping water caused the soil underneath the house to erode and settle. More than a year later, on March 27, 1984, the Nicholsons first contacted State Farm to report the loss. On April 6, 1984 Vere Hotchkiss, claims adjuster for State Farm, made an initial on-premise inspection, and returned again on April 11, 1984 with an engineer to conduct another inspection. Relying on the Franklin & Allen engineering report issued on April 13, 1984, which stated two possibilities for the loss i.e. water alone or permafrost and earth settling, State Farm denied coverage on April 22, 1984, because its policy contained an exclusion for broad water damage and damage caused by earth movement. Furthermore, the Franklin & Allen report recommended that the Nicholson house be observed during **[*1154]** the winter of 1984-1985 to determine if any more settling would occur. Another **[**3]** consulting engineering report agreed with the Franklin & Allen report that a problem with the Nicholson house was permafrost degradation.

In the meantime, State Farm agreed to cover the Nicholsons' next door neighbor for the same loss. On June 14, 1984 State Farm now agreed to extend coverage to the Nicholsons for their loss and requested them to obtain property appraisals. On August 15, 1984 a general contractor J.B. White, Inc. inspected the premises and declined to give a repair estimate to the Nicholsons until a soil survey was performed. In September 1984, Shannon & Wilson drilled two test holes and issued two reports to the Nicholsons on October 23 and December 3, 1984. During the winter of 1985 engineers took perimeter levels around the house twice a month until March 11, 1985. During this time the Nicholsons experienced electrical and structural problems in their house. They were upset with the delay in fixing their house.

On May 29, 1985, a new State Farm adjuster, Roberta Halcro contacted the Nicholsons and requested they con-

tact David Chapman of Pac-Rim Construction Services to provide an estimate for the repair of the house by either demolition or replacement. The Pac-Rim [**4] repair report was issued on June 14, 1985 and both repair estimates exceeded $163,000, well in excess of the policy limits of $113,264.

State Farm then obtained an appraisal of the property with improvements as of September 24, 1985 for $98,200, and offered to pay that amount plus additional reimbursement for repair or replacement costs up to the policy limits. The offer was made on October 9, 1985. The Nicholsons rejected this offer and filed suit against State Farm on October 17, 1985. n1

> n1 In the October 9, 1985 letter State Farm requested (1) that the Nicholsons within 60 days submit a sworn statement of proof of loss; and (2) informed the Nicholsons that they are entitled to replacement or repair cost up to the policy limits of $113,264. The Nicholsons' attorney, Ralph Cushman, made a counteroffer (1) that State Farm pay close to the policy limits, and waive subrogation rights; or (2) pay something in the $170,000 range, and pursue subrogation with the insureds. State Farm rejected these counteroffers.

At trial in March 1987, State Farm offered testimony from several witnesses that the adjustment of this claim was highly unusual, difficult, and complex. The Nicholsons [**5] offered testimony from Robert Lowe, as an expert independent claim adjuster, that State Farm's delay in deciding coverage and settlement of the claim was unreasonable and outrageous.

II.

State Farm argues that the tort of bad faith handling of insurance claims should only be recognized in the context of liability claims, also known as third-party claims, n2 and not in first-party cases, in which an insured seeks coverage for losses he or she incurred. n3 The Nicholsons argue that Alaska should recognize the tort of bad faith in first-party as well as third-party cases.

> n2 Third-party cases involve an insurance company satisfying a claim against the insured by a third party. W. Shernoff, S. Gage & H. Levine, *Insurance Bad Faith Litigation* § 3.01, at 3-3 (1987) [hereinafter W. Shernoff].

> n3 Jury Instruction 16 indicates that the superior court treated the breach of the implied covenant of bad faith and fair dealing as a tort. Jury Instruction 16 stated:

> Every contract imposes upon each party a duty of good faith and fair dealing in its performance or its enforcement.
>
> An insurance company which intentionally deals in bad faith with its insured by refusing unreasonably to pay the insured for a valid claim, or settle a valid claim, covered by the policy may be found liable in tort for damages which proximately result from such conduct. **Bad faith** does not mean bad judgment or negligence, but means having a dishonest purpose through some motive of self-interest or ill will, or having maliciousness or hostile feelings toward its insureds, or acting with reckless indifference to the interests or rights of its insureds.

[**6] The tort of bad faith in the insurance context can be traced to the covenant of good faith and fair dealing, a contractual duty implied in all insurance policies. W. Shernoff, *supra* note 1, § 2.01. Jurisdictions [*1155] differ in their treatment of a breach of the implied covenant of good faith and fair dealing in the insurance context. Some jurisdictions characterize the cause of action as merely a breach of contract; others characterize the cause of action as a tort in third-party cases but not first-party cases; still others characterize the cause of action as a tort in both first-party and third-party cases. *Id.* §§ 2.01-2.02 (and cases cited therein); *see also* 15A R. Anderson, *Couch Cyclopedia of Insurance Law* § 58.3 (1983).

Courts first recognized the tort of bad faith in third-party cases. W. Shernoff, *supra* note 1, § 1.07[2], at 1-24 to 1-25. The California Supreme Court was the first to apply the tort of bad faith to first-party cases. *See Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).* In *Gruenberg,* after fire damaged the insured's restaurant, the insured sought to recover his loss pursuant to a fire policy. After the insurer denied liability under the [**7] policy, the insured sued for the tort of bad faith. The court extended its prior holdings, which recognized the tort of bad faith in third-party cases, n4 to the first-party case before it. *Id.* at 1037-38. The court reasoned that, in third-party cases,

we considered the duty of the insurer to act in good faith and fairly in handling the claims of third persons against the insured, described as a "duty to accept reasonable settlements"; in the case before us we consider the duty of an insurer to act in good faith and fairly in handling the claim of an insured, namely a duty not to withhold unreasonably payments due under a policy. These are merely two different aspects of the same duty. That responsibility is not the requirement mandated by the terms of the policy itself — to defend, settle, or pay. It is the obliga-

tion, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. Where in so doing, it fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action [**8] in tort for breach of an implied covenant of good faith and fair dealing.

Id. at 1037 (emphasis in original).

> n4 *See generally Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958)* (tort of bad faith recognized in third-party cases).

Since *Gruenberg*, a great number of other jurisdictions have recognized the tort of bad faith in first-party cases. n5

> n5 *See Spencer v. Aetna Life & Cas. Ins. Co., 227 Kan. 914, 611 P.2d 149, 151-52 (1980)* (listing jurisdictions which have adopted *Gruenberg*); Kornblum, *The Current State of Bad Faith and Punitive Damage Litigation in the U.S., 23 Tort & Ins. L.J. 812, 824-27 (1988).*

In *Noble v. National American Life Insurance Co., 128 Ariz. 188, 624 P.2d 866, 867-68 (Ariz. 1981)*, the Arizona Supreme Court, in following *Gruenberg*, noted:

> We are persuaded that there are sound reasons for recognizing the rule announced in *Gruenberg*. The special nature of an insurance contract has been recognized by courts and legislatures for many years .... An insurance policy is not obtained for commercial advantage; it is obtained as protection against calamity. In securing the reasonable [**9] expectations of the insured under the insurance policy there is usually an unequal bargaining position between the insured and the insurance company .... Often the insured is in an especially vulnerable economic position when such a casualty loss occurs. The whole purpose of insurance is defeated if an insurance company can refuse or fail, without justification, to pay a valid claim. We have determined that it is reasonable to conclude that there is a legal duty implied in an insurance contract that the insurance company must act in good faith in dealing with its insured on a claim, and a violation of that duty of good faith is a tort.

(Citations omitted). n6 In *White v. Unigard Mutual Insurance Co., 112 Idaho 94, 730* [*1156] *P.2d 1014 (1986)*, the Idaho Supreme Court raised an additional policy justification for holding that the breach of the covenant of good faith and fair dealing sounds in tort:

> An action in tort provides a remedy for harm done to insureds though no breach of an express contractual covenant has occurred and where contract damages fail to adequately compensate insureds .... The requirement that contract damages be foreseeable at the time of contracting, in some cases [**10] would bar recovery for damages proximately caused by the insurer's bad faith. The measurement of recoverable damages in tort is not limited to those foreseeable at the time of the tortious act; rather they include "[a] reasonable amount which will compensate plaintiff for *all* actual detriment proximately caused by the defendant's wrongful conduct."

Id. at 1017-18 (citations omitted). The Texas Supreme Court discussed both justifications in its decision to recognize a common-law cause of action for breach of the duty of good faith and fair dealing:

> In the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insured's misfortunes in bargaining for settlement or resolution of claims. In addition, without such a cause of action insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed. An insurance company has exclusive control over the evaluation, processing and denial of claims.

Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987).

> n6 As one commentator has noted:
>
> [A] related concern is the expectation of the insurance-consuming public which the industry has fostered itself. Allstate's slogan "You're in Good Hands," Travelers' motto of protection "Under the Umbrella," and Fireman's Fund symbolic protection beneath the "Fireman's Hat," exemplify the industry's own efforts to portray itself as a repository of the public trust. But with the public trust may be visited responsibility for a violation of such trust as evidenced by recent recognition of extra-contractual "rights" of insureds or tortious responsibility of insurers beyond the four corners of its insuring agreement — particulary in the first-party area.
>
> McMains, *Bad Faith Claims Handling — New Frontiers: A Multi-state Cause of Action in Search of a Home, 53 J. Air L. & Com. 901, 904 (1988).* It is noteworthy that the insurance company involved in this appeal promotes itself in national advertisements with the slogan, "Like a good neighbor, State

Farm is there."

[**11] In the past, we have declined to recognize a common-law tort duty of good faith and fair dealing in other contexts. For example, in *O.K. Lumber Co. v. Providence Washington Insurance Co., 759 P.2d 523 (Alaska 1988)*, an injured claimant sued a third-party tortfeasor's insurer for failure to promptly settle a claim. We declined to recognize a common-law tort duty of good faith and fair dealing running from an insurer to an injured claimant absent a contractual relationship. However, the decision in *O.K. Lumber* is not controlling in the instant appeal because there is a contractual relationship between State Farm and the Nicholsons: the Nicholsons are both the insureds and the injured claimants.

In *ARCO Alaska, Inc. v. Akers, 753 P.2d 1150, 1153-54 (Alaska 1988)*, we ruled that an employer's breach of the duty of good faith and fair dealing implied in an employment contract is a breach of contract which does not constitute an independent tort. However, employment contracts are substantially different from insurance contracts. Therefore, we do not extend *Akers* to the insurance context.

We hold that, in the first-party context, an insured's cause of action against an insurer [**12] for breach of the duty of good faith and fair dealing sounds in tort. The special relationship between the insured and insurer in the insurance context justifies this result. n7 State Farm contends that such a holding turns every breach of a [*1157] commercial contract into a tort cause of action. We disagree. As commentators have noted:

> The adhesionary aspects of the insurance contract, including the lack of bargaining strength of the insured, the contract's standardized terms, the motivation of the insured for entering into the transaction and the nature of the service for which the contract is executed, distinguish this contract from most other non-insurance commercial contracts. These features characteristic of the insurance contract make it particularly susceptible to public policy considerations.

Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract, 16 U.S.F. L. Rev. 187, 200-01 (1982)* (footnotes omitted).

n7 We reject the holding of *Santilli v. State Farm Insurance Co., 278 Ore. 53, 562 P.2d 965, 969 (1977)*, that the justifications supporting third-party actions do not support first-party actions. The *Santilli* court ignores the insurer's unequal bargaining power as to the insured's claim and the insurer's interest in delaying payment in order to obtain a settlement.

[**13] The availability of a tort action for breach of the duty of good faith and fair dealing will provide needed incentive to insurers to honor their implied covenant to their insureds. We reject the argument that the statutory scheme regulating the insurance industry provides sufficient incentive to insurers. n8 *See AS 21.36.010-.420.* As the Idaho Supreme Court noted in *White,* n9 the State has limited means with which to police the insurance industry. Furthermore, the statutory remedies fail to compensate the insured for damages involved in the insurer's bad faith denial of coverage. *See AS 21.36.320(d),* (e); *O.K. Lumber, 759 P.2d at 526-27.*

n8 *See, e.g., Spencer, 611 P.2d at 158.*

n9 *White, 730 P.2d at 1019 n.3.*

In conclusion, we hold that the trial court did not err in instructing the jury that an insurer's bad faith failure to settle a first-party claim is a tort.

III.

Since State Farm's wrongful acts constituted a tort, punitive damages were also possible. The jury awarded the Nicholsons $7,500 in punitive damages. State Farm argues that the Alaska Insurance Code preempts any punitive damages claims in first-party actions. We disagree. State Farm relies [**14] on the preemption provisions in *AS 21.03.060* and the civil penalty provisions for unfair trade practices. *See AS 21.36.320*; 21.90.020. The preemption provision cited by State Farm involves political subdivisions of the state and in no way addresses the issue of damages against insurance companies in civil actions. n10 The civil penalties provisions involve unfair or deceptive practices prohibited by the code. *AS 21.36.320.*

n10 *AS 21.03.060* reads in full:

> The state hereby pre-empts the field of regulating insurers and their general agents, agents and representatives. All political subdivisions of the state, including home rule boroughs or cities, are prohibited from requiring of an insurer, general agent, agent or representative regulated under this title an authorization, permit or registration of any kind for conducting transactions lawful under the authority granted by the state under this title.

Under *AS 21.36.125,* entitled "Unfair claims settlement practices," an insurance company only violates the chapter if it engages in certain proscribed acts "with such frequency as to indicate a practice." *AS 21.36.125.* Therefore, the potential $25,000 fine referred to by State [**15] Farm thus is not applicable unless the insurer is committing the unfair claim settlement practice with

considerable "frequency." The civil penalty under *AS 21.90.020* is also inapplicable absent "frequent" violations of the insurance code. At most, the Director of Insurance may impose a $1,000 penalty for an isolated act prohibited under the code. *AS 21.36.320(c)*, (d).

As the court of appeals noted in *Hugo v. City of Fairbanks, 658 P.2d 155, 161 (Alaska App. 1983):*

Statutes or ordinances that establish rights or exact penalties that are in derogation of the common law are construed in a manner that effects the least change possible in the common law. If a statute is intended to change the common law, then "the legislative purpose to do so must be clearly and plainly expressed."

Given the limited scope and civil penalties provided by the Alaska Insurance Code, we conclude that the legislature did not intend **[*1158]** to alter a private party's right to seek punitive damages.

Next, State Farm contends that the evidence does not support an award of punitive damages. To support punitive damages, the wrongdoer's conduct must be "outrageous, such as acts done with malice or bad motives or **[**16]** reckless indifference to the interests of another." *Sturm, Ruger & Co., Inc., v. Day, 594 P.2d 38, 46 (Alaska 1979), overruled on other grounds, Dura Corp. v. Harned, 703 P.2d 396 (Alaska 1985).*

Based upon the factual scenario set forth above in section I, as well as our review of the entire record, we conclude there was insufficient evidence as a matter of law to support a finding of outrageous conduct or a gross deviation from an acceptable standard of reasonable conduct in order to sustain an award of punitive damages. Thus, the trial court erred in instructing the jury on the punitive damages issue. *See Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767, 773-74 (Alaska 1982).*

IV.

The jury returned a verdict for the Nicholsons in the amount of $105,700 in compensatory damages. In its final judgment, the superior court ordered State Farm to pay prejudgment interest on the $105,700. State Farm argues that the estimates upon which the jury relied in setting the compensatory damage award were current at trial, and that the trial judge should not have added prejudgment interest to that portion of the damage award.

We discussed the issue of prejudgment interest in *Farnsworth* **[**17]** *v. Steiner, 638 P.2d 181, 183-85 (Alaska 1981).* n11 The rationale behind awarding prejudgment interest is that "judgment creditors are entitled to the time value of the compensation for their injuries [which is] recognized by this court in *all* civil cases." *Farnsworth, 638 P.2d at 184.* We categorized prejudgment interest as a "consequential injury" and held that it was "compensation and not a cost of litigation." *Id.* Since prejudgment interest is an item of compensatory damages,

[an] insurer will not be liable for prejudgment interest in excess of the applicable damage limitation[;] the insurer will be liable for any prejudgment interest which, when added to damages rendered against the insured, does not exceed the limitation on liability.

Guin v. Ha, 591 P.2d 1281, 1287 (Alaska 1979); see also American Nat'l Watermattress Corp. v. Manville, 642 P.2d 1330, 1343 (Alaska 1982). Prejudgment interest should be denied "in only the most unusual case," such as double recovery. *Id.*

n11 *See also Morris v. Morris, 724 P.2d 527, 529 (Alaska 1986).*

State Farm relies on the decision in *Sebring v. Colver, 649 P.2d 932 (Alaska 1982),* in which we discussed one situation **[**18]** when prejudgment interest was inappropriate. In *Sebring*, the jury returned a verdict of $54,000 in compensatory damages, $42,000 of which represented the cost of future repairs. *Id. at 936.* The trial court awarded prejudgment interest on the entire $54,000. Based on the fact that "the probable basis for the jury award was the estimated cost of repairs at the time of trial," *id.*, we held that prejudgment interest should not have been awarded on that portion of damages representing the cost of future repairs. We reasoned:

Since the financial impact of the passage of time was thus incorporated into the jury's damage award, any award of prejudgment interest on this amount would therefore constitute a double recovery.

