

HB

2002

Greenberg Traurig

Memorandum

TO: Alaska State Legislature
Legislative Budget and Audit Committee
Attention: Senator Gene Therriault and Representative Ralph Samuels

FROM: Phillip C. Gildan

DATE: June 2, 2006

RE: SB 2002 Re Jurisdiction of Alaska Supreme Court for Review of Alaska Stranded Gas Fiscal Contract

At your request we have reviewed SB 2002, revising the judicial review provisions of Alaska Stranded Gas Development Act. SB 2002 appears to unintentionally be too broad a delegation of jurisdiction to the Alaska Supreme Court. It would arguably extend to breaches of contract between and among the parties and involve the Supreme Court in fact finding trials. SB 2002 may also be too narrow as it does not appear to cover Collateral Agreements entered into under AS 43.82.437. Suggested legislative amendments to SB 2002 to address those concerns are set forth below:

Amend Section 1 of SB 2002 to read as follows:

Section 1. AS 43.82.440 is repealed and reenacted to read:

Sec. 43.82.440. Judicial Review. The Alaska Supreme Court has original and exclusive jurisdiction of any judicial review [OF A CONTRACT DEVELOPED UNDER THIS CHAPTER] challenging the constitutionality of a of a law authorizing a contract entered into under AS 43.82.435 or AS 43.82.437, the enforceability of a contract executed under a law authorizing a contract entered into under AS 43.82.435 or AS 43.82.437, or the statute of limitations provided by this section (collectively referred to as an AS 43.82 Challenge). A person may not bring an AS 43.82 Challenge unless the action is commenced within 60 days after the date that the contract was executed by parties to the contract. [A PERSON MAY NOT BRING AN ACTION CHALLENGING THE CONSTITUTIONALITY OF A LAW AUTHORIZING A CONTRACT UNDER AS 43.82.435, THE ENFORCEABILITY OF A

CONTRACT EXECUTED UNDER A LAW AUTHORIZING A CONTRACT ENTERED INTO UNDER AS 43.82.435, OR THE STATUTE OF LIMITATIONS PROVIDED FOR IN THIS SECTION, UNLESS THE ACTION IS COMMENCED WITHIN 60 DAYS AFTER THE DATE THAT THE CONTRACT WAS EXECUTED BY THE STATE AND THE OTHER PARTIES TO THE CONTRACT.]

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 2002
 (H) Publish Date: 5/31/06

Revision Date/Time (Note if correction): _____ Dept. Affected: Natural Resources
 Title Court Review of Stranded Gas Contract RDU Resource Development
 Component Oil and Gas Development
 Sponsor Rules by Request of the Governor
 Requester Governor Component No. 439

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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 (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

There is no anticipated fiscal impact for DNR associated with implementation of this bill.

Prepared by: William Van Dyke, Acting Director Phone 269-8800
 Division Oil and Gas Date/Time 5/15/2006
 Approved by: Michael Menge, Commissioner Date 5/15/2006
 Agency Natural Resources

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: HB 2002
 (H) Publish Date: 5/31/06

Revision Date/Time (Note if correction): _____ Dept. Affected: Revenue
 Title SGDA Original Jurisdiction RDU Administration and Support
 Component Commissioner's Office
 Sponsor Rules Committee
 Requester Governor Component No. 123

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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						
Bond Proceeds						
Bond Bank Investment Earnings						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill confers original jurisdiction on the Alaska Supreme Court for the purpose of providing judicial review of a contract executed under the Alaska Stranded Gas Development Act and sets time limits for challenges to that contract. Passage of this bill will reduce any period of uncertainty after a contract is finalized, thus allowing the gasoline project to proceed in a timely manner.

Prepared by: Jerry Burnett Phone 465-2312
 Division Administrative Services Date/Time 5/9/06 12:00 AM
 Approved Steve Porter Date 5/9/2006
 Agency Department of Revenue

LEGAL SERVICES**COPY****DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**(907) 465-3887 or 465-2450
FAX (907) 465-2029
Mail Stop 3101State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 79 Eth St., Rm. 329**MEMORANDUM**

April 20, 2006

SUBJECT: House Bill 502: Your inquiry concerning language of provisions authorizing a time-limited judicial review of TAPS authorization as possible model (Work Order No. 24-LS1858VA)

TO: Representative Lesil McGuire
Chair of the House Judiciary Committee

FROM: Jack Chenoweth
Assistant Revisor

Expedited appeal of the Trans-Alaska Pipeline Authorization appears in sec. 203(d), P.L. 93-153, codified as 43 U.S.C. 1652(d). It reads as follows:

(d) National Environmental Policy Act of 1969 bypassed; issuance of authorizations for construction and operation not to be subject to judicial review; time limits on charges of invalidity or unconstitutionality; jurisdiction; hearings; review. The actions taken pursuant to this title [43 USCS §§ 1651 et seq.] which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline's operation at full capacity, as described in the Final Environmental Impact Statement of the Department of the Interior, shall be taken without further action under the National Environmental Policy Act of 1969; and *the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases, and other authorizations for construction and initial operation at full capacity of said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following its enactment [enacted Nov. '6, 1973], and the claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this title [43 USCS §§ 1651 et seq.], may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified.* Any such complaint shall be filed in a United States district court, and such court shall have exclusive jurisdiction to determine such proceeding in accordance with the procedures hereinafter provided, and no other court of the United States, of any State, territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any