Id.

State Farm misconstrues the decision in *Sebring* insofar as it contends that prejudgment interest is inappropriate as a matter of law when repair estimates are current at the time of trial. *Sebring* stands for the simple principle that prejudgment interest is not available when such an award would constitute a double recovery. In the instant case, there is no such danger; therefore, *Sebring* does not preclude an award of prejudgment interest.

State **[**19]** Farm also argues that the superior court erred by awarding prejudgment **[*1159]** interest because its policy states that the insured is not entitled to payment until thirty days after a final judgment is entered.

We disagree. In *Davis v. Criterion Insurance Co., 754 P.2d 1331, 1332 (Alaska 1988),* we ruled that an insurer who wrongfully denies coverage has materially breached the contract and may not require its insured to comply

with other terms of the policy. In the instant case, the jury found that State Farm should have made a settlement offer in April 1985. Its failure to do so constitutes a material breach of contract. Therefore, we conclude that State Farm may not enforce the policy provision to defeat the Nicholsons' right to collect prejudgment interest on the damage award.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

21 of 22 DOCUMENTS

LAREENE BURRECE, Appellant, v. STATE OF ALASKA, Appellee.

Court of Appeals No. A-6688, No. 1618

COURT OF APPEALS OF ALASKA

976 P.2d 241; 1999 Alas. App. LEXIS 5

February 5, 1999, Decided

PRIOR HISTORY:
[1]** Appeal from the Superior Court, Third Judicial District, Anchorage, Beverly W. Cutler, Judge. Trial Court No. 3PA-S96-52CR.

DISPOSITION:
AFFIRMED.

COUNSEL:
Eugene B. Cyrus, Eagle River, for Appellant.

Kenneth M. Rosenstein, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

JUDGES:
Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges. COATS, Chief Judge, concurring. MANNHEIMER, Judge, dissenting.

OPINIONBY:
STEWART

OPINION:

[*241] OPINION

STEWART, Judge.

Lareene Burrece pleaded no contest to one count of fourth-degree misconduct involving a controlled substance. n1 She preserved her right to appeal the order denying her unsuccessful attack on the search warrant for her [*242] property in Big Lake. n2 Burrece claims that the tip supporting the warrant was stale, that evidence of electric consumption could not corroborate that tip, and that the district court's [**2] reliance on a trooper's telephonic testimony that supplemented his affidavit was impermissible. We conclude that all of those claims fail and affirm her conviction.

n1 *AS 11.71.040(a)(5).*

n2 See *Cooksey v. State, 524 P.2d 1251, 1255-57 (Alaska 1974).*

Facts and proceedings

According to the affidavit filed in support of the search warrant application for Burrece's property, Alaska State Trooper Timothy L. Bleicher interviewed Troy Heaven on August 4, 1995, regarding his possession of marijuana. In that interview, Heaven told Bleicher that he stole the marijuana when he and two juveniles burglarized the Big Lake Laundry Mat. Heaven also told Bleicher that he knew of another place where marijuana was grown. That place was located on Tract D, Echo Hills Subdivision, located at about .5 mile Echo Lake Drive. Heaven knew of the place because a friend of his had lived there.

In the interview, Heaven told Bleicher that his friend had been asked to leave by the owner of the property. Heaven said he drove [**3] out to the property about four months before the interview and found his friend removing a large bag of marijuana from a white trailer located on the property. Heaven reported that his friend told him that there were about twelve marijuana plants inside the trailer.

Bleicher went to the property and observed several structures including a white trailer with "boarded up and covered" windows. Bleicher learned that Mike and Lareene Burrece were the owners of the property that Heaven identified.

Bleicher asked John Bogue, the Matanuska Electric Association's Energy Service Manager, about the electricity consumption for that property. He was told by Bogue that there were two accounts on the property, both in the names of Mike and Lareene Burrece. Bogue told him that the electrical consumption was suspicious and consistent with a marijuana grow because the pattern of consumption was inconsistent with the normal increase in the winter months and the normal decrease in the summer months. Bogue did not provide any data on the kilowatts used on the property but did indicate that the unusual pattern had continued after Heaven's visit to the property.

On August 9, 1995, Bleicher executed an [**4] affidavit that included the information obtained from Heaven and from his investigation. He filed that affidavit in support of a request for a search warrant for Burrece's property. On August 10, 1995, District Court Judge Peter G. Ashman called from the Palmer court to the Trooper's office in Wasilla and asked Trooper Bleicher some questions about the investigation and his affidavit. Judge Ashman stated in part:

Trooper Bleicher is present at my request, by telephone today, I received a long affidavit for a search warrant in 3PA-95106SW and I ... I'm basically prepared to grant the search warrant but I need to clarify a few points in the affidavit. [ ] I'm really basing my decision there's probable cause to search on matters contained in the affidavit, um and since that's been presented to me and sworn to, I believe that taking this additional telephonic testimony is [ ] I think there's ground to go forward in this fashion.

Judge Ashman asked Bleicher several questions and then announced, "I'm going to find that this is really not a proceeding on telephonic testimony but rather a telephonic ... an opportunity for the court to announce the basis of its decision [**5] and for the officer to take advisement telephonically." Judge Ashman granted the search warrant.

On August 14, 1995, the troopers served the search warrant and found eleven marijuana plants (two of them dead), "starter" marijuana plants, and over a pound of marijuana.

Burrece was indicted on three counts of fourth-degree misconduct involving a controlled substance. She moved to suppress the evidence that was seized pursuant to the warrant. Following a hearing, Superior Court Judge Beverly M. Cutler denied Burrece's [*243] motion. Burrece entered a no contest plea to one of the counts, preserving the issues that she argues on appeal.

Discussion

First, Burrece argues that Heaven's tip was stale because it was four months old when given to Bleicher. Because the tip was four months old, she argues that there was no reasonable ground to believe there was evidence on the property when Bleicher applied for the warrant.

Before a search warrant can be issued, the issuing judge or magistrate must be satisfied that current information supports a finding that probable cause to search presently exists. n3 Whether the information presented to the court is fresh or stale is determined by a flexible [**6] test. That test considers the totality of the circumstances. One of those circumstances is the span of time that has passed from the acquisition of that information by the informer or the police officer and the presentation of that information to the court. n4 Other relevant circumstances include the type of crime involved and the character of the items sought. n5

n3 See *Snyder v. State, 661 P.2d 638, 646-47 (Alaska App. 1983).*

n4 See *id. at 647.*

n5 See *Snyder, 661 P.2d at 647-48.*

Probable cause to search requires sufficient information to permit the conclusion that the criminal activity, the contraband, or the evidence of the crime will be found at the place to be searched. n6 That conclusion does not have to reach an absolute certainty, but the State must provide "reasonable grounds" to justify the conclusion that the items searched for are at the premises to be searched. n7

n6 See *id. at 645.*

n7 *Simmons v. State, 899 P.2d 931, 934 (Alaska App. 1995).*

[**7]

Bleicher's affidavit described the large amount of equipment commonly found in an operating grow, including high intensity lights, ballasts, tracks, timers, heaters, fans, pumps, and other equipment. Bleicher also noted that the electrical power for such an operation commonly is provided by the local utility and that windows in structures containing a grow are commonly covered to enhance the artificial-light cultivation. His affidavit also noted that the pattern of power consumption had not changed since Heaven had been at the property and that the trailer described by Heaven had boarded-up windows. All of this indicates that the site of marijuana cultivation is not likely to move in the four-month period between Heaven's visit to Burrece's property and the application for the search warrant.

Considering the totality of the circumstances in this case, we conclude that Judge Ashman could properly find that the information before him provided reasonable grounds to believe that evidence of a marijuana grow would be found when he issued the warrant. Judge Ashman could reasonably rely on the large amount of equipment that can be required for the cultivation of marijuana, the ongoing character [**8] of plant cultivation, coupled with the specific information in Bleicher's affidavit about Burrece's property to conclude that there would be evidence of a marijuana grow on Burrece's property. The specific information included the report of the unchanging pattern of electrical consumption (which provided an additional basis to infer that the cultivation

was ongoing and to conclude that Heaven's tip was not stale) and Heaven's report to Bleicher about the marijuana. Thus, we reject Burrece's contention that the warrant was invalid because Heaven's tip was stale.

Burrece argues that Judge Ashman could not rely on the evidence of electrical consumption when granting this warrant. But as we noted above, the evidence of the pattern of electrical usage that was provided in the warrant permitted an inference that there was no significant change in the activity on the property since Heaven visited. We conclude that the district court could rely on the description of Burrece's pattern of electrical consumption to infer that Heaven's tip described an ongoing operation.

[*244] Finally, Burrece relies on *AS 12.35.015(a)* n8 to attack the district court's use of Trooper Bleicher's telephonic testimony **[**9]** in support of the warrant. Burrece argues that the exclusionary rule should be applied to suppress any evidence obtained pursuant to the warrant because Judge Ashman did not follow the procedure established in that statute. For purposes of resolving this issue, we assume that the statute applies to this case.

n8 *AS 12.35.015(a)* provides:

> A judicial officer may issue a search warrant upon the sworn oral testimony of a person communicated by telephone or other appropriate means, or sworn affidavit transmitted by facsimile machine, if the judicial officer finds that there is probable cause to believe that
>
> (1) the presentation of the applicant's affidavit or testimony personally before the judicial officer would result in delay in obtaining a search warrant and in executing the search; and
>
> (2) the delay might result in loss or destruction of the evidence subject to seizure.

While Judge Ashman did not make the findings required by *AS 12.35.015(a)*, Burrece has neither shown nor argued any bad faith **[**10]** on the part of the court or the trooper. n9 Burrece argues that a violation of the statute by Judge Ashman is sufficient to suppress the evidence obtained pursuant to the warrant. But she does not argue that any of Bleicher's testimony was a critical or indispensable component of Judge Ashman's probable cause finding.

n9 See *AS 12.35.015(f)* ("Absent a finding of bad faith, evidence obtained under a warrant issued under this section is not subject to a motion to suppress on the ground that the circumstances did not support its issuance under (a) of this section.").

In several decisions, our appellate courts have faced the question whether the government's violation of a statute should result in the suppression of evidence. n10 An analysis of those decisions shows that the exclusionary rule embodied in Alaska Rule of Evidence 412 has not been applied when the statute that has been violated is wholly unrelated to a defendant's constitutional rights. n11 Furthermore, in Sundberg, a factor in the supreme court's **[**11]** analysis was the absence of a legislative directive to apply the exclusionary rule to the violation of the statute at issue. "We note that there is no legislative directive calling for invocation of an exclusionary rule as a sanction ...." n12 In the statute in question here, the legislature issued a directive that the exclusionary rule should not apply in the absence of bad faith. And the statute here does not implement or enforce a defendant's constitutional right, but regulates the process of search warrant applications.

n10 See *Zsupnik v. State, 789 P.2d 357, 361 (Alaska 1990); Ward v. State, 758 P.2d 87, 90 (Alaska 1988); Copelin v. State, 659 P.2d 1206, 1214-15 (Alaska 1983); State v. Sundberg, 611 P.2d 44, 50-52 (Alaska 1980); Nathan v. Anchorage, 955 P.2d 528, 533 (Alaska App. 1998); Harker v. State, 637 P.2d 716, 719-20 (Alaska App. 1981).*

n11 Cf. *Zsupnik, 789 P.2d 357, Ward, 758 P.2d 87,* and *Copelin, 659 P.2d 1206,* with *Sundberg, 611 P.2d 44, Nathan, 955 P.2d 528,* and *Harker, 637 P.2d 716.*

n12 *Sundberg, 611 P.2d at 50.*

[12]**

Burrece has not claimed that the purported violation of the statute was in bad faith. Furthermore, she has not claimed that absent Bleicher's testimony, the warrant would be invalid. We conclude that the exclusionary rule should not apply.

Conclusion

The judgment of the superior court is AFFIRMED.

CONCURBY:
COATS

CONCUR:

COATS, Chief Judge, Concurring.

I write separately because I am concerned that the court's decision might be read as more critical of Judge Ashman's actions than it should be. In my view, it is highly questionable whether Judge Ashman acted in violation of *AS 12.35.015(a)* when he took supplemental telephonic

testimony from Trooper Bleicher. As Judge Mannheimer concedes, there was nothing improper in Judge Ashman's action in having Trooper Bleicher provide supplemental information to strengthen the state's showing of established probable cause. n1 This appears to me to be the action of a conscientious magistrate reviewing a search warrant.

n1 Dissent at page 17.

[*245] Since the information which [**13] Trooper Bleicher provided was not the original application for the search warrant but was supplemental, in my view there is a serious question whether *AS 12.35.015* required Judge Ashman to find, in order to proceed telephonically, that "the delay might result in loss or destruction of the evidence subject to seizure." n2 Judge Stewart does not resolve this issue in his opinion. He concludes that even if there was a violation of the statute, Burrece has not made any claim which would warrant application of the exclusionary rule.

n2 *AS 12.35.015(a)(2).*

I agree with Judge Stewart's opinion. However, I would state the conclusion somewhat more strongly. I think it is an open question whether Judge Ashman violated *AS 12.35.015(a)* in taking the supplemental testimony. I believe Judge Ashman's conclusion that the statute did not prevent telephonic supplementation was reasonable. Under these circumstances, I conclude that it would be inappropriate to find that Judge Ashman acted in bad faith. I further conclude that it [**14] would not be appropriate to apply the exclusionary rule to this case.

DISSENTBY:
MANNHEIMER

DISSENT:

MANNHEIMER, Judge, dissenting.

I agree with the majority's resolution of all issues except the last: Judge Ashman's decision to take telephonic testimony from Trooper Bleicher. The record shows that Judge Ashman knowingly violated *AS 12.35.010(b)* and *AS 12.35.015(a)*. n1

n1 *AS 12.35.010(b)* states, "A judicial officer may issue a search warrant upon the sworn oral testimony of a person communicated by telephone or other appropriate means, or sworn affidavit submitted by facsimile machine, in accordance with *AS 12.35.015*."

The pertinent language of *AS 12.35.015* is discussed in this dissent.

Judge Coats reasons that Judge Ashman did not violate these statutes since the trooper's telephonic testimony supplemented a prior written affidavit. But neither *AS 12.35.010(b)* nor *AS 12.35.015(a)* draws any distinction between an officer's initial testimony and any later testimony the officer may give to bolster the search warrant [**15] application.

Judge Stewart concludes that even if Judge Ashman violated these statutes, the violation should be ignored. For the reasons explained here, I do not agree.

The facts of this case are straightforward. Trooper Bleicher initially applied for the search warrant by affidavit. After Judge Ashman read this affidavit, he contacted Bleicher and asked the trooper to give supplemental telephonic testimony:

THE COURT: Trooper Bleicher is present, at my request, by telephone today. I received a long affidavit for a search warrant in [case number] 3PA-95-106 SW, and I — I'm basically prepared to grant the search warrant, but I need to clarify a few points in the affidavit. Trooper Bleicher ... is [currently] located across the Valley in Wasilla, is that right?

BLEICHER: That is correct.

THE COURT: All right. And you're thirty minutes or so away from the courthouse?

BLEICHER: At least. Yes.

THE COURT: And it's now 5:10 in the afternoon. Given that the matters [I wish to inquire into] are simply ones of ... brief clarification, and [given] that Trooper Bleicher has testified personally in front of me literally hundreds of times, I believe that it's appropriate to [**16] [take] brief supplemental telephonic testimony as part of the search warrant [application]. It's not an [indiscernible] circumstance, and I don't believe that it would cause the loss or destruction of evidence. And if the State feels that it would be more appropriate to set this [hearing] for a time when the trooper could be present personally, I'd be happy to accommodate the trooper. Trooper Bleicher, is it your preference to go forward like this today, or would you like an opportunity to come over [to the courthouse in Palmer]?

BLEICHER: I would like ... [to] proceed telephonically.

Under *AS 12.35.015(a)*, a judicial officer has the authority to hear a search warrant application telephonically, but only "if the [*246] judicial officer finds that there is

probable cause to believe that ... [personal] presentation of the applicant's affidavit or testimony ... would result in delay [that] might result in loss or destruction of the evidence subject to seizure". The problem in the present case is that Judge Ashman affirmatively found that the statutory requirement was *not* satisfied. That is, Judge Ashman affirmatively found that there was no reason to believe that **[**17]** delay might result in loss or destruction of any evidence.

The majority offers three reasons why Judge Ashman's violation of the statute does not matter.

First, the majority adopts Judge Ashman's rationale that the search warrant application was essentially complete, that Judge Ashman had already decided to issue the warrant, and that the judge only wanted the trooper to provide "brief clarification" of the matters stated in the affidavit. However, the record shows that Judge Ashman was not simply seeking clarification of Bleicher's affidavit. Instead, the judge was trying to supplement the record with fairly important information.

The search warrant application in this case was based primarily on hearsay information obtained from Troy Heaven, so the government had to establish Heaven's "basis of knowledge" and "credibility" under the Aguilar - Spinelli test. n2 Heaven gave the police a detailed account of discovering marijuana at Burrece's residence, thus satisfying the "basis of knowledge" prong of Aguilar - Spinelli. But the evidence supporting Heaven's credibility was thin. Heaven was a "police informant", and he had not provided information to the police in the **[**18]** past. Moreover, in his statements to the police, Heaven provided reason to suspect that he was motivated by revenge or ill-will toward Burrece. (Heaven had a friend who was wanted by the law. The friend had been staying at Burrece's residence; but when Burrece discovered that Heaven's friend was hiding from a warrant, Burrece threw the friend out.) Thus, independent corroboration of Heaven's story was crucial to the issuance of the warrant.

> n2 *Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).* See *State v. Jones, 706 P.2d 317, 324-25 (Alaska 1985)* (holding that, as a matter of Alaska law, the Aguilar - Spinelli test continues to govern the evaluation of hearsay information offered to support a search or seizure).

In his affidavit, Trooper Bleicher referred to the fact that another search warrant had already been issued for a laundry in Big Lake. This prior search warrant application was based **[**19]** on a tip provided by Troy Heaven, who was also the informant in Burrece's case. However, Bleicher's affidavit was unclear regarding what the police discovered when they served the warrant at the laundry. Bleicher's affidavit stated:

[The] investigators observed that the Big Lake laundry mat [sic] *had been utilized* as a marijuana grow operation with extensive damage done to the facility, as well as evidence of marijuana being grown in 3 separate rooms within that building. The marijuana grow operation *appeared to have been an ongoing operation for an extended time period*[,] such as a couple of years.

(Emphasis added) This description, combined with Bleicher's failure to assert that the troopers found any marijuana or other evidence of current or recent marijuana cultivation, makes it sound as if the troopers had found an abandoned marijuana cultivation site. This state of affairs would arguably be inconsistent with Heaven's assertion that he had recently burglarized the laundry and had found marijuana growing there.

As the following portion of the transcript shows, Judge Ashman knew that the troopers had found quantities of marijuana when they served that **[**20]** earlier warrant — a discovery which indicated that the site was only recently abandoned:

THE COURT: I reviewed the [trooper's current] affidavit, and I actually did the search warrant that's referred to, on ... let's see ...

BLEICHER: 8-4-95?

THE COURT: Yeah, I'm trying to find the page reference. Okay, the operation referred to on page 3 [of the current affidavit]; ... a Big Lake laundry was the **[*247]** subject of [an earlier] search warrant, is that right?

BLEICHER: That's correct.

THE COURT: And ... as I read this affidavit, that [earlier] warrant was executed, and there were drugs found?

BLEICHER: That is correct, Your Honor.

...

THE COURT: And it was Troy Heaven who was one of the ... informants in that [earlier] case? And the State is asking the court to ... find that Heaven's credibility is corroborated by the fact that his information about the Big Lake laundry was verified by the search, is that right?

BLEICHER: That is correct.

In the above-quoted exchange, Judge Ashman indicates that all of this information about the earlier search was already contained in Bleicher's affidavit. But the judge's statement is not supported by the record. Bleicher's

[**21] affidavit referred to the earlier search warrant issued for the laundry in Big Lake and the fact that Troy Heaven provided the tip about that laundry, but Bleicher's affidavit did not fully describe the results of that earlier search. From the record, it appears that Judge Ashman independently knew the results of that search because he was the judicial officer who issued the earlier warrant.

To me, this record indicates that Judge Ashman was not simply trying to "clarify" Bleicher's affidavit. Rather, Judge Ashman was attempting to make a record — attempting to supplement Bleicher's affidavit with material information that the judge already knew but that Bleicher had forgotten to mention. For this purpose, Judge Ashman asked Bleicher a series of leading questions — questions that simply required Trooper Bleicher to confirm the judge's statements.

I am not suggesting that Judge Ashman acted improperly when he prompted Bleicher to provide supplemental information. Judicial officers often deal with testimony or affidavits that are imprecisely or inartfully worded, requiring the judge to elicit clarifying testimony or supplemental affidavits. Moreover, I do not believe that judges [**22] necessarily overstep their proper role when they ask police officers to confirm important facts that are already well-known but that somehow did not find their way into the officer's search warrant application. The problem here is that Judge Ashman was eliciting these important facts by telephone.

The fact that the earlier search of the laundry yielded positive evidence of a recently-abandoned marijuana cultivation site was not mere "clarification" of Bleicher's affidavit. This information was not contained in Bleicher's affidavit. Moreover, judging from the pains that Judge Ashman took to place this information on the record, the judge did not view this information as trivial. Rather, the record shows that Judge Ashman considered this information to be important when assessing the credibility of Troy Heaven's tip in Burrece's case.

For these reasons, I reject the idea that Bleicher's telephonic testimony was a mere "clarification" of his affidavit, and I further reject the majority's conclusion that Bleicher's telephonic testimony was of trivial importance.

Judge Coats concludes that, even if Bleicher's supplemental information was material to the ultimate finding of probable cause, [**23] Judge Ashman did not violate *AS 12.35.010(b)* and *AS 12.35.015(a)* when he elicited the trooper's supplemental testimony by telephone. Judge Coats notes that Trooper Bleicher had previously submitted an affidavit in support of the search warrant application; the trooper's telephonic testimony was a "supplement" to this affidavit. Judge Coats then suggests that the statutes apply only to the initial testimony in support of a search warrant — that they do not restrict telephonic testimony that "supplements" prior testimony.

The problem with this analysis is that the two statutes neither contain nor suggest any such distinction. By their terms, both *AS 12.35.010(b)* and *AS 12.35.015(a)* define the circumstances in which "[a] judicial officer may issue a search warrant upon ... sworn oral testimony ... communicated by telephone". The statutes do not distinguish between testimony that was part of the initial [*248] search warrant application and testimony that was supplied later as a supplement to the application. If Judge Ashman relied upon Trooper Bleicher's telephonic testimony when he made his decision to issue the search warrant (and the record shows that he did), then Judge Ashman "issued [**24] a search warrant upon ... sworn oral testimony ... communicated by telephone", and the two statutes governed his conduct.

Moreover, Judge Coats's suggestion that *AS 12.35.010(b)* does not apply to "supplemental" testimony leads to unacceptable results. Applying this same logic to the other subsection of the statute, *AS 12.35.010(a)*, one might conclude that the requirement of "oath or affirmation" applies only to the initial search warrant application — that supplemental statements in support of a search warrant need not be under oath. Such an interpretation, I assume, would be rejected out of hand. But just as I believe that *AS 12.35.010(a)* applies to any and all statements presented in support of a search warrant application, I likewise believe that its sibling provision, *AS 12.35.010(b)*, applies to any and all statements presented in support of a search warrant application. I therefore conclude that *AS 12.35.010(b)* and *AS 12.35.015(a)* apply to all telephonic testimony in support of a search warrant — even telephonic testimony that "supplements" an earlier search warrant application.

The majority offers a second reason for concluding that Judge Ashman's violation of the statute [**25] does not matter. A separate clause of *AS 12.35.015* — subsection (f) — declares that, "absent a finding of bad faith, evidence obtained under a warrant issued under this section is not subject to [suppression] on the ground that the circumstances did not support [the warrant's] issuance under (a) of this section." Translating subsection (f) into plain English, the legislature has declared that when a search warrant is issued on the basis of a telephonic application, the warrant will generally remain valid even if the defendant later shows that there was, in fact, no probable cause to believe that delay in issuing the warrant would result in loss or destruction of evidence. The only exception is for situations in which someone has acted in bad faith.

The majority asserts that "Burrece has neither shown

nor argued any bad faith on the part of [Judge Ashman] or the trooper". I am not sure what the majority means by "**bad faith**". If, by "**bad faith**", the majority means "evil motive", the answer is that no evil motive is required.

As the transcript demonstrates, Judge Ashman knew that *AS 12.35.015(a)* authorized him to accept a telephonic search warrant application only under specific **[**26]** circumstances. The judge declared that these circumstances did *not* exist (and the trooper did not dispute the judge's statement). The judge then stated that he would take Bleicher's telephonic testimony anyway. No other sort of "bad faith" is required to establish a violation.

The majority offers a third reason why Judge Ashman's violation of the statute does not matter. According to the majority, Burrece's challenge to the warrant must be rejected because Burrece has failed to assert that, but for Bleicher's telephonic testimony, the search warrant would not have been issued. It is true that Burrece does not directly assert that Bleicher's telephonic testimony was material to Judge Ashman's decision to issue the warrant, but the record certainly suggests that this was the case.

As explained above, Bleicher's telephonic testimony was not merely a trivial clarification of his affidavit; rather, it materially supplemented the information in the affidavit. Moreover, Judge Ashman went to a great deal of effort to make sure that Bleicher's "clarification" was placed on the record. To me, this strongly implies that Judge Ashman was not willing to issue the warrant until Bleicher provided **[**27]** the supplemental testimony.

For these reasons, I can not join in the majority's decision to ignore Judge Ashman's violation of *AS 12.35.015(a)*. I conclude that the statute was inexcusably violated, and I further conclude that the violation was important to the issuance of the search warrant.

[*249] One might be tempted to ask what difference all of this makes. We live in an age of global wireless telephonic communication, an age of fax and of Internet e-mail. What purpose could be served by limiting a court's authority to accept telephonic search warrant applications — especially in a state like Alaska, where great distances have always hampered traditional forms of communication? I have two answers.

First, it is important that the guardians of the law take pains to observe the law. Whatever the arguments may be for unrestricted telephonic search warrants, the legislature has decreed that courts can accept telephonic search warrant applications only in limited circumstances. Trial judges and magistrates should not knowingly ignore these limitations, nor should this court turn a blind eye when the statute is violated — as I believe it was in this case.

The district court decided to take **[**28]** Bleicher's telephonic testimony — in fact, the court actively solicited Bleicher's telephonic testimony — because it was the end of the business day (5:10 p.m.) and because Bleicher was some thirty minutes away by car. The court took Bleicher's testimony telephonically even though the court openly acknowledged that there was no reason to believe that a thirty-minute delay might result in loss or destruction of evidence. Inconvenience is not a valid reason to ignore the statute.

Second, the legislature's decision to limit telephonic search warrant applications is supported by important policy considerations. Clearly, the limitation on telephonic search warrant applications is not intended to ensure that officers apply in person for search warrants; if that had been the legislature's aim, they would have outlawed search warrant applications by affidavit. Instead, I conclude that telephonic testimony is disfavored because of the different way in which the oath is administered to the person(s) applying for the warrant.

In a normal search warrant application, the officer either signs an affidavit or testifies in court. In either case, the officer must personally appear before an official **[**29]** (either a notary or a judge) and, in that official's presence, the officer must swear or affirm that they are telling the truth. When an oath is administered by telephone, on the other hand, there is no formal moment when the officer must stand before a public official, face to face, and formally swear or affirm that they are telling the truth.

Bowing to practical necessity, the legislature has authorized telephonic testimony and its less-formal oath, but only in restricted circumstances. Judge Ashman specifically found that those circumstances did not exist in Burrece's case.

Because there was no justification for the district court's violation of *AS 12.35.015(a)*, and because Bleicher's telephonic testimony appears to have been material to the issuance of the search warrant, I conclude that Burrece should be entitled to a reversal of her conviction if one other condition is met: if, as a legal matter, a knowing violation of *AS 12.35.015(a)* requires suppression of the resulting evidence.

This question — whether courts should apply the exclusionary rule to purposeful violations of *AS 12.35.015(a)* — has no easy answer. Moreover, the parties have thus far failed to address this issue. **[**30]** I would order the parties to brief this issue, and, if suppression is indeed the remedy for a violation of the statute, I would reverse Burrece's conviction.

23-LS0349\X.2
Ford
5/15/03

AMENDMENT

OFFERED IN THE SENATE BY SENATOR THERRIAULT

TO: SCS CSSSHB 86(JUD)

Page 1, following line 2:

Insert a new bill section to read:

"* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

PURPOSE AND FINDINGS. (a) The purpose of secs. 3 and 4 of this Act is to legislatively authorize and approve all oil and gas projects located within the Cook Inlet Basin that have, as of the effective date of this Act, a final authorization, permit, or other form of approval from the Department of Environmental Conservation, the Department of Fish and Game, the Department of Natural Resources, or the division of governmental coordination, formerly part of the office of management and budget. AS 46.40.096(i), added by sec. 3 of this Act and sec. 4 of this Act supersede and replace any other form of approval previously required by law. A project authorized and approved by AS 46.40.096(i), added by sec. 3 of this Act and sec. 4 of this Act shall remain subject to regulation by any agency having jurisdiction over the project, consistent with the terms and requirements of the authorization, permit, or other approval issued by the agency.

(b) The legislature finds that

(1) it is in the best interests of the state to legislatively approve and authorize the oil and gas projects covered by secs. 3 and 4 of this Act;

(2) secs. 3 and 4 of this Act coincide with an executive branch reorganization directly affecting the Department of Environmental Conservation, the Department of Fish and Game, the Department of Natural Resources, and the division of governmental coordination, formerly part of the office of management and budget; secs. 3 and 4 of this Act are intended to help facilitate the reorganization and the transition to a new administrative structure by

removing from these agencies the burden of possible or on-going litigation over past administrative decisions;

(3) secs. 3 and 4 of this Act avoid costly litigation over projects overseen by these agencies that uniquely benefit all Alaskans, especially the larger population centers and communities encompassed by the Cook Inlet Basin; among other benefits, those projects provide jobs, generate local tax revenue, and fuel local economies by their tertiary economic effects; the legislature finds that it is in the public interest to promote those projects, without litigation;

(4) the public interest is protected by secs. 3 and 4 of this Act; all oil and gas projects authorized and approved by this Act remain subject to the regulation and oversight of all state agencies with jurisdiction over those projects; the appropriate state agencies shall regulate each project consistent with the terms and requirements of any permit or approval previously granted for the project; those permits and approvals are granted only after extensive administrative review, including public notice and comment with respect to the project; compliance with those requirements, coupled with the continued oversight by the appropriate state agencies, will ensure the protection of human health and safety and the environment."

Page 1, line 3:

Delete "**Section 1.**"

Insert "**Sec. 2.**"

Page 2, following line 19:

Insert new bill sections to read:

"* **Sec. 3.** AS 46.40.096 is amended by adding a new subsection to read:

(i) Notwithstanding any other provision of law, and except with respect to an appeal filed by the applicant or an affected coastal resource district, or a claim based on the United States Constitution or the Constitution of the State of Alaska, a consistency determination made under this section is

(1) not subject to review, stay, or injunction by any court; and

(2) effective immediately.

* **Sec. 4.** The uncodified law of the State of Alask. is amended by adding a new section to read:

AUTHORIZATION AND APPROVAL OF PROJECTS IN THE COOK INLET BASIN. Nc withstanding any other provision of law, any oil and gas project located within the Cook Inlet Basin that, as of the effective date of this Act, is the subject of a final authorization, permit, or approval of the Department of Environmental Conservation, the Department of Fish and Game, the Department of Natural Resources, and the division of governmental coordination, formerly part of the office of management and budget, is hereby authorized and approved by the legislature. The authorization and approval provided by this section supersedes and replaces any permit or authorization previously required by law. AS 46.40.096(i), added by sec. 3 of this Act, and this section, the authorization and approval provided by sec. 3 of this Act and this section, and the final agency action previously required by law are not subject to judicial review or, if pending, continued judicial review. A project under this section shall continue to be subject to the jurisdiction of the appropriate state agencies, as otherwise provided by law, and shall be regulated under the terms and requirements of any permit or approval previously granted for that project, which are incorporated by reference in the authorization provided by this section."

Renumber the following bill section accordingly.

Total Annual Impact to the State of Idling Redoubt Unit -- $73.9 Million.

- Loss of $1.2 million in property taxes.
  (60% to Borough, 40% to State)
- Loss of $1.5 million in Redoubt royalties.
- Loss of $500,000 in other Cook Inlet royalties.
  (due to higher (50¢/bbl) pipeline tariff on royalty oil)
- Loss of $60,000 in production taxes.
- Direct loss of 150 high paying jobs with an estimate payroll of $15 million. (Source: 2001 McDowell Study on Economic Impact of Oil Industry in Alaska)
- Indirect loss of 900 jobs with an estimated payroll of $45 million.
  (Source: 2001 McDowell Study on Economic Impact of Oil Industry in Alaska)
- [NOTE: The above reflects loses at current production levels. The Development Plan for the Redoubt Unit contemplates increased production from the Unit as additional wells are drilled. These numbers increase significantly as production from the Unit increases over time.]