Representative Lesil McGuire

April 20, 2006

Page 2

such claim whether in a proceeding instituted prior to or on or after the date of the enactment of this Act [enacted Nov. 16, 1973]. Such court shall not have jurisdiction to grant any injunctive relief against the issuance of any right-of-way, permit, lease, or other authorization pursuant to this section except in conjunction with a final judgment entered in a case involving a claim filed pursuant to this section. An interlocutory or final judgment, decree, or order of such district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

[Emphasis added].

JBC:med

06-324.med

LEGAL SERVICES

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

COPY

(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

April 20, 2006

SUBJECT: House Bill 502: considering amendments applicable to modifying provisions related to judicial review (Work Order No. 24-LS1858\A)

TO: Representative Lesil McGuire
Chair of the House Judiciary Committee

FROM: Jack Chenoweth
Assistant Revisor

Whatever you may decide to do to the bill to modify *judicial* review provisions currently part of the Stranded Gas Development Act (AS 43.82), you should understand that the following provisions of AS 43.82 apply and may have to be amended --

First; AS 43.82.150 limits the persons who have standing to challenge a determination by the commissioner of revenue that a party qualifies to negotiate a contract. Only an applicant -- presumably, an applicant who has been denied standing to negotiate or who has not been able to successfully negotiate, may bring an action:

Sec. 43.82.150. Actions challenging determinations on applications. (a) Only an applicant under AS 43.82.120¹ who is aggrieved by a determination of the commissioner of revenue or the commissioner of natural resources under AS 43.82.140 may seek judicial review of the determination.

(b) The only grounds for judicial review of a determination made under AS 43.82.140 are

¹ "[A]pplicant under AS 43.82.120" is a reference to "a qualified sponsor or qualified sponsor group" that submits to the commissioner of revenue an application for development of a contract. The contract, developed through the process of negotiation, would be expected to contain provisions authorized by the Act, among which are, principally, provisions for (1) periodic payment in lieu of one or more taxes that otherwise would be imposed by the state or a municipality on the qualified sponsor or members of the qualified sponsor group as a consequence of the sponsor's or group's participation in an approved qualified project under this chapter, and (2) certain adjustments regarding royalty under AS 43.82.220.

Representative Lesil McGuire
April 20, 2006
Page 2

- (1) failure to follow the qualification and application procedures set out in AS 43.82.100 - 43.82.180; or
- (2) abuse of discretion that is so capricious, arbitrary, or confiscatory as to constitute a denial of due process.

Second, under current law, anyone may challenge the final findings and determination of the commissioner that support the contract in the form submitted to the legislature:

Sec. 43.82.430. Final findings, determination, and proposed amendments; execution of the contract. (a) Within 30 days after the close of the public comment period under AS 43.82.410(4), the commissioner of revenue shall

- (1) prepare a summary of the public comments received in response to the proposed contract and the preliminary findings and determination;

- (2) after consultation with the commissioner of natural resources, if appropriate, and with the pertinent municipal advisory group established under AS 43.82.510, prepare a list of proposed amendments, if any, to the proposed contract that the commissioner of revenue determines are necessary to respond to public comments;

- (3) make final findings and a determination as to whether the proposed contract and any proposed amendments prepared under (2) of this subsection meet the requirements and purposes of this chapter.

(b) After considering the material described in (a) of this section and securing the agreement of the other parties to the proposed contract regarding any proposed amendments prepared under (a) of this section, if the commissioner determines that the contract is in the long-term fiscal interests of the state, the commissioner shall submit the contract to the governor.

(c) The commissioner's final findings and determination under (a) of this section are final agency decisions under this chapter.²

² "Final findings and determination" probably would be considered as equating to a "final administrative order" or "final administrative decision" which, under AS 44.62.560(a), may be made the basis of an administrative appeal to the superior court:

- (a) Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters. Except as otherwise provided in this section, the notice of appeal shall be filed within 30 days after the last day on which reconsideration can be ordered, and served on each party to the proceeding. The right to appeal is not affected by the failure to seek reconsideration before the agency.

Representative Lesil McGuire
April 20, 2006
Page 3

Finally, AS 43.82.440 imposes a limitation on questions that may be submitted for judicial review as related to an executed contract:

Sec. 43.82.440. Judicial review. A person may not bring an action challenging the constitutionality of a law authorizing a contract enacted under AS 43.82.435 or the enforceability of a contract executed under a law authorizing a contract enacted under AS 43.82.435 unless the action is commenced within 120 days after the date that the contract was executed by the state and the other parties to the contract.

You will see, I'm sure, that the limitations of this section of state law are not dissimilar to the limited scope of review for Trans-Alaska Pipeline Authorization Act-related claims in the material that I provided to you earlier. The TAPS provision limits review to "claims alleging the invalidity of this section (that is, the section that limits judicial review of TAPS decisions)" and "claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this title."