FOREST OIL CORPORATION

1600 Broadway, Suite 2200
Denver, Colorado 80202
303.812.1400 - Main

To: Brian Hove

Senator Ralph Ceekins Office

Fax #: 907-465-5241 **Phone #:**

Date: May 16, 2003

From: Newton W. "Trey" Wilson III
Senior Vice President – Legal Affairs & Secretary

Phone: 303.812.1569

Fax: 303.812.1510

Assistant: Andrea St. Peter
303.812.1645

Total number of pages (including cover sheet): 4

- ***COMMENTS:***

RE: HEARING OF THE ALASKA SENATE JUDICIARY COMMITTEE CONCERNING HOUSE BILL 86
LETTER DATED MAY 16, 2003

If you have any problems with this fax, please call Andrea St. Peter at 303.812.1645

FOREST OIL CORPORATION
1600 Broadway • Suite 2200
Denver, Colorado 80202 (303) 812-1400

May 16, 2003

Honorable Gene Therriault
State Senate President
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Re: Hearing of the Alaska Senate Judiciary Committee Concerning House Bill 86

Dear Senator Therriault:

My name is Trey Wilson. I am an officer of Forest Oil Corporation and am located in the Company's headquarter offices in Denver, Colorado. My title is Senior Vice President, General Counsel & Secretary. In that capacity I provide legal advice to the senior management and Board of Directors of Forest Oil and attend all meetings of the Board and its committees. I have been with Forest Oil since November 2000.

It is my understanding that there will be a hearing of the Alaska Senate Judiciary Committee this afternoon regarding an amendment to House Bill 86, which amendment would provide legislative ratification of certain Cook Inlet projects with existing permits and final consistency determinations. It is also my understanding that if this amendment is adopted and House Bill 86 then becomes law, one effect would be legal finality to the permits and other approvals received by Forest Oil with regard to its Redoubt Shoal development and production project.

Gary Carlson, Forest Oil's Senior Vice President – Alaska, will testify at today's hearing regarding the amendment. I am sure he will inform the Committee as to the millions of dollars that Forest Oil has invested in projects in Alaska. However, I would like to share with you my thoughts on the impact of the existing uncertainty overshadowing the permitting and approval processes in Alaska for projects like Redoubt Shoal.

The Company believes that it has made a strong and committed effort to meet the regulatory requirements of the State of Alaska with regard to all of its projects and operations. We take our legal obligations very seriously, and we very much want to be a good corporate citizen as we conduct business in Alaska. We want to earn a good reputation with Alaskans as to the quality of our operations and our sensitivity to the concerns of our host state and its citizens. Therefore, we work very hard during the permitting and approval process to ensure that our projects satisfy the requirements of the State of Alaska. However, our experience has been that even though our projects have received the approval of the State, after significant opportunity for comment and input

has been given to citizens of the State, there remains great uncertainty with regard to our ability to continue operations as planned without interruption.

In fact, the State's approval of our Redoubt Shoal project has to date been repeatedly attacked in the courts of Alaska at great expense to Forest Oil. In the last several years we have spent more than $360,000 in legal expense and other fees associated with this litigation. However, more troubling than the cost is the uncertainty associated with the litigation. As you may know, our drilling operations were enjoined by the Supreme Court of Alaska for a number of weeks during the last session of the legislature, causing us to suspend drilling operations at Redoubt Shoal at a significant cost to the Company.

I can assure you that the litigation and the subsequent injunction gravely concerned our senior management and our Board of Directors, and they had great difficulty understanding how a project that had been so thoroughly reviewed by the State of Alaska could possibly be enjoined by a court. They also could not understand how a court could conclude that our drilling operations represent such a serious threat to the interests of others as to require a suspension of operations. With the help of the Alaska Legislature, we were ultimately able to put that litigation to rest; but as soon as our development and production phase permitting was final, new litigation commenced. We are now again embroiled in litigation involving the Superior Court and the Supreme Court of Alaska.

This litigation and its attendant uncertainty have a genuine negative effect on our Board of Directors as it considers investment in new projects. Currently we have nine prospects in Alaska with unrisked reserve potential of over 2 trillion cubic feet of gas and gas equivalents. Our Board of Directors has not yet made a decision to invest in any of these prospects and continues to weigh the additional costs and risks associated with litigation challenging State permitting action in Alaska. Additionally, it is difficult to find other investors to join us in the drilling of these prospects given the uncertainty of the permitting process. Finally, I would like to add that I believe that this uncertainty has also had a negative effect on the market's valuation of the Company's common stock. Indeed, we feel the need to describe the status of the on-going litigation in Alaska in the Company's periodic reports to the SEC.

In conclusion, we respectfully request that the Committee favorably consider the proposed amendment to bring finality to the permitting process for Cook Inlet projects. Adoption of the amendment would allow Forest Oil to continue to drill the remaining wells required for full development of the Redoubt Shoal field without interruption. We greatly appreciate the support that we have received from the Alaska State Legislature for our presence and operations in Alaska, and we hope that conditions will develop in the State that will encourage Forest Oil to make significant additional investment in oil and gas activities.

I appreciate the opportunity to share my thoughts regarding this matter.

Respectfully yours,

Newton W. "Trey" Wilson III
Senior Vice President, General Counsel & Secretary

NWW:asp

xc: Robert S. Boswell, Chairman and CEO
H. Craig Clark, President and COO

Testimony of Gary E. Carlson, Senior Vice President
Alaska Division, for Forest Oil Corporation
On House Bill 86
Before the Senate Judiciary Committee
May 16, 2003

Mr. Chairman and members of the Committee, for the record my name is Gary Carlson, Senior Vice President Alaska of Forest Oil Corporation. Joining me today by telephone is Mr. Trey Wilson, Senior Vice President, General Counsel & Corporate Secretary for Forest Oil, who also has submitted a letter for the record and is available to respond to any questions the Committee might have regarding the Redoubt litigation. We appreciate this opportunity to address the committee this afternoon, as HB 86, as amended, is critical to Forest Oil and its Alaska operations.

Forest Oil is the operator of the Osprey Platform, which is developing the Redoubt Shoal Oil Field located offshore in Cook Inlet south of Anchorage. The Redoubt Shoal Field is the largest oil field to be developed in Cook Inlet since the early 1970s, and its production is vital to both Forest Oil's and the state's interest. Forest Oil has invested over 200 million dollars in this project to date, and it and the State are just now beginning to see some return on that investment.

The facilities to process the production have been installed and are functioning as designed. The pipelines have been installed, tested and commissioned. They are now transporting approximately 3,500 barrel of oil per day. It is hoped that this volume will climb to 10,000 barrels per day as additional development wells are completed and the field reached its maximum production.

All of this was accomplished in a safe manner, using state-of-the-art design, engineering and innovation to minimize the environmental impacts of the project. For example the Osprey Platform:

- is the first platform in the Cook Inlet to grind and inject all of its drill cuttings, thus eliminating the need to transport and bury those materials ashore;
- the first platform to re-inject all of its produced fluids on location;
- the first platform to electrify its drilling rig using shore power, thus eliminating the need for diesel engines and reducing associated air emissions; and
- the first Cook Inlet platform to use shore borings for pipeline installation, thus eliminating any disturbance to the shoreline.

As an investor in the State's resource development, we have done what the State asked—plus. Notwithstanding all of these voluntary efforts to minimize conflicts and to provide enhanced environmental protection, development of the Redoubt Shoal project has been the subject of continuing litigation, quite literally, since before the involved leases were issued by the State of Alaska. For those of you who may not be aware of the scope and the continuity of that litigation, I have summarized it in the attached chronology, because I think it is very important for you to recognize the financial costs and uncertainty that such litigation entails and the amount of value it destroys. Mr. Wilson, as well as Forest's outside counsel involved in the litigation, are available to answer any detailed questions related to the litigation that members may have.

As the attached chronology reflects, 10 years after the issuance of the subject leases was determined by Alaska to be both in the State's best interest and consistent with the Alaska Coastal Zone Management Program, litigation and uncertainty over the scope and cost of the development of the Redoubt Shoal Field continues. In fact, since the State made its initial decision to lease the Redoubt tracts in 1993, the Redoubt leases, as well as specific project permits and approvals, have been the subject of four separate legal challenges each of which involved substantially the same complaint – that leasing the

Redoubt tracts and authorizing oil and gas exploration and development on those tracts is not consistent with the Alaska Coastal Zone Management Program.

The cost of the litigation alone for Forest now exceeds $2.0 million, including the costs of the shut-down as well as direct litigation costs. These costs do not reflect the costs that the Alaska Department of Law and other State agencies have incurred in defending the State's permits and authorizations.

Today, as we are continuing to drill the development wells necessary to realize the field's production potential, we are doing so under the very real threat that the Alaska Supreme Court could issue an injunction at any time. If it were to do so, the fiscal impacts for both Forest Oil and the State of Alaska would be dramatic and immediate. I have also attached another table that summarizes the minimum fiscal impacts that would occur, based upon the existing production volumes, which of course are considerably smaller than those anticipated at full production.

In summary, a shut down at this stage would cost the State and its citizens annually over $73.9 million as follows:

- Loss of $1.2 million in property taxes;
- Loss of 1.5 million in royalties from Redoubt production;
- Loss of an additional $500,000 in other Cook Inlet royalties;
- Loss of at least $60,000 in production taxes;
- Direct loss of 150 high paying jobs, with an estimated payroll of $15 million; and
- Indirect loss of 900 jobs, with an estimated payroll of $45 million.

The duration of those losses, should an injunction be issued, cannot be predicted. However, based upon the record of litigation to date, it would be unreasonable to assume that there would be a quick resolution.

In our view, there are few things that the Legislature can do to encourage continued and expanded exploration and development in Cook Inlet and elsewhere in the State that

would rival passage of this bill. We believe that it also makes sense in light of the Legislature's recent passage of House Bill 191 streamlining the State's administration of the Coastal Zone Management process.

Legislative ratification of oil and gas projects in Cook Inlet that have already received all their permits and Coastal Zone Consistency approvals under the prior procedures would eliminate the continuing uncertainty, avoid unnecessary litigation costs for all parties and assure the State's continued receipt of royalties, severance taxes and property taxes vital to its economy. Finally, and perhaps most importantly, it would send the clearest signal that having completed the long and costly process of compliance with the permitting and CZM procedures set out in statute, companies will be assured of their opportunity to develop the State's resources so long as their activities remain in compliance with the terms of their permits and authorizations.

Thank you again for the opportunity to share our views on this matter, and we urge your favorable consideration and passage of HB 86. I will be happy to answer any questions that members of the committee may have.

CHRONOLOGY OF REDOUBT SHOAL UNIT LITIGATION
1993 TO PRESENT

- September 9, 1993—The State of Alaska issued its Coastal Zone Management Consistency Determination for Cook Inlet Sale 78;
- October 19, 1993—The State of Alaska issues its Final Best Interest Finding for Sale 78;
- October-November, 1993—Environmental Groups challenged Lease Sale 78 based upon alleged deficiencies in both the Best Interest Finding and in the CZM Determination—The Superior Court enjoined the sale—the Superior Court subsequently lifted its injunction, and Sale 78 was held;
- December 1993—The State of Alaska awarded the leases--the underlying litigation continued;
- December 1996—three years after the litigation was filed—the Alaska Supreme Court affirmed the Best Interest Finding for Sale 78, but reversed the Superior Court's decision upholding the Sale 78 CZM Consistency Determination—the litigation continued;
- October 8, 1996—The State of Alaska renders its CZM Consistency Determination affirming the United States Environmental Protection Agency's re-issuance of the Cook Inlet General Permit, which regulates disc' arges for oil and gas operations for the Inlet;
- November 4, 1996—Environmental Groups challenge the State's Consistency Determination for the General Permit in State Superior Court;
- June 16, 1997—The State's Consistency Determination for the re-issued General Permit is remanded by the Superior Court for additional review and findings;
- January 28, 1999—The State of Alaska issues its revised Consistency Determination;
- May 10, 1999—two and one half years after the State issued its original CZM Consistency Determination—the EPA re-issues the renewed Cook Inlet General Permit;

- May 1998—at Forest Oil's request, the State of Alaska begins its CZM Consistency and permitting review for the exploration phase at the Redoubt Shoal field;
- September 1999—The CZM Consistency Determination and permits for the exploration phase are issued by the State of Alaska after a 17 month review;
- October 1999—Environmental groups challenge the CZM Consistency Review;
- April 23, 2002—The Redoubt exploration project is halted by an injunction issued by Justice Matthews of the Alaska Supreme Court;
- April-June, 2002—Forest Oil suffers a 52 day project interruption due to the injunction; resulting in 100 + job layoffs at a cost of more than $1.2 million to the company;
- June 2002—The Alaska Legislature passes SB 371, confirming the State of Alaska's reliance on general permits;
- June 13, 2002—The injunction is lifted, but the underlying litigation continues;
- December 2001—The State of Alaska begins its CZM Consistency and permit review for the Redoubt Development phase;
- May 2002—after fifteen months of review—the State of Alaska issues its affirmative CZM Consistency Determination and permits for the development of the Redoubt Shoal Field;
- May 2002—Environmental groups challenge the CZM Consistency Determination and request another injunction from the Superior Court—the Superior Court denies the injunction in November;
- November 2002—Environmental groups file a petition for review with the Alaska Supreme Court, seeking review of the Superior Court's denial of its injunction request;
- At present—the main case is pending before the Superior Court, and the groups' petition for review is pending before the Alaska Supreme Court.

Oil & Gas Projects in Cook Inlet

Pioneer Unit -- development drilling, continued exploration drilling.

Ninilchik Unit -- Pad construction, expansion and drilling of development wells at the Grassim Oskolkoff pad, the Susan Dionne pad and the Falls Creek pad. Construction of the Kenai-Katchemak Pipeline to carry production from the Ninilchik Unit to Kenai.

Trading Bay Unit -- continued development work

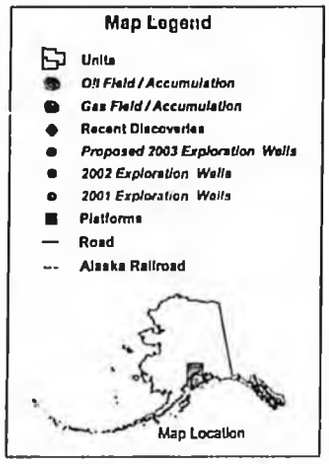
Kasilof Unit -- exploration permitting, site survey work, etc.

Cosmopolitan Unit -- exploration drilling (Hansen No. 2 well).

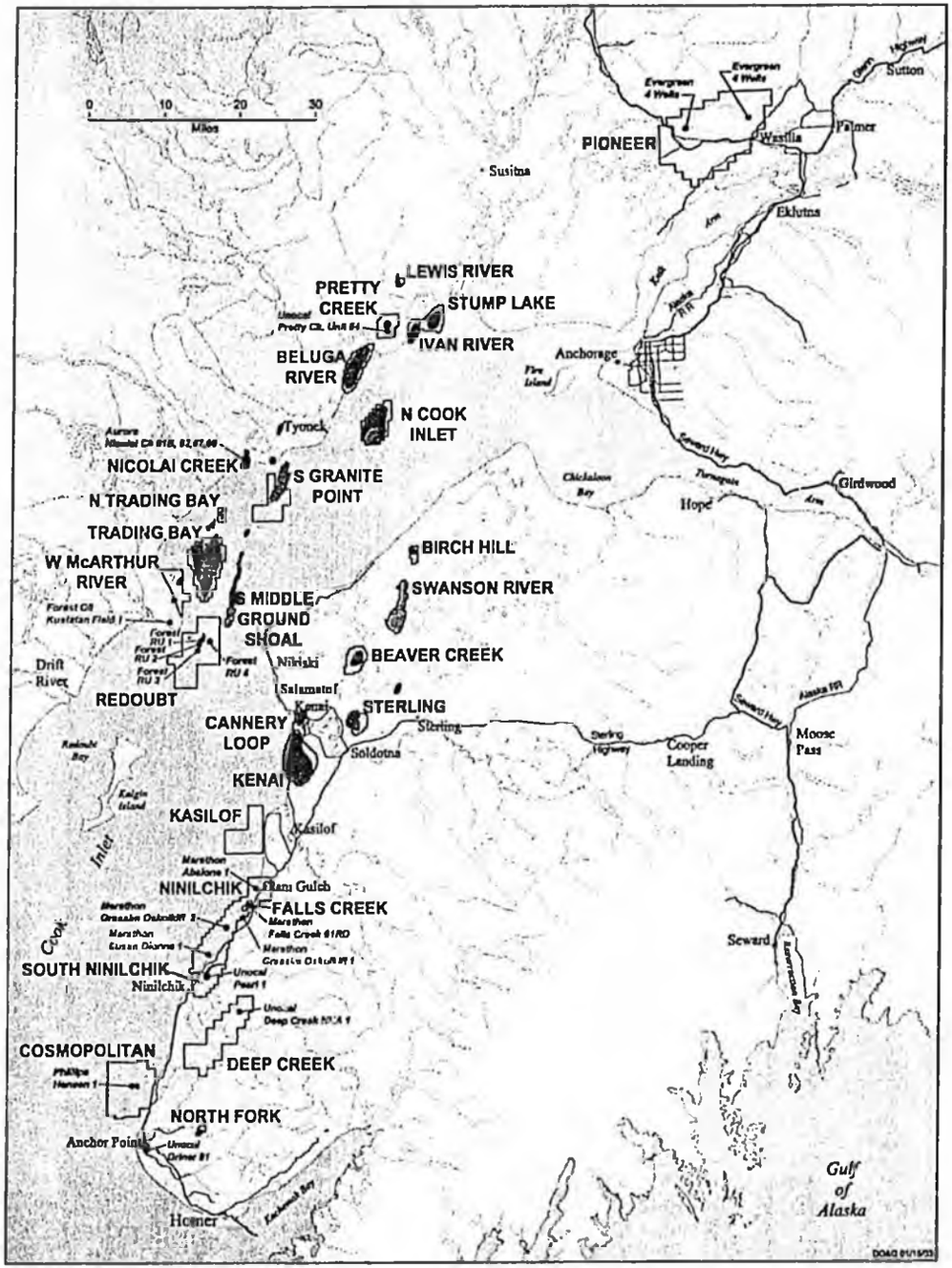
Redoubt Unit -- continued development drilling

Sources: conversations with Bill Van Dyke (DNR, Division of Oil & Gas) and Glenn Gray (DNR, Alaska Coastal Management Program) on 5/16 and the Division of Oil & Gas website.

Cook Inlet Oil & Gas Activity & Discoveries January 2003



Alaska Department of
NATURAL RESOURCES
Division of Oil and Gas



LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM May 17, 2003

SUBJECT: Amendment X.2 to CSSSHB 86 (Judiciary) -- your memo of May 16 (Work Order No. 23-LS0349\X.2)

TO: Representative Hugh Fate

FROM: Jack Chenoweth
Assistant Revisor of Statutes

Various points are outlined in Jim Pound's May 16 memo, to which I have been asked to prepare a response. The points consider elements of amendment X.2 offered to CSSSHB 86 (Judiciary).

Due process considerations:

The memo cites uncodified intent language along with a permanent law provision and a temporary law provision that suspend judicial review as evidence that these provisions compromise due process.

The limited review provided under the permanent law provision set out in bill section 3 of the amendment probably accords with due process safeguards; the blanket prohibition against review appearing in the uncodified law set out in the amendments bill section 4 almost certainly does not.

The standard was enunciated by the court in *K&L Distributors v. Murkowski*, 486 P.2d 351 (Alaska 1971). The principle derived from that decision holds that courts have the power to look for administrative compliance with the demands of due process. In *Murkowski*, the court had to decide whether the commissioner of economic development's grant of an industrial incentive tax credit was subject to judicial review in the face of a statute, AS 43.26.040(e), which provided that "all decisions and findings of the [commissioner] . . . . are final and no judicial or administrative appeal or other proceeding lies against them . . . ." :

> It is the constitutionally vested duty of this court to assure that administrative action complies with the laws of Alaska. We would not be able to carry out this duty to protect the citizens of this state in the exercise of their rights if we were unable to review the actions of administrative agencies simply because the legislature chose to exempt their decisions from judicial review. The legislative statement of finality is one which we

> will honor to the extent that it accords with constitutional guarantees. But if the administrative action is questioned as violating, for example, the due process clause, we will not hesitate to review the propriety of the action to the extent that constitutional standards may require.

Murkowski, 486 P.2d at 357.

Separation of powers consideration:

The reference is to the amendment's page 3, lines 8 and 9, wherein

> . . . any oil and gas project located within the Cook Inlet basin that, as of the effective date of this Act, is the subject of a final authorization, permit, or approval of [one of the three state resource agencies or the former division of governmental coordination] is hereby authorized and approved by the legislature. The authorization and approval provided by this section supersedes and replaces any permit or authorization previously required by law.

I take Mr. Pound's cryptic question as wanting a reply to this: Does this violate separation of powers considerations?

If asked to review the measure, there is a good likelihood that a court would find that the legislature has encroached on matters usually reserved to the executive.

As a consequence of the doctrine of separation of powers which is inherent in the Alaska Constitution, *Public Defender Agency v. Superior Court, Third Judicial District*, 534 P.2d 947 (Alaska 1975), one branch of government is prohibited from encroaching upon and exercising the powers of another branch. The separation of powers doctrine places the primary responsibility for the conduct of legislative activities with the legislature. *Van Brunt v. State*, 653 P.2d 343, 346 (Alaska App., 1982). By contrast, in addition to vesting the executive power of the state in the governor, section 16 of Article III of the Alaska Constitution provides that "the governor shall be responsible for the faithful execution of the laws." *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976).

In this instance, the legislature, by law, is relieving the specific projects from complying with permit and authorization requirements that may be imposed elsewhere by law. Is this consistent with the "conduct of legislative activities [assigned by the state constitution to] the legislature" or does it, instead, compromise the obligation of the governor to "be responsible for the faithful execution of the laws"?

In a case challenging the relationship of the executive and the judiciary, the courts have indicated the limits on interference with the discretion of the executive. In the earlier-referenced *Public Defender Agency* decision, the Alaska Supreme Court considered an attempt by a judge of the superior court to order the attorney general to undertake a

criminal prosecution of a person. The Alaska Supreme Court found that criminal prosecution was an executive branch function and the courts had no authority to interject themselves into the criminal prosecution decision.

> When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers.

The legislature has, by law, assigned the approval of permits and authorizations to particular officers of the executive branch. Disposition is subject to compliance with the general standards applicable to those approvals that are set down in law. These provisions circumscribe administrative discretion by express standards in order to reduce the opportunity for capricious exercise of power. Arguably, the legislative decision to set aside the operation of the usual procedures and standards that would be otherwise applicable and to arrogate to itself the final decision ***without changing the content of the applicable law*** could well be considered an encroachment on the executive's authority. I do not deny that the legislature could, for instance, suspend the operation of the statutes, or repeal or amend the statutes, to reach the same end -- that is, to provide an exception or exemption from the requirements otherwise imposed on similar projects. But this amendment doesn't do that. Here, the legislative action taken "by law" amounts to its own evaluation of the substantive standards and a substitution of the legislature's judgment for that of the administrators' as to compliance with the standards. Rather than modifying, repealing, or suspending the operation of the statute--all of which the legislature may properly do as part of its exercise of law-making authority so that the executive may not thereafter exercise judgment--the legislature retains the standards and, as against them, substitutes its judgment for that of the reasoned consideration that would otherwise be the prerogative of the executive.

JBC:lmb
03-213.lmb

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

P.O. BOX 110300
123 4TH ST., DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-6729
FAX: (907)465-2075

May 17, 2003

Honorable Gene Therriault
Senate President
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Re: Department of Law Expenditures re "Chronology of Redoubt Shoal Unit Litigation"

Dear Senator Therriault:

At your request, the Department of Law has identified the legal fees and expenses incurred by the State of Alaska in connection with the events described in the "Chronology of Redoubt Shoal Unit Litigation, 1993 to Present," presented to the Senate Judiciary Committee on May 16, 2003 by representatives of Forest Oil Corporation.

The Department of Law did not begin department-wide timekeeping until January 1, 1996, so the internal attorneys' fees expended prior to that time cannot be ascertained with certainty. However, we can conclude the following:

1. Timekeeping records (1996 to the present) reflect approximately $100,000 in attorney time expended by the Department of Law on these matters; and

2. By comparing the nature and extent of the legal work predating timekeeping to that afterward, we estimate that an additional $40,000 of attorney time was expended by the Department of Law on these matters prior to 1996.

In addition, the Department of Law has submitted three separate claims to the Alaska State Legislature for payment of attorneys' fees and costs in connection with aspects of the Chronology on which Cook Inlet Keeper prevailed. In 2001 $81,974.99, plus interest, was paid to Trustees for Alaska. Senate Bill 100, currently pending in the House Finance Committee, contains two additional claims payable to Trustees for Alaska totaling $84,739.00, plus interest. If approved, the total attorneys' fees and costs paid by the State of Alaska to Trustees for Alaska will total $166,713.99, plus interest. Copies of the claim forms submitted by the Department of Law are attached for your review.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:

Scott J. Nordstrand
Deputy Attorney General
Civil Division

Department of Law

JUDGMENTS/CLAIMS/SETTLEMENTS FOR PAYMENT

(Please Type)

**This form will be used for the purpose of standardizing the submission of claims to the Legislature. Complete and accurate information will expedite payment to the claimants, thereby reducing the amount of interest required to be paid by the state. If any of the information changes, please immediately advise the Director, Administrative Services Division, P.O. Box 110300, Juneau, AK 99811, or call (907) 465-3673.

PART ONE

1. Case Name: Cook Inlet Keeper v. SOA/Forest Oil Corp.

2. Case Number: Superior Court 3AN-99-03482 CI

3. Judge/Justices: By joint stipulation. Order to be signed by Judge Card.

4. Date Judgment entered: Joint stipulation signed by the State on May 5, 2003.

5. Did the date of the cause of action accrue on or after August 7, 1997? Yes

6. Amount to be paid: $33,000.00 (total attorneys fees and court costs)

7. Interest Rate: 3.75% Effective Date: Date when Judge Card signs stipulated order (likely before June 1, 2003.)

8. Requested hourly rate and total compensation of attorneys to be paid: Several attorneys involved at rates ranging from $174/hr to $250/hr. Total fees requested: $34452.50

9. Court approved/ordered hourly rate and total compensation of attorneys to be paid: The parties agreed to a total fee and cost award of $33,000.00 without proportioning between attorneys fees and court costs and without identifying the attorneys' hourly rates.

10. Payable to: Trustees for Alaska, 1026 West Fourth Ave., Suite 201, Anchorage, AK 99501

11. EIN: 92-6010379 or SSN:

12. Send check to: _X__ above address Departmental contact: ____

Departmental attorney contact: Departmental Approval:

Steve White
Name
465-3600
Telephone Number

Kathryn Deyhle for Scott Norstrand
Deputy Attorney General

Date

Department of Law

JUDGMENT/SETTLEMENT FUNDING REQUEST QUESTIONNAIRE

PART TWO

The following information needs to be provided on all judgment awards and/or settlements made against the State.

Case Name: Cook Inlet Keeper v. SOA, Forest Oil Corp.

Case No.: 3AN-99-03482 CI (superior court)

1. **Describe the circumstances or events resulting in this case and ultimately this judgment/settlement against the State.** The appellant challenged the State's determination that Forest Oil Corp's Osprey Project (involving an exploratory drilling operation in Cook Inlet) was consistent with the Alaska Coastal Management Program. The superior court ruled in the State's favor, but it was reversed by the Alaska Supreme Court. That court found that the State had improperly excluded from its review the project's proposed discharges of various wastes.

2. **Describe issues of State policy or law involved in this case, if they are relevant to and resulted in substantial effort and expense for the department to bring or defend this case.** The State took the position that since the Osprey Project's projected waste discharges were covered by an EPA general wastewater permit, which had itself undergone a consistency review, it was not necessary for the state to consider the waste discharges in its review of the Osprey Project. The Alaska Supreme Court disagreed, holding that the State should have considered the waste discharges in the specific context of the Osprey Project. The Supreme Court entered its decision on May 3, 2003.

The 22nd Alaska Legislature subsequently enacted SB 317, which, among other things, amended AS 46.40.096, providing that "the reviewing entity may exclude from the [ACMP] consistency review and determination process for a project . . . an activity that is authorized under a general or nationwide permit that has previously been determined to be consistent with the applicable coastal management programs." The amendment became effective on June 8, 2002.

3. **Did the State prevail on any issues? If so, describe.** No.

4. **Did we challenge plaintiffs' request for costs and fees or in other ways seek to reduce the costs to the State? If so, describe to what extent we were successful.** Yes.

We negotiated the attorney's fees and court costs that were requested by the appellants, which initially totaled $35,611.36, down to $33, 000.00.

5. What was the source of the State's liability in this case? Appellate Rule 508 (providing for payment of attorney's fees and costs).

6. What, if any, preventative action has been taken by the involved agency to prevent or reduce the potential for such liability in the future? See item 2, above.

7. If the information is available to you, has the agency involved taken any corrective action as a result of this case? If the information is not protected from publication by statute, privilege, or right to privacy, indicate what the corrective action was. See item 2, above.

8. Any recommendations concerning cases of this type in the future? No.

9. Any recommendations for changes in statutes, regulations or policy? Cite any applicable statutes or regulations. No.

Attorney completing form:	Date:
Stephen M. White	May 9, 2003
Assistant Attorney General Title	465-6724 Phone Number

Department of Law

JUDGMENTS/CLAIMS/SETTLEMENTS FOR PAYMENT

(Please Type)

**This form will be used for the purpose of standardizing the submission of claims to the Legislature. Complete and accurate information will expedite payment to the claimants, thereby reducing the amount of interest required to be paid by the state. If any of the information changes, please immediately advise the Director, Administrative Services Division, P.O. Box 110300, Juneau, AK 99811, or call (907) 465-3673.

PART ONE

1. Case Name: Cook Inlet Keeper v. SOA, Forest Oil Corp.

2. Case Number: S-09730 (Trial Court 3AN-99-03482 CI)

3. Judge/Justices: Fees order entered by direction of Justice Bryner

4. Date Judgment entered: July 1, 2002 (fees) & July 25, 2002 (costs)

5. Did the date of the cause of action accrue on or after August 7, 1997? Yes

6. Amount to be paid: $51,739.00 ($51,215 in fees, $524 in costs)

7. Interest Rate: 4.25% Effective Date: July 1, 2002 (fees)
July 25, 2002 (costs)

8. Requested hourly rate and total compensation of attorneys to be paid: Several attorneys involved at rates ranging from $150/hr to $250/hr. Total fees requested: $51,715.00

9. Court approved/ordered hourly rate and total compensation of attorneys to be paid: The court approved the appellant's fees request as submitted, but apportioned $500.00 of the fees to intervenor Forest Oil Corp.

10. Payable to: Trustees for Alaska, 1026 West Fourth Ave., Suite 201, Anchorage, AK 99501

11. EIN: 92-6010379 or SSN:

12. Send check to: _X__ above address Departmental contact: ____

Departmental attorney contact:

Steve White/Blaine Hollis_____
Name
465-3600_____
Telephone Number

Departmental Approval:

_____
Deputy Attorney General
4/18/03
_____
Date

Revised 08/25/99

Department of Law

JUDGMENT/SETTLEMENT FUNDING REQUEST QUESTIONNAIRE

PART TWO

The following information needs to be provided on all judgment awards and/or settlements made against the State.

Case Name: Cook Inlet Keeper v. SOA, Forest Oil Corp.

Case No.: S-09730 (Trial Court 3AN-99-03482 CI)

1. **Describe the circumstances or events resulting in this case and ultimately this judgment/settlement against the State.** The appellant challenged the state's determination that Forest Oil Corp's Osprey Project (involving an exploratory drilling operation in Cook Inlet) was consistent with the Alaska Coastal Management Program. The Alaska Supreme Court found for the appellant, holding that the state had improperly excluded from its review the project's proposed discharges of various wastes.

2. **Describe issues of State policy or law involved in this case, if they are relevant to and resulted in substantial effort and expense for the department to bring or defend this case.** The state took the position that since the Osprey Project's projected waste discharges were covered by an EPA general wastewater permit, which had itself undergone a consistency review, it was not necessary for the state to consider the waste discharges in its review of the Osprey Project. The Alaska Supreme Court disagreed, holding that the state should have considered the waste discharges in the specific context of the Osprey Project. The Supreme Court entered its decision on May 3, 2003.

The 22nd Alaska Legislature subsequently enacted SB 317, which, among other things, amended AS 46.40.096, providing that "the reviewing entity may exclude from the [ACMP] consistency review and determination process for a project . . . an activity that is authorized under a general or nationwide permit that has previously been determined to be consistent with the applicable coastal management programs." The amendment became effective on June 8, 2002.

3. **Did the State prevail on any issues? If so, describe.** No.

4. **Did we challenge plaintiffs' request for costs and fees or in other ways seek to reduce the costs to the State? If so, describe to what extent we were successful.** No.

5. What was the source of the State's liability in this case? Appellate Rule 508 (providing for payment of attorney's fees and costs).

6. What, if any, preventative action has been taken by the involved agency to prevent or reduce the potential for such liability in the future? See item 2, above.

7. If the information is available to you, has the agency involved taken any corrective action as a result of this case? If the information is not protected from publication by statute, privilege, or right to privacy, indicate what the corrective action was. See item 2, above.