JBC:lmb
06-142.lmb

eight percent a year until paid, and shall be collected by foreclosure in the manner provided for the foreclosure of mortgages. (§ 3(1) ch 12 SLA 1951)

Collateral references. — 3 Am. Jur. 2d, Aviation, §§ 58, 59.

Sec. 02.25.070. Variances. A person desiring to erect a structure, or increase the height of a structure, or permit the growth of a tree, or otherwise to use the person's property in violation of airport zoning regulations adopted under this chapter may apply to the department for a variance from the zoning regulations. Variances shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but would do substantial justice and would be in accordance with the spirit of the regulations and this chapter. (§ 3(2) ch 12 SLA 1951)

Revisor's notes. — See Revisor's notes to AE 02.25.080.

Sec. 02.25.080. Obstruction marking and lighting. [Repealed, § 14 ch 56 SLA 2001.]

Article 3. General Provisions.

Section	Section
90. Action by department	110. Definitions
100. Criminal liability for violation	120. Short title

Sec. 02.25.090. Action by department. The department may institute an action in the superior court to prevent, restrain, correct, or abate a violation of this chapter or of airport zoning regulations adopted under this chapter or of an order or ruling made in connection with their administration or enforcement, and the court shall give relief, by way of injunction or otherwise as may be proper, in order to fully effectuate the purposes of this chapter and of the regulations adopted and orders and rulings made under this chapter. (§ 6 ch 12 SLA 1951)

Sec. 02.25.100. Criminal liability for violation. Each violation of this chapter or of a regulation, order, or ruling adopted or made under this chapter is a misdemeanor and is punishable by a fine of not more than \$500 or by imprisonment for not more than 90 days or by both. (§ 6 ch 12 SLA 1951)

Sec. 02.25.110. Definitions. In this chapter, unless the context otherwise requires,

(1) "airport" means an area of land or water designed for the landing and taking-off of aircraft and used or to be used as a point of arrival or departure by air;

(2) "airport hazard" means anything that may obstruct or interfere with the navigation or operation of aircraft on or in the vicinity of an airport, including man-made structures of all kinds, trees and other natural growths, lights or beacons, and electrical or electronic devices emitting signals capable of disrupting radio communication;

(3) "airport hazard area" means an area in the vicinity of an airport in which a hazard to the operation of aircraft might be situated, and that may be designated as such by the department;

(4) "department" means the Department of Transportation and Public Facilities;

(5) "person" means an individual, firm, copartnership, corporation, company, association, joint stock association, or body politic, and includes a trustee, receiver, assignee, or similar representative;

(6) "structure" means an object constructed or installed by man, including buildings, towers, smokestacks, and overhead transmission lines;

Greenberg Traurig

Memorandum

TO: Alaska State Legislature
Legislative Budget and Audit Committee
Attention: Senator Gene Therriault and Representative Ralph Samuels

FROM: Phillip C. Gildan

DATE: June 2, 2006

RE: SB 2002 Re Jurisdiction of Alaska Supreme Court for Review of Alaska Stranded Gas Fiscal Contract

At your request we have reviewed SB 2002, revising the judicial review provisions of Alaska Stranded Gas Development Act. SB 2002 appears to unintentionally be too broad a delegation of jurisdiction to the Alaska Supreme Court. It would arguably extend to breaches of contract between and among the parties and involve the Supreme Court in fact finding trials. SB 2002 may also be too narrow as it does not appear to cover Collateral Agreements entered into under AS 43.82.437. Suggested legislative amendments to SB 2002 to address those concerns are set forth below:

Amend Section 1 of SB 2002 to read as follows:

Section 1. AS 43.82.440 is repealed and reenacted to read:

Sec. 43.82.440. Judicial Review. The Alaska Supreme Court has original and exclusive jurisdiction of any judicial review [OF A CONTRACT DEVELOPED UNDER THIS CHAPTER] challenging the constitutionality of a of a law authorizing a contract entered into under AS 43.82.435 or AS 43.82.437, the enforceability of a contract executed under a law authorizing a contract entered into under AS 43.82.435 or AS 43.82.437, or the statute of limitations provided by this section (collectively referred to as an AS 43.82 Challenge). A person may not bring an AS 43.82 Challenge unless the action is commenced within 60 days after the date that the contract was executed by parties to the contract. [A PERSON MAY NOT BRING AN ACTION CHALLENGING THE CONSTITUTIONALITY OF A LAW AUTHORIZING A CONTRACT UNDER AS 43.82.435, THE ENFORCEABILITY OF A

CONTRACT EXECUTED UNDER A LAW AUTHORIZING A CONTRACT ENTERED INTO UNDER AS 43.82.435, OR THE STATUTE OF LIMITATIONS PROVIDED FOR IN THIS SECTION, UNLESS THE ACTION IS COMMENCED WITHIN 60 DAYS AFTER THE DATE THAT THE CONTRACT WAS EXECUTED BY THE STATE AND THE OTHER PARTIES TO THE CONTRACT.]