8. Any recommendations concerning cases of this type in the future? No.

9. Any recommendations for changes in statutes, regulations or policy? Cite any applicable statutes or regulations. No.

Attorney completing form: Date:

Blaine H. Hollis April 18, 2002

Assistant Attorney General 465-3600
Title Phone Number

Department of Law

JUDGMENTS/CLAIMS/SETTLEMENTS FOR PAYMENT

(Please Type)

**This form will be used for the purpose of standardizing the submission of claims to the Legislature. Complete and accurate information will expedite payment to the claimants, thereby reducing the amount of interest required to be paid by the state. If any of the information changes, please immediately advise the Director, Administrative Services Division, P.O. Box 110300, Juneau, AK 99811, or call (907) 465-3673.

PART ONE

1. **Case Name:** Cook Inlet Keeper et al. v. State, DNR

2. **Case Number:** 3AN-99-3343 CV

3. **Judge/Justices:** Judge Murphy

4. **Date Judgment entered:** 11/2/00

5. **Did the date of the cause of action accrue on or after August 7, 1997?** Yes

6. **Amount to be paid:** $81,974.99

7. **Interest Rate:** 8% Effective Date: November 2, 2000

8. **Requested hourly rate and total compensation of attorneys to be paid:** $143.00/$123.768

9. **Court approved/ordered hourly rate and total compensation of attorneys to be paid:** $143.00/$81.974.99

10. **Payable to:** Trustees for Alaska; 1026 West Fourth Avenue, Suite 201
Anchorage, AK 99501

11. **EIN:** 92-6010379 or SSN:

12. Send check to: X above address Departmental contact: ____

Departmental attorney contact:

Lawrence Ostrovsky
Name

269-5256
Telephone Number

Departmental Approval:

Deputy Attorney General

12/19/00
Date

Department of Law

JUDGMENT/SETTLEMENT FUNDING REQUEST QUESTIONNAIRE

PART TWO

The following information needs to be provided on all judgment awards and/or settlements made against the State.

Case Name: Cook Inlet Keeper et al. v. State, DNR

Case No.: 3AN-99-3343 CV

1. Describe the circumstances or events resulting in this case and ultimately this judgment/settlement against the State.

Cook Inlet Keeper challenged DNR's Best Interest Finding and ACMP Consistency Determination for the 1999 Cook Inlet Areawide oil and gas lease sale. Cook Inlet Keeper's focus was on the fact that DNR included over 100 tracts that the National Marine Fisheries Service (NMFS) identified as important to beluga whale migration and feeding.

In spite of the fact that NMFS requested that the tracts be deleted from the sale, DNR concluded that specific measures to protect belugas could be put in place if the tracts were leased, and development actually proposed. Cook Inlet Keeper argued that because DNR did not follow NMFS's recommendation, the best interest finding was inadequate. Cook Inlet Keeper also argued that DNR inadequately considered, in both the best interest finding and the ACMP consistency determination, the potential harm to various fish and wildlife species and problems with transporting oil from remote areas of the sale.

2. Describe issues of State policy or law involved in this case, if they are relevant to and resulted in substantial effort and expense for the department to bring or defend this case.

Before conducting oil and gas lease sales, DNR must best interest findings (AS 38.05.035) and ACMP Consistency Determinations (AS 46.40.096). As a matter of policy, DNR rejected NMFS's request to delete tracts, and determined that conflict issues with respect to Cook Inlet belugas are best treated after a lease is issued, and development actually proposed. The court found that DNR's best interest finding was inadequate because the Cook Inlet beluga population is threatened, and DNR needed to show a more substantial basis for its decision to go ahead with leasing the beluga tracts in the face of NMFS's opposition and show that there were mitigation measures in place to insure protection of the belugas.

3. Did the State prevail on any issues? If so, describe.

While DNR prevailed on the issues relating to transportation and other fish and wildlife, the court found that DNR did not fully consider the potential impacts to beluga whales. This was based both on NMFS's recommendation and on the fact that Cook Inlet beluga population has declined substantially. Even though the court recognized that oil and gas activities were not responsible for the decline of the Cook Inlet belugas, the court determined that oil and gas activities could be a threat to the already reduced population, and that DNR did not take that into adequate consideration in designing mitigation measures.

4. **Did we challenge plaintiffs' request for costs and fees or in other ways seek to reduce the costs to the State? If so, describe to what extent we were successful.**
Cook Inlet Keeper requested $123,768 in attorney's fees and costs. DNR objected, arguing that Cook Inlet Keeper should not be considered the prevailing party because DNR prevailed on more issues. DNR also argued that attorney's fees and costs should be apportioned to the specific issues on which Cook Inlet Keeper actually prevailed. Finally, DNR argued that Cook Inlet Keeper was not entitled to attorney's fees and costs incurred during the portion of the appeal that was before DNR. The court rejected the first two arguments, but agreed that Cook Inlet Keeper could not recover attorney's fees and costs incurred during the portion of the case before DNR, and reduced the request to $81,974.9[illegible]

It would be very difficult to overturn the trial court's decision because its findings are not clearly erroneous and are consistent with Alaska Supreme Court rulings on awarding attorney's fees and costs. The Alaska Supreme Court has determined that, to be considered the prevailing party, a party is not required to prevail on *all* the issues in a case, merely the *main* issue. In addition, the Court does not permit apportionment of attorney's fees and costs by issue except when fees are frivolous or obviously inflated. Cook Inlet Keeper provided an itemized bill and there was no evidence that attorney's fees and costs were either frivolous or inflated.

5. **What was the source of the State's liability in this case?**
Under Alaska law, prevailing public interest litigants are entitled to *full* reasonable attorney's fees and costs in order to encourage meritorious claims that otherwise might not be brought. In a similar case, the appellants challenging a state oil and gas lease sale were found to be public interest litigants. *See Ninilchik Traditional Council v. Noah*, 928 P.2d 1206 (Alaska 1998).

6. **What, if any, preventative action has been taken by the involved agency to prevent or reduce the potential for such liability in the future?**
Because of the court's ruling, former Commissioner Shively withdrew the beluga tracts from upcoming sales, and determined that they would only be included if DNR made a supplemental finding that there is a comprehensive plan in place to address concerns about beluga habitat.

7. **If the information is available to you, has the agency involved taken any corrective action as a result of this case? If the information is not protected**

23-LS0349\X.2
Ford
5/15/03

AMENDMENT #2

OFFERED IN THE SENATE BY SENATOR THERRIAULT

TO: SCS CSSSHB 86(JUD)

Page 1, following line 2:

Insert a new bill section to read:

"* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

PURPOSE AND FINDINGS. (a) The purpose of secs. 3 and 4 of this Act is to legislatively authorize and approve all oil and gas projects located within the Cook Inlet Basin that have, as of the effective date of this Act, a final authorization, permit, or other form of approval from the Department of Environmental Conservation, the Department of Fish and Game, the Department of Natural Resources, or the division of governmental coordination, formerly part of the office of management and budget. AS 46.40.096(i), added by sec. 3 of this Act and sec. 4 of this Act supersede and replace any other form of approval previously required by law. A project authorized and approved by AS 46.40.096(i), added by sec. 3 of this Act and sec. 4 of this Act shall remain subject to regulation by any agency having jurisdiction over the project, consistent with the terms and requirements of the authorization, permit, or other approval issued by the agency.

(b) The legislature finds that

(1) it is in the best interests of the state to legislatively approve and authorize the oil and gas projects covered by secs. 3 and 4 of this Act;

(2) secs. 3 and 4 of this Act coincide with an executive branch reorganization directly affecting the Department of Environmental Conservation, the Department of Fish and Game, the Department of Natural Resources, and the division of governmental coordination, formerly part of the office of management and budget; secs. 3 and 4 of this Act are intended to help facilitate the reorganization and the transition to a new administrative structure by

removing from these agencies the burden of possible or on-going litigation over past administrative decisions;

(3) secs. 3 and 4 of this Act avoid costly litigation over projects overseen by these agencies that uniquely benefit all Alaskans, especially the larger population centers and communities encompassed by the Cook Inlet Basin; among other benefits, those projects provide jobs, generate local tax revenue, and fuel local economies by their tertiary economic effects; the legislature finds that it is in the public interest to promote those projects, without litigation;

(4) the public interest is protected by secs. 3 and 4 of this Act; all oil and gas projects authorized and approved by this Act remain subject to the regulation and oversight of all state agencies with jurisdiction over those projects; the appropriate state agencies shall regulate each project consistent with the terms and requirements of any permit or approval previously granted for the project; those permits and approvals are granted only after extensive administrative review, including public notice and comment with respect to the project; compliance with those requirements, coupled with the continued oversight by the appropriate state agencies, will ensure the protection of human health and safety and the environment."

Page 1, line 3:

Delete "**Section 1.**"

Insert "**Sec. 2.**"

Page 2, following line 19:

Insert new bill sections to read:

"* **Sec. 3.** AS 46.40.096 is amended by adding a new subsection to read:

(i) Notwithstanding any other provision of law, and except with respect to an appeal filed by the applicant or an affected coastal resource district, or a claim based on the United States Constitution or the Constitution of the State of Alaska, a consistency determination made under this section is

(1) not subject to review, stay, or injunction by any court; and

(2) effective immediately.

* Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to read:

AUTHORIZATION AND APPROVAL OF PROJECTS IN THE COOK INLET BASIN. Notwithstanding any other provision of law, any oil and gas project located within the Cook Inlet Basin that, as of the effective date of this Act, is the subject of a final authorization, permit, or approval of the Department of Environmental Conservation, the Department of Fish and Game, the Department of Natural Resources, and the division of governmental coordination, formerly part of the office of management and budget, is hereby authorized and approved by the legislature. ~~The authorization and approval provided by this section supersedes and replaces any permit or authorization previously required by law.~~ AS 46.40.096(i), added by sec. 3 of this Act, and this section, the authorization and approval provided by sec. 3 of this Act and this section, and the final agency action previously required by law are not subject to judicial review or, if pending, continued judicial review. A project under this section shall continue to be subject to the jurisdiction of the appropriate state agencies, as otherwise provided by law, and shall be regulated under the terms and requirements of any permit or approval previously granted for that project, which are incorporated by reference in the authorization provided by this section."

Renumber the following bill section accordingly.

* unless it is a claim based on ~~a constitutional~~ the United States Constitution or the Constitution of the State of Alaska.

THE JUDICIAL REVIEW AMENDMENT TO HB 86 UNCONSTITUTIONALLY RESTRICTS COURT ACCESS TO A PRIVILEGED CLASS OF CITIZENS

"[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law..." Alaska Constitution, Art. 1, sec. 1 (Equal Protection Clause).

"Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." Alaska Constitution, Art. VIII, sec. 17 (Uniform Application Clause).

"[A]ll potential litigants ... have a constitutional right in Alaska of meaningful access to the justice system." Peter v. The Progressive Corp., 986 P.2d 865, 872 (Alaska 1999).

"[A]ny system which closes participation to some, but not all, applicants will necessarily create a tension with article VIII." McDowell v. State, 785 P.2d 1, 9 (Alaska 1989).

- The amendment to HB 86 proposed in the Senate Judiciary Committee on May 16, 2003, would **prohibit most Alaska citizens** from challenging important coastal zone decisions. Only project applicants and coastal districts would be allowed to file lawsuits.

- This **unequal access to the courts** violates the Equal Protection and Uniform Application Clauses of the Alaska Constitution.

- The Alaska Supreme Court has held that the right of access to the courts is an "important" one, and that laws providing unequal access require "**close scrutiny**." *Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375, 1379 (Alaska 1988).

- The Uniform Application Clause of Article VIII requires even "**more stringent review**" when the unequal treatment concerns use of natural resources. *McDowell*, 785 P.2d at 10. This is why the Supreme Court struck down the rural preference for subsistence uses in Alaska.

- For the same reason that state laws may not discriminate between rural and urban residents in providing access to subsistence resources, the laws may not discriminate between different classes of citizens in providing access to the courts in natural resource cases.

TRUSTEES FOR ALASKA

A Nonprofit Public Interest Law Firm Providing Counsel to Protect and Sustain Alaska's Environment

1026 W. 4th Ave., Suite 201 Anchorage, AK 99501 (907) 276-4244 (907) 276-7110 Fax Email: ecolaw@trustees.org
Web address: www.trustees.org

May 17, 2003

Honorable Ralph Seekins
Chair, Senate Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801-1183

Re: Proposed Amendment to SCS CSSSHB 86(JUD) (23-LS0349\X.2)

Dear Senator Seekins and Members of the Senate Judiciary Committee:

We are writing on behalf of Cook Inlet Keeper and the Alaska Center for the Environment to provide information about the problems with the proposed amendment to HB 86 and about the litigation over the Redoubt Shoal project, in which we represent Cook Inlet Keeper and which is the target of the proposed amendment. Please accept this letter, share it with the other members of your committee and include it as part of the Committee's record of proceedings on HB 86.

Why Is This Amendment Being Rushed Through Without a Public Hearing?

Our first concern about this amendment is its timing and the drastic change that it makes to the previous version of the bill. Until the amendment was distributed in the Judiciary Committee meeting yesterday, there was no indication that legislation of this nature was coming. And yet the Redoubt Shoal litigation targeted by the amendment has been going on during the entire legislative session. This amendment should have been brought out much earlier in the process to allow all parties an opportunity to provide information and for the issues to be fully aired and considered.

Instead, the amendment was brought out six days before the end of the session, with no advance notice to the public of the nature or substance of the amendment. Not surprisingly, no interested member of the public was present to testify because no one knew the amendment was coming. Even though we represent one party in the lawsuit targeted by the amendment, we were not given the amendment in time for the meeting; our Anchorage Legislative Information Office did not have it until after the meeting

adjourned; and as of 8:30 this morning, the amendment was still not available online. Most of the people who historically have demonstrated a concern for coastal consistency reviews and the environmental quality of Cook Inlet – fishermen, Native villages, local communities, conservation groups – still are entirely unaware of this amendment. Instead, the only people who were prepared for yesterday's meeting with copies of the amendment and written testimony were the people associated with Forest Oil Corporation.

The timing and handling of this amendment suggest that consideration of this amendment was never intended to be an open or deliberate process, and that the exclusion of the public is intentional. This is never the way new law should be made, but the exclusion of the public is especially wrong here because the amendment is completely unrelated to the subject matter of HB 86 and it guts the public's ability to safeguard its interests in Alaska's coastal resources – resources that belong to all Alaskans, not just a privileged few.

There has not been adequate time to fully air these significant proposed changes to HB 86, and the interested members of the public were blind-sided by the introduction of such an unrelated amendment to the bill. We urge the members of the Committee not to go along with this distortion of the public process, and instead to give this amendment the analysis, the deliberate consideration, and the full and fair hearing that it warrants.

What Is Wrong With the Proposed Amendment to HB 86?

First, as just discussed, the amendment was brought out too late in the legislative process with no public notice, so it has not received the careful consideration that it warrants.

Second, the amendment is unfair to the Alaskan public because it shuts them out of the consistency review process, closing the courthouse doors to the public even when the agencies make a bad decision. Fishermen, Native villages, local communities, and conservation groups are a critical counterbalance to industry influence as the resource agencies make decisions that affect natural resources belonging to all Alaskans. Alaskans depend on these groups to represent their interests in the environmental side of the oil and gas equation. That's why thousands of Alaskans belong to Cook Inlet Keeper, Alaska Center for the Environment, and other groups that seek to protect the water quality, fisheries, and habitats of Cook Inlet and Alaska. This amendment would silence all of these voices.

Third, this amendment breaks a promise that the State has made for years, that a thorough and site-specific consistency review will be done when a specific oil and gas development is proposed, rather than at earlier stages like the lease sale stage. When the Ninilchik Traditional Council litigated Lease Sale 78 (which Forest Oil mentions in its chronology) because the State had failed to analyze the coastal impacts with enough specificity, the State argued that it could not do an adequate analysis because of the speculative nature of a lease sale. Instead, the State claimed that the detailed, specific

analysis would occur when there is a specific oil and gas project. When the Villages of Port Graham and Nanwalek litigated the Cook Inlet general permit (also mentioned in the chronology) in part because the subsistence analysis was not site-specific, the State again argued that its analysis was properly general at that stage. (The Superior Court agreed with the Villages, and the State did not appeal.) When Cook Inlet Keeper litigated the Redoubt Shoal exploration project because the polluted wastewater discharges weren't analyzed at all, the State claimed it didn't have to because that analysis already was done at the general permit stage. (The Alaska Supreme Court agreed with Cook Inlet Keeper.) The State has always promised it would provide specific analysis of oil and gas project impacts when a specific project is developed, and then tried to argue its way out of that promise when a specific project review is challenged. Now it is breaking the promise entirely by promoting an amendment that takes away the public's right to judicial review altogether. Without the right of judicial review, the public cannot hold the State agencies accountable and compel them to keep their promise and do the consistency review right.

Finally, the amendment raises serious constitutional questions that do not appear to have been analyzed. Whenever a piece of legislation closes the courthouse doors to particular groups or for particular types of actions, its legality should be carefully reviewed. The timing and substance of this amendment indicate that this kind of careful review has not been done.

Why Is the Redoubt Shoal Project Controversial?

Cook Inlet Keeper sued over the Redoubt Shoal project because of the project's discharges of pollution into the inlet and its impacts on the inlet's habitats, fisheries, and subsistence resources. These harms to coastal resources were not fully considered by the reviewing agency (the Division of Governmental Coordination), as Alaska's coastal law requires. Without this full review, the agency could not and did not make an informed decision about whether coastal habitats, fisheries, and subsistence areas would be protected if the project were allowed to go forward.

Alaskans care deeply about clean air, clean water, and healthy fisheries, just as they care about jobs and economic development. Cook Inlet Keeper and the Alaska Center for the Environment exist to put that care into practice, and in the case of Redoubt Shoal, that ultimately meant going to court to compel the State to withdraw its approval. Like the fishermen, Native villages, and local community groups that historically have turned to the agencies and the courts to pursue their interests in protecting coastal resources, Cook Inlet Keeper exercised its First Amendment right to petition the government with its legitimate claims about the project and the consistency review. Had the State done its job right in the first place, litigation wouldn't have been necessary.

Other oil and gas projects have managed to go forward without litigation – in fact, far more projects go unchallenged than go to court. During the years of the Redoubt Shoal litigation, dozens of oil and gas-related projects in Alaska have been approved and moved forward without lawsuits. Just a few examples are the Kenai-Kachemak pipeline and its related pads and facilities, ConocoPhillip's Cosmopolitan Project on Stariski

Creek, and the Cook Inlet areawide lease sales of the last couple years. Many more projects are identified on DGC's website, which was unfortunately down last night and this morning.

What Has the Redoubt Shoal Litigation Accomplished?

Cook Inlet Keeper sued the State over the exploration phase of the Redoubt Shoal project in 1999. The Superior Court ruled in the State's favor and Cook Inlet Keeper appealed. In 2002, the Alaska Supreme Court issued an injunction that temporarily stopped drilling activity on the final exploration well, finding that Cook Inlet Keeper was likely to succeed on the merits of its claim. (The last well was not included in the original plan and therefore was never given a coastal consistency review at all.) And indeed, Cook Inlet Keeper did succeed on the merits. Shortly after the injunction was issued, the Alaska Supreme Court ruled without dissent that the State had illegally failed to analyze the polluted water discharges that were part of the project and it remanded the case to DGC for a new consistency review. *Cook Inlet Keeper v. State, DGC,* 46 P.3d 957 (Alaska 2002). The Legislature then passed a bill (SB 371) that essentially resolved the impasse, and shortly thereafter Cook Inlet Keeper, the State, and Forest Oil reached a settlement that ended the litigation over the exploration stage.

The result of the settlement was that Forest Oil stopped all of its discharges of toxic wastewater into Cook Inlet. This was an important accomplishment and precedent that is good for Cook Inlet's fisheries and water quality and that advances the state of the technology used in oil and gas projects in the inlet. It's also a big boost to the Kenai Peninsula Borough's wild salmon initiative in Cook Inlet. This important achievement shows why access to the judicial branch is critical to resolving disputes over coastal resources that belong to all Alaskans. It also demonstrates the importance of judicial review to ensuring that companies like Forest Oil clean up their act.

The lawsuit over the development phase of the Redoubt Shoal is presently pending in the Alaska Supreme Court. The project's impacts on coastal habitats and subsistence areas were not fully identified, much less analyzed, by DGC. This consistency review is the only public check on the process to ensure projects will not harm sensitive coastal resources. As we discussed earlier, when it is not done right, the public's interest in its coastal resources is impaired. Based on the exploration phase experience, however, it is evident that this suit too could be resolved in a way that benefits all by protecting coastal resources and advancing the technology used by the oil and gas industry in Cook Inlet.

In sum, this amendment is too much, too little analyzed, too late in the game. It deserves careful legislative and public scrutiny, as well as substantial legal analysis. As it stands, the amendment has skirted the normal public process and evaded the attention of the fishermen, conservation groups, Alaska Native communities, and local community groups that have consistently demonstrated their concern for Alaska's coastal resources.

Adopting this amendment without hearing from these groups would be a grave injustice. If the amendment is in fact a good faith attempt to address a legitimate issue, then it should be fully aired and all sides allowed to present information and testimony on the amendment.

We urge the Committee to slow down this amendment to HB 86 and to give it deeper consideration and a full public process before moving it forward. Thank you for accepting this statement.

Sincerely,

Rebecca Bernard
Staff Attorney
Trustees for Alaska

On Behalf Of:

Cook Inlet Keeper
Alaska Center for the Environment

ALASKA STATE LEGISLATURE

House of Representatives

Representative Hugh (Bud) Fate

State Capitol, Room 128
Juneau, AK 99801
Phone: (907) 465-4976
Fax: (907) 465-3883
Toll Free: (866) 465-4976

Co-Chair Resources
Member:
Military & Veterans Affairs
Oil & Gas
Transportation

Memorandum

To: Senator Ralph Seekins, Chair Senate Judiciary Committee
Fm: Jim Pound, Chief of Staff
Cc:
Date: May 5, 2003
Re: CS for SS for HB 86am "INJUNCTIONS AGAINST PERMITTED PROJECTS"

Please accept this memo and attached documents as a request for the Senate Judiciary Committee to schedule for hearing CSSS for House Bill 86am, "INJUNCTIONS AGAINST PERMITTED PROJECTS". This legislation will provide protection for businesses trying to start permitted projects from the costs associated with unjust injunctions.

Thank you for your consideration in this matter.

Attached: Sponsor Statement, CSSS for HB 86am, SSHB 86, HB 86, House Floor Action, Committee Action, Support Documents, Fiscal Note

Chair-Resources Committee
Energy Council
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Fairbanks, Alaska 99701
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Alaska State Legislature

House of Representatives

Representative Hugh "Bud" Fate

While in Session
State Capitol, Room 128
Juneau, Alaska 99801-1182
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Sponsor Statement

CS for SS for House Bill 86 (JUD)am

"An Act relating state permitted projects; and providing for an effective date."

Committee Substitute for Sponsor Substitute for House Bill 86am will be a major step in getting Alaska going. For too long properly permitted projects end up being delayed before ground is ever broken. These projects are on hold because our current system allows individuals or entities to stop a project without a truly legitimate reason and without any serious consequences.

Adding this section to the Code of Civil Procedure language means, those who file malicious claims in an attempt to stop projects, may have to realize the economic effects of their actions. The bill is written to give the defendant a cause of action, and provides guidance to the courts when determining damages.

In most cases, once a project is permitted the contractor begins the process by purchasing materials, hiring sub-contractors, and individuals, essentially making commitments for them to go to work. This process affects the lives of many people and businesses. Even a temporary forced work stoppage means the economic damages far exceed just attorney and court fees. CSSSHB 86am causes the responsible party to assume responsibility for their actions, if the court determines the action was improper.

For Alaska to move forward we must have the ability to get projects started and completed. In many cases once permits are issued, the talk is over and it is time for the work to begin. CS for SSHB 86am gives Alaskans and the courts the additional tool to help keep those projects on track.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SSHB 86
(h) Publish Date: 4/8/03

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to permits issued by the state; and amending Rules 65, 79, and 82, Alaska Rules of Civil . . ."
BRU Civil Division
Component Environmental Law
Natural Resources
Sponsor Representative Fate
Requester House Resources Committee
Component No. 2211; 2212

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

Under this bill, a person who obtains an injunction in the course of a bad-faith legal challenge to a state-permitted project would be civilly liable for damages caused by the injunction. The liability extends to any materially damaged party, rather than solely to parties to the proceeding in which the injunction was issued.

Passage of this legislation is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 4/2/03 1:07 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 4/2/2003
Agency Department of Law

(Revised 9/2002 OMB)

C...ITTEE COPY

While I remain open to other suggestions for improving the Board system, I ask that you remain open to this idea. Bear in mind that since the last time the regional board concept was discussed the salmon crisis has only grown in complexity and intensity.

4) **Balance between sustainable fisheries and environmental lock up of the resource? How will you deal with competing points of view? What about Marine Protected areas?**

Alaska has the best sustainable fisheries management in the United States, perhaps in the world, and we should be proud advocates of our strong record of protecting water quality and essential fish habitat. We should never forget that or let outside interest with extreme viewpoints misrepresent our management accomplishments. That doesn't mean we cannot improve. Indeed, it is the innovative drive of Alaskans that has constantly looked to strengthen and improve our management that has brought us to where we are today.

Sustainable fisheries and environmental protection go hand in hand. It need not be an either/or situation. As your Governor, I can credibly deliver this message to well meaning but misinformed environmental groups who may not know how responsibly we've managed our resources. The first part of delivering this message would be to ensure that Alaska gets credit for all the protective measures enacted since statehood. Many of these measures, such as stream buffers, reduced harvest levels, and no-trawl zones were initiated by fishermen. Just because we didn't call them marine protected areas does not mean that we should not get credit for being proactive and environmentally responsible. We've been doing it right all along and we will continue to do so.

There are some today who advocate setting aside certain waters as the preferred tool for protecting the marine environment, but I don't see it that way. We have many tools to protect the health of Alaska's fish and their habitat. Marine protected areas are only one tool, and often the last, that should be used. Given Alaska's strong environmental track record and sustainable fishery management techniques, it is rarely warranted here.

Anyone advocating more marine protected areas in Alaska must be able to demonstrate convincing scientific evidence that such an extreme action is necessary and not be driven by a simplistic desire to limit commercial fishing.

Paid for by Fran Ulmer for Governor
PO Box 200890, Anchorage, AK 99520-0890 • 907-569-FRAN (3726) • 907-569-1003 (fax)
Jay Hammond & Janie Leask, Co-Chairs •

My experience has shown that if we can foster dialogue away from issue positions and toward goals and objectives, the competing points of view begin to fade. Protecting unique ecosystems vital to the productivity of multiple species, such as the Sitka pinnacles, is a goal we share. Sound science and coordinated research can point us in the right direction toward this goal.

We have the best-run commercial fisheries in the world. In fact, our salmon management is certified as sustainable. We should listen to competing points of view, of course, but we don't need to apologize or suffer from wrongheaded lawsuits. Alaska fishermen can be proud of their record as stewards of the resource, and I will work with you to continue to build on that record for the good of the fishery.

5) What will you do to continue the contribution of hatcheries to the Alaska economy?

Most Alaskans probably don't realize that in the year 2000, hatcheries produced 34 percent of the statewide commercial harvest of salmon, a total of some 40 million fish.

State supported hatcheries contribute another 7 million fish to the annual sport catch. Hatcheries are particularly important to the Kodiak area, Cook Inlet, Prince William Sound and Southeast. As a Southeast sport fisher, I know about the contribution that hatcheries make to many Alaskans first hand, and I have frequently spoken in support of the hatchery program.

Alaska has learned from problems in the Northwest and elsewhere, and has in place strong scientifically tested techniques for addressing salmon disease and conserving genetic diversity and vigor. Indeed Alaska hatcheries are a model of how to do the job responsibly.

I support legislation such as SB 266 to help hatchery operators weather tight financial times. The ability to refinance loans at lower rates is a good way to free up needed cash for hatcheries and continue their viability.

ALASKA: MORE THAN JUST A PRETTY FACE?

by Paula Easley, Senior Policy Analyst, Resource Development Council for Alaska

Is there more to the 49th State than incomparable scenery? With much of Alaska federally controlled, non-residents greatly influence decisions affecting it. The U.S. senate will decide whether to tap petroleum resources in ANWR's coastal plain or declare it wilderness.

AlaskaR17;s bigness is mind-boggling. Superimposed, it would cover 20% of the 48 contiguous states. Its Alaska Range boasts 23 peaks over 10,000 feet high, with Mount McKinley reaching nearly four miles high. America's largest glaciers—the Bering and Malaspina, each bigger than Delaware—are here, plus 5,000 others. Bordered by two oceans and three seas, there's plenty of water, with 3,000,000 lakes and 3,000 rivers.

AmericaR17;s largest national forests, the Tongass and the Chugach, are also here. The state is virtually all wilderness. However, if a new state were formed with just the 58 million acres of federal Wilderness, it would be larger than Minnesota, Idaho or Utah—with no roads, structures or development. As it is, Alaska is home to 62% of all federal Wilderness, 70% of national parks, 17% of national forests, and 85% of national refuge lands.

All told, 152 million acres of the state are federal parks, preserves, forests, scenic rivers, recreation and military lands, refuges, and national monuments. Most were withdrawn in the massive 1980 land reclassification. Millions more acres are managed as Wilderness. The legislature withdrew another 8.5 million acres, reflecting Alaskans' concerns for special places. Much remaining land is mountains, icefields or wetlands, unsuitable for development

Roads access but 12,000 of the state's 586,412 square miles, a railroad crosses 500 miles, and state ferries link primarily Southeastern communities. It has more coastline than all the other states combined, and 80% of the people live on the coasts. Individuals own far less than one percent of the land.

AlaskaR17;s tiny population (620,000) discourages instate manufacturing. Most materials, food and equipment come from other states or countries.

Development is hard to come by. Distances from markets, limited infrastructure, high operating costs and other roadblocks daunt most ventures. To be economic, projects must generally be world-class, like Prudhoe Bay. Others are ruled out because they are in, near, or blocked by federal conservation units. Transportation routes affecting key conservation units are forbidden without an Act of Congress.

Natural resources are bountiful: 29% of the nation's proved oil reserves; 20% of natural gas reserves, (excluding ANWR and NPR-A). Possibly half the nation's coal resources, some six trillion tons, are in Alaska. There's gold, silver, zinc, copper, lead, barite, iron, platinum, nickel, uranium, antimony, titanium, chromium, etc., but only the very wealthy

can outlive the "process" of trying to extract them. Many valuable deposits are in areas closed to development.

Through the efforts of countless "Save Alaska" fundraising groups, traditional fishing, forestry and mining opportunities have radically declined. New proposals, even recreation facilities, attract national opposition and environmental lawsuits. With little success diversifying Alaska's economy, unemployment rates remain higher than national averages. High-paying resource industry jobs are replaced with low-paying service jobs, ranking Alaska second-from-last in state growth rates.

Two projects could jumpstart the national and Alaska economies–(1) a natural gas pipeline from Prudhoe Bay to the Midwest, and (2) ANWR development. Yet preliminary studies of a gas line indicate its $15-20 billion cost is too high. That leaves ANWR.

Prohibiting ANWR development means denying huge economic benefits and jobs to every state. It means more imports, a growing trade deficit, and a major blow to national security. It means putting un-elected special interest groups in charge of Alaska's economy.

Three-fourths of Alaska residents say they live here because of its pristine environment. Three-fourths of its residents also support opening ANWR. They know that, using 21st century arctic technology and great caution, ANWR's resource treasures and a pristine environment are compatible. More than 60% of Americans have now reached the same conclusion.

HereR17;s the situation: Unless Americans convince the U.S. Senate to open ANWR, it will become Wilderness, and the greens will have seized control over national energy policy.

If special interests can gang up to prevent development of America's single-most promising oil and gas prospect, in remote Alaska, imagine how difficult it will be to develop energy projects in any other state.

Word count: approx. 700 ###

Easley Associates, January 2002

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Web posted Thursday, February 14, 2002

Eight timber sales focus of possible injunction

By JOANNA MARKELL
THE JUNEAU EMPIRE

Eight Southeast Alaska timber sales are getting much of the attention in a Juneau federal courtroom this week. U.S. Forest Service officials, timber industry advocates, conservationists and Southeast community leaders were in court today for the second of three days of testimony about a possible Tongass logging injunction.

U.S. District Judge James Singleton ruled last year that the Forest Service violated federal law when it failed to consider some areas for wilderness designation when it issued its 1997 Tongass Land Management Plan. He issued a two-month injunction last year and is presiding over this week's hearing to determine the need for and possible scope of a new logging ban.

So far, much of the discussion has focused on eight timber sales in southern and central Southeast Alaska. Viking Lumber and Silver Bay Logging hope to use five of the sales to fuel sawmills in Wrangell and on Prince of Wales Island this year. Conservationists argue the sale areas are better off left alone.

The Forest Service is working on a supplemental environmental impact statement to evaluate areas for wilderness designation, as required by the court. The review should be complete this fall, according to Department of Justice attorney Bruce Landon, who is representing the Forest Service.

The timber industry hopes to cut wood at Upper Carroll near Ketchikan, King George on Etolin Island near Wrangell, South Arm on Prince of Wales Island, South Lindy near Petersburg and Four Leaf on southern Kupreanof Island this year. Testimony also has focused on the Crystal timber sale near Petersburg, Saook Bay on north Baranof Island and Canal Hoya near Wrangell.

Sitka Conservation Society Executive Director Pat Veesart testified Wednesday that timber harvest and road building would hurt wilderness values in the eight areas. The isolated sites provide wildlife habitat and opportunities for primitive recreation, he said.

"To me, wilderness is a place where one can experience a high degree of solitude," he said. "A place where one can see the Earth as created by its maker." Alaska Forest Association attorney Jim Clark said the sites don't have the attributes required to be classified as wilderness. Roads already have been built and timber harvest has already occurred, he said.

"Each is a work in progress," he said. "None of the drainages is undeveloped."

Whether the Forest Service should continue planning timber sales as the wilderness review occurs also is an issue of dispute in the case. So is the Swan Lake-Lake Tyee electric intertie. The 57-mile power line would link Ketchikan and Wrangell.

The hearing continues Friday in Juneau.

Joanna Markell can be reached at joannam@juneauempire.com.

Forest Oil's Gary Carlson, on inlet's prospects

With pipeline to Redoubt Shoal now complete, Forest looks to begin production

Q&A on O&G Editor's Note: Gary Carlson, Alaska senior vice president for Forest Oil Corp., is interviewed by the Alaska Oil and Gas Reporter on the status of Forest's development of the Redoubt Shoal, the first new Cook Inlet oil field in years, and other issues.

Forest's Osprey platform was fabricated and put in place in the inlet to support exploration drilling into the Redoubt Shoal prospect. The platform is now being converted to a production facility. Pipelines to the platform from shore-based oil processing facilities have just been completed.

Forest has recently been the target of environmental lawsuits aimed at stopping drilling on Redoubt Shoal. The first suit involved the state's interpretation of Best Available Technology requirements in oil spill contingency plans. The Legislature passed a law last spring mooting the litigation.

In a second lawsuit, environmental groups challenged a state decision to rely on approval of a federal permit for discharges, instead of following a duplicate state procedure. For the second time last spring, the Legislature passed a law to moot the lawsuit.

Q What's the status of the lawsuits affecting the project?

A With the completion of the work on the remand from the Supreme Court, the ruling of the objection against our exploratory drilling is no longer in effect. We're drilling our fifth exploration well now. It's at 12,000 feet today, scheduled to go to 16,000 feet.

What is ironic is that at the time the injunction was granted to Cook Inlet Keeper (litigants), we were not disposing of the water-based cuttings overboard. We were grinding and injecting the drilling cuttings into our disposal well on the Osprey. Forest Oil had already agreed to inject all the drill cuttings during the development phase of Redoubt Shoal, and we were testing the system in the last exploratory well. This court action was not about the environment but legal process. But the injunction caused us to lay people off and send them home. It caused some real hardships.

Q Are they going to stop suing?

A We eventually reached an agreement with Cook Inlet Keeper on future

litigation on the exploration program. They asked us to inject our rainwater runoff rather than let that go overboard. Their concern, they said, was that there might be some toxins in the rainwater runoff. So, we applied for a permit and installed the necessary equipment, and we are set up to inject rainwater. However, they have already filed suit against the state for granting the permits to develop the field.

Q Do other Inlet operators do these things?

A The other operators are held to high standards by federal and state agencies' permits, which allow water-base cutting to be disposed overboard, along with produced water, once it had been conditioned. Forest decided early on, however, to design our facilities to inject our produced water. We're quite willing to spend money to deal with the real environmental issues, but we would also like to be treated like the rest of the industry. It may be because we're doing the newest development that we're attracting this attention.

Q What's the status of construction?

A We're working on final installation of the pipeline now. It was a challenge to drill the boreholes through the bluff, but the pipelines have been pulled through the boreholes and on to the platform.

Q How was this done?

A We used a large barge that was well anchored. The pipe string, which was previously welded, was pulled with winches on the barge. It took three long pulls to get the pipe to the platform. It was then jacked up to the platform itself. The contractors Conam Construction and Crowley Maritime, its subcontractor -- have done a superb job on it.

Q What are the dimensions of the pipe?

A There are three pipelines, two eight-inch diameter and one six-inch diameter. This is very heavy steel. Of the eight-inch pipelines, one has a wall thickness of 7/8 of an inch and the other is 3/4 of an inch. The pipe is intended to be heavy enough to remain stable on the inlet floor. Previous Cook Inlet pipelines, built in the 1960s and 1970s, had a concrete coating to keep them stable. We felt in this case, a concrete coating would have created a wider cross-section for the current to act against. Heavier steel is more expensive but creates a lower profile for the current to act against. We think

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Environmental Law

Alaska Oil & Gas Association
We represented Alaska Oil & Gas Association (AOGA), a consortium of national and multi-national companies involved in the exploration and development of oil and gas resources in Alaska, in the drafting and submission of comments to the National Marine Fisheries Service (NMFS) opposing designation of critical habitat in the Alaskan Beaufort Sea for the Western Arctic stock of the bowhead whale.

We represent AOGA in connection with an ongoing effort to comprehensively reform the Alaska Coastal Management Program (ACMP). The ACMP implements the provisions of the federal Coastal Zone Management Act (CZMA) and plays a direct and significant role in permitting processes throughout Alaska. We have drafted extensive comments to proposed revised regulations, facilitated related discussions with key state agencies and participated in development of legislative initiatives.

We represent AOGA and the Resource Development Council of Alaska, two consortiums of businesses active in the development of natural resources in Alaska, as intervenors in federal court litigation brought by environmental advocacy groups seeking to reverse the decision of NMFS that a listing of the Cook Inlet, Alaska population of beluga whales under the Endangered Species Act (ESA) is not warranted. Consistent with the intervenors' position, the Washington, D.C. federal court sustained NMFS' decision, and the litigation is now on appeal to the federal Court of Appeals for D.C. Circuit. This case is the first to consider the statutory exemptions in the ESA and in the Marine Mammal Protection Act that address Native Alaskan subsistence hunting. The district court's decision is also the first time NMFS' decision not to list a species has been sustained under challenge.

Blue Heron Paper Company
We defended Blue Heron Paper Company against two citizen suits under the Clean Water Act and the Endangered Species Act regarding the temperature and turbidity of the mill's wastewater discharge. At the same time, we negotiated with the Oregon Department of Environmental Quality (DEQ) the terms of a new National Pollutant Discharge Elimination System permit that is the first in Oregon to use a temperature management plan and the first to comprehensively regulate turbidity. This case shaped DEQ's current policies on temperature and turbidity and was closely watched throughout the Northwest. Blue Heron Paper Company is an integrated producer of newsprint and specialty papers using more than 50% recovered fiber and is located in Oregon City, Oregon.

Dry Creek Rancheria Band of Pomo Indians
We advised the Dry Creek Rancheria Band of Pomo Indians on their economic development and litigation strategies, primarily concerning their rights to use an easement for purposes of developing a casino. The Dry Creek Rancheria Band of Pomo Indians is a federally recognized tribe with tribal lands located north of San Francisco Bay in Sonoma County.

Gate-King Properties
We represent the owner of a proposed 500-acre industrial park development in Santa Clarita, California. The project involves the preparation of an environmental impact report, a development agreement, subdivision approval, conditional use permits, Section 404 approval and compliance with new SB 610 (water supply planning for large-scale projects).

Greenfield Monterey Park, LLC
We represent Greenfield Monterey Park, LLC, the master developer of a portion of the OII Superfund site in Monterey Park, California, on which will be developed a 510,000 square-foot shopping center. The matter includes negotiations of agreements between our client and the landowner, the steering committee, the retail developer and the City of Monterey Park, as well as agreements and the negotiation of a 200-page consent decree with the Department of Justice and the Environmental Protection Agency.

Hawaii Longline Association
We represent the Hawaii Longline Association, a trade association representing Hawaii tuna and swordfish fisheries, in pending litigation in Washington, D.C. federal court challenging a biological opinion issued by the National Marine Fisheries Service concerning effects of these fisheries on pelagic sea turtle species. Our representation also includes nonlitigation representation in the ongoing ESA consultation processes concerning effects of the Hawaii fisheries on various species protected under the ESA.

Keenan Land Company
We provide litigation and land use counseling for Keenan Land Company, a high-end developer involved in residential and hotel development in Half Moon Bay, Scotts Valley and Hayward, California. The issues include compliance with the California Environmental Quality Act, the Subdivision Map Act, ESA, the California Coastal Act and the Clean Water Act (CWA).

L.D. McFarland Company, Ltd.
We assisted L.D. McFarland Company, Ltd. in developing and implementing a strategy to cost-effectively clean up and redevelop a former wood treating site in Milwaukie, Oregon. Through a comprehensive risk assessment and the application of an Oregon law that we helped develop, we were able to convince DEQ to accept a cost-effective remedial action. The site will be redeveloped for commercial and multifamily residential use. L.D. McFarland Company is a wood treatment and preservation company with operations throughout the Northwest.

The Newland Group
We represented The Newland Group in obtaining a Section 404 authorization from the U.S. Army Corps of Engineers for fill-in wetlands associated with a residential development. We also obtained approval from the Washington Department of Ecology and the local government, as well as concurrence from the federal government of compliance with ESA. The Newland Group is a developer of residential communities and is based in Vancouver, Washington.

Oregon Water Resources Congress
We worked with Oregon Water Resources Congress, a trade organization representing irrigation districts and water-delivery organizations throughout Oregon, to develop an agreement with DEQ that enabled irrigation districts to continue their use of aquatic herbicides while providing protection for natural waterways. The Ninth Circuit Court of

Appeals had issued an opinion requiring irrigation districts to obtain permits under CWA in order to use aquatic herbicides in irrigation ditches. Without the use of herbicides, many Northwest irrigation districts would have been unable to deliver water, thereby putting the irrigated agricultural users at serious risk. The groundbreaking agreement reached between Oregon Water Resources Congress and the DEQ has become a model for subsequent permits and similar agreements.

Outside In
We represented Outside In in obtaining final approvals for its youth shelter located in Portland, Oregon. The unusual architecture of the building raised many issues, including constitutional issues under the City of Portland Sign Code, that required careful discussion and negotiation with the city. The building has been identified as "one of the unique and notable buildings in Portland."

Phillips Alaska, Inc.
We represented Phillips Alaska, Inc., a subsidiary of Phillips Petroleum Company, in a successful defense against administrative petitions filed under ACMP regarding five North Slope oil development and exploration projects. Prevailing on these petitions in a quick manner was essential to allow the projects to proceed during the limited window of frozen ice/tundra winter conditions.

Portland General Electric
We represented Portland General Electric (PGE) in successfully negotiating an administrative settlement with NMFS and the Oregon Department of Fish & Wildlife arising out of the accidental killing of ESA-listed Chinook salmon at a PGE hydroelectric facility. Oregon's largest utility, PGE serves more than 730,000 customers in Portland, Salem and nearby communities.

Port of Oakland
We provide ongoing advice and consultation to the Port of Oakland, California in connection with public trust, land title and a variety of water-quality issues arising from Port operations and construction at marine terminals, real estate developments and the Oakland International Airport. The Port owns and operates the airport and the fourth largest container seaport facilities in the United States.

Port of Seattle
We successfully defended the Port of Seattle in ESA litigation brought by local organizations concerning construction of a third runway at Seattle-Tacoma International Airport. We likewise assisted the Port in obtaining federal approvals required under the ESA to permit construction of this project. The Third Runway Project is one of the largest public construction projects in the state of Washington.

Public Water District
We have advised a large public water district in Washington on developing an ESA compliance strategy. Our work has helped the district avoid potential liability under the ESA as a result of private lawsuits or governmental actions.

Sabroso, Inc.
We represented Sabroso, Inc., a Medford, Oregon fruit processor, in obtaining rights to dispose of industrial rinse water on exclusive farm use land. The process contributes to the full use of the water both for fruit processing and as irrigation for a farm crop. Approval was gained through

Jackson County and, in order to confirm the appropriateness of the process, we represented Sabroso in persuading the Oregon legislature to adopt Senate Bill 212, allowing for reuse of such water for crop irrigation.

SBA Communications Corporation
We represented SBA Communications Corporation, a leading developer of wireless communications structures, in successfully arguing that conditional land use permits could be issued to infrastructure providers with appropriate conditions. Deschutes County had consistently taken the position that conditional use permits for wireless communications facilities would be issued only to the providers of cellular service. We obtained a conditional land use permit for SBA's LaPine, Oregon site.

Snohomish River Regional Water Authority
We represent Snohomish River Regional Water Authority in a water rights appeal before the Washington Pollution Control Hearings Board. The Snohomish River Regional Water Authority is an entity consisting of the Woodinville Water District, the Northshore Utility District and the City of Everett.

Snowbird Ski and Summer Resort
On behalf of Snowbird Ski and Summer Resort, we successfully defended a citizen suit challenging the construction of a new ski lift connecting Snowbird with Alta Ski Resort. The suit was filed during the construction phase to block the installation of the interconnecting chairlift. We represented the client to the Tenth Circuit Court of Appeals, which subsequently denied the injunction. Snowbird installed the chairlift and implemented a joint-lift pass program with Alta, making the combined terrain the third largest ski area in North America. Snowbird owns and operates a ski and summer resort in the Wasatch mountain range outside of Salt Lake City, Utah.

South San Francisco Scavenger Company
We successfully represented South San Francisco Scavenger Company in zoning and environmental review matters for its development of a 100,000 square-foot solid-waste materials recycling and transfer facility to serve the communities of South San Francisco and Millbrae and the San Francisco International Airport. We were also successful in defeating a subsequent referendum raised against the project.

Trans-Alaska Pipeline System Owners
We represent the six direct operating companies of the Trans-Alaska Pipeline System (TAPS), regarding Alaska coastal zone consistency review, ESA consultation with NMFS and the U.S. Fish & Wildlife Service, and essential fish habitat consultation pertaining to a unique renewal process for the federal grant and state lease authorizing the existing TAPS right-of-way. TAPS transports approximately 17% of domestic U.S. crude oil production and 100% of Alaska North Slope crude oil to refineries via an 800-mile crude oil transportation system running from Prudhoe Bay on the North Slope of Alaska to the Port of Valdez. The TAPS owners are pipeline transportation subsidiaries of Amerada Hess, BP, ExxonMobil, Phillips Petroleum, Unocal and Williams.

Walla Walla River Irrigation District, Hudson Bay District
We assisted three irrigation districts in the Walla Walla basin in Oregon and Washington in reaching a settlement agreement with the U.S. Fish & Wildlife Service involving alleged violations of the ESA. The agreement enabled the districts to continue to deliver water to irrigators in the basin and put in place a process for ensuring long-term compliance with the

ESA.

Washington Public Utility Districts Association
We represented the Washington Public Utility Districts Association as amicus curiae in PUD No. 1 of Pend Oreille County v. Dept. of Ecology, a water rights appeal before the Washington Supreme Court. Washington PUD Association represents 28 nonprofit, community-owned utilities that provide electricity, water and sewer services and broadband telecommunications.

Client Name Withheld
We defended an undisclosed client in a federal criminal investigation involving an employee's falsification of monitoring records under a National Pollutant Discharge Elimination System permit. We conducted a comprehensive internal investigation that resulted in the U.S. Attorney declining to prosecute the company. We assisted the company in self disclosure of the matter and in settling a companion civil enforcement action. Based on the company's self disclosure and cooperation, we negotiated an 80% reduction in DEQ's penalty and convinced the agency to drop its economic benefit penalty.

Client Name Withheld
We advise the nation's largest luxury motor coach manufacturer on environmental issues at its five Oregon plants. One of these plants was the focus of a multimillion-dollar nuisance and trespass suit brought by its neighbors. We assisted the company in crafting a settlement that satisfied the neighbors' concerns and allowed the manufacturer to maintain its operational levels.

Client Name Withheld
We represented a major industrial client with manufacturing operations in Oregon that determined that a change in feedstock unexpectedly resulted in a substantial increase in sulfur dioxide emissions. This triggered the need to submit a joint Title V and new source review permit application and respond to state and federal information requests. As part of this effort, the facility was required to perform a complex best available control technology determination. DEQ initially proposed multimillion-dollar penalties related to the higher emissions. We assisted this client in preparing the application, responding to the information requests, addressing the control technology determination and ultimately negotiating a reasonable penalty.

Client Name Withheld
We successfully defended a petroleum refining company in two CWA citizen suits brought in the U.S. District Court for the Northern District of California. The cases presented the question of whether the sale of the facility met the test for "mootness" under recent U.S. Supreme Court precedent on the basis that there was no reasonable possibility that any CWA violations could be committed by the refining company at the sites. We prevailed on motions for summary judgment. The case is now on appeal and is a case of first impression in the Ninth Circuit.

Client Names Withheld
Many parts of the Northwest suffered from severe drought conditions during 2001. We assisted a number of clients, including industries, municipalities and private businesses such as golf courses and nursery operations, in obtaining water right diversion point changes, securing back-up sources of water and firming up existing water supplies. We also represented water suppliers in contract negotiations with water users to

address the many unique water supply needs created by the drought.

